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THE LAW OF

REAL PROPERTY

AND

DEEDS

BY ROBERT T. DEVLIN
UNITED STATES ATTORNEY, SAN FRANCISCO, CAL.
AUTHOR OF "THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES."

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THE LAW OF DEEDS.

CHAPTER XXI.

REGISTRY LAWS OF THE SEVERAL STATES.

§ 576. Statutory provisions.
577. Alabama.
578. Arizona.
579. Arkansas.
580. California.
581. Colorado.
582. Connecticut.
583. Dakota North and South.
584. Delaware.
585. District of Columbia.
586. Florida.
587. Georgia.
588. Idaho.
589. Illinois.
589a. Indian Territory.
590. Indiana.
591. Iowa.
592. Kansas.
593. Kentucky.
594. Louisiana.
595. Maine.
596. Maryland.
597. Massachusetts.
598. Michigan.
599. Minnesota.
600. Mississippi.
601. Missouri.
602. Montana.
603. Nebraska.
604. Nevada.
605. New Hampshire.
606. New Jersey.
607. New Mexico Territory.
608. New York.
609. North Carolina.
609a. North Dakota.
610. Ohio.
611. Oregon.
611a. Oklahoma.
612. Pennsylvania.
613. Rhode Island.
614. South Carolina.
614a. South Dakota.
615. Tennesee.
616. Texas.
617. Utah.
618. Vermont.
619. Virginia.
620. Washington.
621. West Virginia.
622. Wisconsin.
623. Wyoming.
624. Effect of statutes giving time to record deed—Valid from delivery.
625. Protection of grantee.

§ 576. Statutory provisions.—The statutes of the different States are not uniform as to the time prescribed within which conveyances should be or are required to be recorded.

In some of the States, it is provided by statute that the registration of a deed is effective as constructive notice from the time only when it is filed for record. In other States, the statutes allow a purchaser a specified time after the execution of the deed in which to have it recorded. The subject of registration is an important one, and many decisions are based alone upon the particular language of the statute. For the purpose of enabling the reader to determine whether a decision is founded upon the peculiar phraseology, or some special provision of a statute of a particular State, as well as to furnish him with an idea of the reason for the conflict among the decisions that will frequently be found in the various questions arising from the registry laws, it has been considered advisable to give an abstract of the statutes of the different States relative to the registration of deeds. With the exceptions above noted, however, the statutes show a general uniformity. All have registry laws and the tendency is toward uniformity. Recent legislation tends to remove the necessity for a married woman acknowleding a deed in a manner different from that required of an unmarried woman. It is not our purpose, in the following sections, to give all the statutory provisions complete, as such a compilation would serve no useful purpose. Our object is simply to show the salient points of the statutes which the courts have examined and construed when deciding cases involving the registry laws. In some instances a statute has been given verbatim, although changes may have since been made, when it would seem that decisions were based upon the particular language used. In such case the date is given when the statute was in force. Changes that have been made are generaly to abolish the provisions giving a specified time to record conveyances. But, inasmuch as many decisions have been based upon former statutes, it is important to know their substance, and hence it has been deemed advisable to give them as they were when decisions founded upon them might seem to be in conflict with the decisions of other States.

§ 577. **Alabama.**—Unless recorded within a specified time from their date, all conveyances of unconditional estates and mortgages, or instruments in the nature of mortgages of real property, to secure any debt created at their date, formerly were void as against purchasers for a valuable consideration, mortgagees, and judgment creditors without notice.[1] But all other conveyances of real property, mortgages, or deeds of trust, to secure any debts other than those above enumerated, are, as to purchasers for a valuable consideration, mortgagees, and judgment creditors without notice, inoperative and void, unless recorded before the accrual of the rights of such persons. But all such conveyances are perfectly valid without registration as between the parties themselves, and against creditors whose claims have not been put into judgments. Conveyances must be recorded in the county in which the land lies, in the office of the judge of probate. The conveyance is operative as a record from the day on which it is delivered to the judge. And the recording in the proper office of any deed or conveyance of property which may be legally admitted to record, operates as notice of such conveyance, without any acknowledgment or probate.[2]

§ 578. **Arizona.**—Conveyances are valid between the parties without registration, and are required to be recorded

[1] Rev. Code, §§ 1810–1812. See Alabama Civil Code, § 2168, before revision of 1886. See Code of Alabama, approved 1897, § 1005. By corded within the specified time or be void as to purchasers for a valuable consideration, mortgagees and judgment creditors of the original grantee without notice.

[2] See Gray's Administrators v. Cruise, 36 Ala. 559. See, also § 990, Code of Alabama, approved 1897; also §§ 987, 991; Coster v. Bank § 1007 the defeasance of an absolute conveyance must also be recorded of Georgia, 24 Ala. 37; Jordan v. Mead, 12 Ala. 247; Wyatt v. Stewart, 34 Ala. 716; De Vendal v. Malone, 25 Ala. 272; Wallis v. Rhea, 10 Ala. 451; Boyd v. Beck, 29 Ala. 703; Dearing v. Watkins, 10 Ala. 20; Ohio Life Ins. & Trust Co. v. Ledyard, 8 Ala. 866; Andrews v. Burns, 11 Ala. 691; Center v. P. & M. Bank, 22 Ala. 473; Daniel v. Sorrels, 9 Ala. 436; Smith v. Branch Bank of Mobile, 21 Ala. 125; Rev. Code, § 1810, et seq; 3 Rev. Stats., §§ 2601, 2602.

in the county in which the land is situated. The record, when duly made, imparts notice to all of the contents of the deed from the time it is delivered to the recorder, and all subsequent purchaser and mortgagees are considered purchasers with notice.[3]

§ 579. **Arkansas.**—Every deed or instrument affecting the title in law or in equity to any property which is entitled to record, is constructive notice to all persons from the time such conveyance is filed for record in the office of the recorder of the proper county. The recorder is required to indorse on the instrument the precise time when it was filed for record.[4] No conveyance is good or valid against subsequent purchasers for valuable consideration, without actual notice, or against any creditor of the grantor, obtaining a judgment or decree, which may be a lien upon the real estate described in such conveyance unless such conveyance shall be filed, after acknowledgment, for record in the recorder's office of the county where such land is situated.[5] A mortgage is a lien on the mortgaged property from the time the same is filed in the recorder's office, and not before.[6]

§ 580. **California.**—A deed is conclusive against the grantor and all persons subsequently claiming under him, except purchasers or encumbrancers acquiring, in good faith and for a valuable consideration, a title or lien by an instrument which is first duly recorded.[7] A conveyance is constructive notice of the contents to subsequent purchasers and

[3] Rev. Stats. 1887; Comp. Laws 1877, §§ 2268, 2269; Rev. Stat. 1891, par. 736.

[4] See §§ 6370–6380 Digest of the Statutes of Arkansas, of Sandels and Hill.

[5] See Hamilton v. Foulkes, 16 Ark. 340; Byers v. Engles, 16 Ark. 543.

[6] Dig. of Stats. § 656, et seq. See Jacoway v. Gault, 20 Ark. 190, 73 Am. Dec. 494. See, also, Sandels & Hill's Dig. 1894.
Text galley 179

[7] Civil Code, § 1107.

mortgagees from the time it is filed with the recorder for record.[8] A deed is void against subsequent purchasers or mortgagees of the same property, or any part thereof, in good faith and for value, whose conveyances are first duly recorded.[9] Unrecorded instruments, however, are valid between the parties and those having notice.[1] And powers of attorney when recorded can be revoked only by an instrument recorded in the same office in which the power of attorney is recorded.[2] An assignment of a mortgage may be recorded, and the record operates as notice to all persons subsequently acquiring title from the assignor.[3] When a deed absolute in form is intended as a mortgage, or to be defeasible on the performance of certain conditions, the deed is not defeated or affected as against any other persons than the grantee, his heirs or devisees, or persons having actual notice, unless the defeasance is recorded in the office of the recorder of the county where the land lies.[4] The recording of an assignment of a mortgage is not of itself notice to the mortgagor so as to invalidate any payment made by him to the mortgagee.[5]

[8] Civil Code, § 1213.
[9] Civil Code, § 1214.
[1] Civil Code, § 1217.
[2] Civil Code, § 1216.
[3] Civil Code, § 2934.
[4] Civil Code, § 2950.
[5] Civil Code, § 2935. See, generally, on the subject of registration, Bird v. Dennison, 7 Cal. 297; Woodworth v. Guzman, 1 Cal. 203; Landers v. Bolton, 26 Cal. 393; Jones v. Marks, 47 Cal. 242; Fogarty v. Sawyer, 23 Cal. 570; Vassault v. Austin, 36 Cal. 691; Patterson v. Donner, 48 Cal. 369; Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167; Odd Fellows' Sav. Bank v. Banton, 46 Cal. 603; Lawton v. Gordon, 37 Cal. 202; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543; O'Rourke v. O'Connor, 39 Cal. 442; Title etc. Co. v. Kerrigan, 150 Cal. 289, 8 L.R.A.(N.S.) 682, 88 Pac. 356, 119 Am. St. Rep. 199; Bothin v. Cal. etc. Co., 153 Cal. 718, 95 Pac. 500; Stanislaus etc. Co. v. Bachman, 152 Cal. 716, 15 L.R.A. (N.S.) 359, 93 Pac. 858; Edwards v. Grand, 121 Cal. 254, 53 Pac. 796; Glas v. Glas, 114 Cal. 566, 46 Pac. 667, 55 Am. St. Rep. 90; Snodgrass v. Ricketts, 13 Cal. 359; Thompson v. Pioche, 44 Cal. 508; Mahoney v. Middleton, 41 Cal. 41; Fair v. Stevenot, 29 Cal. 486; Wilcoxson v. Donner, 49 Cal. 193; Frey v. Clifford, 44 Cal. 335; Dennis v. Burritt, 6 Cal. 670; Long v. Dollarhide, 24 Cal. 218; Packard v. Johnson, 51 Cal. 545; McMinn v.

§ 581. **Colorado.**—Conveyances are recorded in the office of the recorder of the county in which the land is situated, and take effect as to subsequent *bona fide* purchasers and encumbrancers by mortgage, judgment, or otherwise, not having notice thereof from the time of filing for record, and not before.[6] Deeds and other conveyances are deemed, from the time of filing for record, notice to subsequent purchasers or encumbrancers, though not acknowledged or proven according to law. But neither they nor the record can be read in evidence, unless such coveyances are subsequently acknowledged or proved according to law, or their execution be proved in the same manner as other writings.[7] The laws of Colorado now provide also for the "Torrens system" of registration of land titles in lieu of recording.[8]

§ 582. **Connecticut.**—No conveyance, unless recorded in the records of the town in which the land is situated, is effectual against any other person than the grantor and his heirs. The town clerk is required to note on the deed the day and year when he received it. When once received it shall not be delivered up again until it is recorded. If a deed is executed under a power of attorney, the latter must be recorded with the deed. When a conveyance of land lying in two or more towns is recorded in one or more of such towns, and is afterward lost, a certified copy of the record may be recorded in the other towns, and have the same effect as a record of the original. "An unacknowledged deed, and any instrument intended as a conveyance of land, but which, by reason of a formal defect, shall operate only as a conveyance of an equitable interest in such lands, and contracts for the conveyance of lands, or of any interest therein, and all in-

O'Connor, 27 Cal. 238; Call v. Hastings, 3 Cal. 179; Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260; McCabe v. Grey, 20 Cal. 509.

[6] Gen. Laws, § 176 (ch. 18, § 17).

[7] Gen. Laws, § 178.

[8] Laws 1903, pp. 311, et seq; Mills, Annotated Statutes Colo. 1891–1905, vol. 3, page 197, et seq.

struments by which an equitable interest in lands is created, in which such lands are particularly described, may be recorded in the records of the town in which such lands are; and such record shall be notice to all the world of the equitable interest thus created." All conveyances of which the grantor is ousted by the possession of another are void unless made to the person in actual possession.[9] But the possession by a mortgagee is not considered as being adverse.[1] Although a deed may not be recorded till after the death of the grantor, it is good as against a purchaser from his heir.[2] An action lies against the clerk for delivering up a deed before it is recorded.[3]

§ 583. **Dakota, North and South.**—Since the issuance of the first edition, Dakota Territory has been divided into North and South Dakota, and both have been admitted as States. For the laws of these States relating to the registry laws see the sections on North Dakota and South Dakota.

§ 584. **Delaware.**—Deeds shall be recorded in the recorder's office for the county in which the land is situated, if lodged in such office within one year after the day of the sealing and delivery of such deed.[4] The registration of a deed in one county has effect only to lands mentioned in the deed

[9] Gen. Stats. §§ 2961–2966; Gen'l Stats. of Conn. Rev. of 1902, §§ 4036, 4038, 4039, 4042.

[1] Sanford v. Washburn, 2 Root, 499. See, generally, Ray v. Bush, 1 Root, 81; Franklin v. Cannon, 1 Root, 500; Hartmeyer v. Gates, 1 Root, 61; Beers v. Hawley, 2 Conn. 467; Hine v. Robbins, 8 Conn. 342; Wheaton v. Dyer, 15 Conn. 307; Hinman v. Hinman, 4 Conn. 575; Welch v. Gould, 2 Root, 287; Judd v. Woodrug, 2 Root, 298; Hall's Heirs v. Hall, 2 Root, 383; Dickenson v. Glenney, 27 Conn. 104; Summer v. Rhoda, 14 Conn. 135; Watson v. Wells, 5 Conn. 468; Carter v. Champion, 8 Conn. 549, 21 Am. Dec. 695.

[2] Hill v. Meeker, 24 Conn. 211.

[3] Wells v. Hutchinson, 2 Root, 85. See Hine v. Robbins, 8 Conn. 342.

[4] Laws, Rev. Code, p. 504, § 14. But see the change made in Delaware by act, vol. 17, c. 213.

situated in such county.[5] If a deed is not recorded in the proper office within one year after the day of the sealing and delivery, "it shall not avail against a subsequent fair creditor, mortgagee, or purchaser for a valuable consideration," unless it shall be shown that the creditor when giving the credit, or the mortgagee or purchaser when advancing the consideration, had notice of such deed.[6] A purchase money mortgage recorded within sixty days after its execution has preference over any judgment against the mortgagor, or any other lien created by him, although the same may be of a date prior to the mortgage.[7] Where there is an absolute conveyance and a defeasance or reconveyance, the person to whom such conveyance is made shall cause to be indorsed thereon and recorded with it, a note stating that there is such a defeasance and its general purport, else the recording of such conveyance shall be of no effect; and such defeasance must be duly acknowledged and recorded in the recorder's office of the county in which the land lies, within sixty days after the day of making the same, or it shall be of no avail against a fair creditor, mortgagee, or purchaser for a valuable consideration, from the person to whom the conveyance is made, unless such persons had notice at the time of giving credit or parting with the consideration.[8] Though the acknowledgment to deeds may be defective, record of such deeds if dated prior to January 1, 1880, duly signed and sealed by the grantor, will be admitted in evidence as valid.[9]

§ 585. **District of Columbia.**—Deeds, contracts, and other instruments in writing affecting the title or ownership of real estate, when duly acknowledged and certified[1] are recorded in the office of the recorder. Under the old law,

[5] Laws, Rev. Code, p. 503, § 15.
[6] Laws, Rev. Code, p. 504, § 17.
[7] Laws, Rev. Code, p. 505, § 21.
[8] Laws, Rev. Code, 1874, p. 504, § 18.
[9] Dev. Laws, 1893, p. 1116.
[1] Code of Laws for District of Columbia as amended to 1905, p. 117.

deeds took effect as to all persons from the time of acknowledgement or proof, if recorded within a specified time. Under the revised law, however, deeds and deeds of trust and mortgages, and all other conveyances, take effect as against subsequent purchasers for a valuable consideration without notice, and creditors, and mortgagees without notice, only from the time that such deed, deed of trust, mortgage, or other conveyance, shall have been delivered to the recorder for record after its proper acknowledgment. When two or more deeds of the same property are made to *bona fide* purchasers for value without notice, the deed or deeds first recorded according to law are preferred.[2]

§ 586. **Florida.**—No conveyance, transfer or mortgage of real property or any interest therein, nor any lease for a term of one year or longer, is good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless it is recorded in the office assigned by law for that purpose. No conveyance of any character made by virtue of a power of attorney, is good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the power of attorney is recorded before the accrual of the right of such creditor or subsequent purchaser.[3]

§ 587. **Georgia.**—"Every deed conveying lands shall be recorded in the office of the clerk of the superior court where the land lies, within one year from the date of such deed. On failure to record within this time, the record may be made at any time thereafter; but such deed loses its priority over a subsequent deed from the same vendor, recorded in

[2] Code of Laws for the District of Columbia as amended to 1905, pp. 108, 109, 112.

[3] Sec. 2480, page 980, Gen'l Stats. of Florida, 1906.

time, and taken without notice of the existence of the first."[4] A registered deed is admitted in evidence without further proof, unless the grantor, or one of his heirs, or the adverse party in the suit, will file an affidavit that the deed to the best of his knowledge and belief is a forgery, when the court will arrest the cause and try the issue as to the genuineness of such alleged deed.[5] A mortgage must be recorded within three months from its date, and if not so recorded, while remaining valid as against the mortgagor, it is postponed to all other liens created or obtained, or purchases made prior to the time the mortgage is actually recorded. If the purchaser has notice of the prior unrecorded mortgage the lien of such mortgage is good as against him.[6] A mortgage which is recorded in an improper office, or without due acknowledgment, or recorded so defectively as not to give notice to a prudent inquirer, is not notice to subsequent *bona fide* purchasers or encumbrancers. But the record is not vitiated by a mere formal mistake.[7] Though a mortgage is not recorded within the time prescribed, it is notice to all the world from the time at which it is recorded.[8] The law as above stated on which many decisions are based, has been modified by the act of October 1, 1889, providing that conveyances take effect only from the time at which they are filed for record in the clerk's office as against third persons who act in good faith and without notice, and the clerk is required to note on the instrument the day and hour when it was filed for record.

[4] Code, 1873 (Irwin, Lester & Hill), § 2705; Code 1883, § 2705.

[5] Code, 1873, § 2712. See Benson v. Green, 80 Ga. 230.

[6] Code, 1873, § 1957.

[7] Code, 1873, § 1959.

[8] Code, 1873, § 1960; Code, 1883, § 1960. See, generally, on the registry acts, Felton v. Pitman, 14 Ga. 536; Allen v. Holding, 29 Ga. 485, Sup. Ct. 32 Ga. 418; Hardaway v. Semmes, 24 Ga. 305; Wyatt v. Elam, 19 Ga. 335; Williams v. Adams, 43 Ga. 407; Lee v. Cato, 27 Ga. 637, 73 Am. Dec. 746; Herndon v. Kimball, 7 Ga. 432, 50 Am. Dec. 406; Burkhalter v. Ector, 25 Ga. 55; Williams v. Logan, 32 Ga. 165; Rushin v. Shilds, 11 Ga. 636, 56 Am. Dec. 436; Andrews v. Mathews, 59 Ga. 466; Myers v. Picquet, 61 Ga. 260.

§ 588. **Idaho.**—Every conveyance to operate as notice to third persons must be recorded in the office of the recorder of the county in which the land lies, but is valid between the parties without such record. Every conveyance imparts notice to all persons of its contents from the time the same is filed with the recorder for record, and subsequent purchasers are deemed to purchase with notice. Every conveyance not so recorded is void against subsequent purchasers in good faith and for a valuable consideration, whose conveyances are first duly recorded.[9] A revocation of a recorded power of attorney shall not be valid until such revocation is deposited for record in the same office in which the power of attorney is recorded.[1]

§ 589. **Illinois.**—Deeds, mortgages, and other conveyances authorized to be recorded, take effect from the time they are filed for record and not before, as to creditors and purchasers without notice. Although deeds may not be acknowledged according to law, they are deemed, from the time of being filed for record, notice to subsequent purchasers and encumbrancers, but they are not entitled to be read in evidence, unless their execution be proved in the mode required by the rules of evidence, so as to supply the defects of such acknowledgment.[2]

§ 589a. **Indian Territory.**—With the exception of the Quapaw Agency the title to land is still in the United States, and the different Indian tribes hold their reservations in common under patent from the Federal Government. Allotments have been taken by nearly all the affiliated tribes of the Qua-

[9] Rev. Laws, §§ 24–26; §§ 2453, 2456, 2460, 2457, Idaho Codes, Civil Code, 1901.

[1] Rev. Laws, § 28; § 2459, Idaho Codes, Civil Code, 1901.

[2] Rev. Stats. 1845, p. 109, §§ 23, 28; Rev. Stats. 1877, c. 30, §§ 30, 31; Rev. Stats. by Hurd (1880), p. 271, § 30; Rev. Stats. by Hurd (1883), p. 284, § 2831. See Hurd, 371, et seq. See p. 944, et seq. Starr and Curtis's Ann. Ill. Stats.

paw Agency, and with the exception of lots in this agency, and in the townsite of Miami, citizens of the United States cannot own land but must hold as tenants of some Indian landlord.

§ 590. Indiana.—Conveyances are recorded in the recorder's office of the county where the land lies, and if not recorded within forty-five days from their execution they are fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration.[3] When a deed absolute in form is intended as a mortgage, the original deed is not defeated as against any person other than the maker, or his heirs or devisees, or persons having actual notice, unless the defeasance shall have been recorded according to law within ninety days after the date of the deed.[4] Each recorder is required to keep a book, each page of which shall be divided into five columns, with the following heads:—

Date of Reception.	Names of Grantors.	Names of Grantees.	Description of Lands.	Vol. and page where recorded.

The recordr is required to enter in this book all deeds left with him for record, noting in the first column the day and hour the deed was received, and the other particulars in the other columns. Every deed is considered as recorded at the time so noted.[5]

§ 591. Iowa.—Deeds are recorded in the county in which the land lies, and are of no validity as against subse-

[3] See Reasoner v. Edmundson, 5 Ind. 393; Wright v. Shepherd, 47 Ind. 176, 179; Faulkner v. Overturf, 49 Ind. 265; Tresler v. Tresler, 38 Ind. 282, 285; Brannan v. May, 42 Ind. 92, 96; Burns' Ann. Ind. Stats. Rev. of 1901, vol. 2, § 3350.

[4] Stats. Revision of 1876, p. 365, § 17; Ind. Rev. Stats., § 2931; Burns' Ann. Ind. Stats., Rev. of 1901, vol. 2, § 3351.

[5] Stats. Revision of 1876, p. 367, § 29; 1881, § 2931. See, also, Rev. Stats. 1888; Burns' Ann. Ind. Stats., Rev. of 1901, vol 2, § 3371.

quent purchasers without notice, unless so recorded. To entitle them to registration they must be duly acknowledged or proved.[6]

§ 592. **Kansas.**—Deeds are recorded in the the office of the register of deeds of the county in which the real estate is situated. A deed imparts notice to all persons of its contents from the time it is filed with the register of deeds for record, subsequent purchasers being deemed to purchase with notice.[7] A deed is not valid except as between the parties thereto, and such as have actual notice, until it is deposited with the register of deeds for record.[8] A power of attorney should be recorded previous to the sale or the execution of the deed made under it, and when once recorded shall not be deemed to be revoked by any act of the party by whom it was

[6] Code of 1873, §§ 1941, 1942, and Rev. Code of 1880, by Miller (1880), § 1941; 1884, p. 1941, § 194. See, also, § 2925, Supp. Code of Iowa, annotated. On the question of notice and subsequent purchasers, see Miller v. Bradford, 12 Iowa, 14; Stewart v. Huff, 19 Iowa, 557; Calvin v. Bowman, 10 Iowa, 529; Suiter v. Turner, 10 Iowa, 517; Willard v. Cramer, 36 Iowa, 22; Gower v. Doheney, 33 Iowa, 36; Scoles v. Wilsey, 11 Iowa, 261; Brinton v. Seevers, 12 Iowa, 389; Bostwick v. Powers, 12 Iowa, 456; Breed v. Conley, 14 Iowa, 269, 81 Am. Dec. 485; Haynes v. Seacrest, 13 Iowa, 455; Stewart v. Huff, 19 Iowa, 557; Dargin v. Beeker, 10 Iowa, 571; Bringholff v. Munzenmaier, 20 Iowa, 513; Koons v. Grooves, 20 Iowa, 373; Gardner v. Cole, 21 Iowa, 205. See, also, Rea v. Wilson, 112 Ia. 517; Higgins v. Dennis, 104 Ia. 605; Sherod v. Ewell, 104 Ia. 253.

[7] See Simpson v. Mundee, 3 Kan. 172; Brown v. Simpson, 4 Kan. 76; Claggett v. Crall, 12 Kan. 397; Wickersham v. Zinc Co., 18 Kan. 487, 26 Am. Rep. 784; §§ 1670, 1671, Gen'l Stats. of Kan., 1909.

[8] Comp. Laws (Dassler), p. 212, § 1044. See, also, Gen. Stats. 1134. See Coon v. Browning, 10 Kan. 85; Simpson v. Mundee, 3 Kan. 172; Gray v. Ulrich, 8 Kan. 112; Swarts v. Stees, 2 Kan. 236, 85 Am. Dec. 588; School District v. Taylor, 19 Kan. 287; Johnson v. Clark, 18 Kan. 157, 164; Jones v. Lapham, 15 Kan. 140; § 1672, Gen'l Stats. of Kan. 1909.

[9] Comp. Laws (Dassler), §§ 1046, 1047. See Gen. Stats. 1134; §§ 1673, 1674, 1675, Gen'l Stats. of Kan., 1909.

made, until the instrument of revocation is filed in the recorder's office for record.[2]

§ 593. **Kentucky.**—Where a conveyance made by virtue of a power is required to be recorded to make it valid against creditors and purchasers, the power must be recorded in the same manner.[1] Where the power of attorney is not recorded, the registration of the deed will not operate as constructive notice.[2] "Deeds made by residents of Kentucky, other than deeds of trust and mortgages, shall not be good against a purchaser for a valuable consideration, not having notice thereof, or any creditor, except from the time the same shall be legally lodged for record, unless the same be so lodged within sixty days from the date thereof. If made by persons residing out of Kentucky, and in the United States, within four months; if out of the United States, within twelve months."[3] Although a deed be not filed for record within eight months, it is still good against a subsequent purchaser with notice, and if the purchaser be a married woman, notice to her husband is likewise notice to her.[4] Instruments should be recorded in the county where the land or the greater part thereof may be.[5]

§ 594. **Louisiana.**—Conveyances, while valid between the parties and their heirs, are void as to third persons, unless publicly inscribed on the records of the parish, and they become operative as to such persons from the time they are filed for record.[6] For the purpose of rendering a search for mortgages for a period further back than ten years unneces-

[1] Gen. Stats. 1873 (Bullock & Johnson), p. 256, § 13; Ky. Stats., 1903, § 499.

[2] Graves v. Ward, 2 Duval, 301.

[3] Gen. Stats. 1873, p. 257, § 14; Gen. Stats. 1883, p. 257, § 14. But this distinction was abolished in 1893. See Acts 1893, c. 186, § 7; Stats. 1894, § 496; Ky. Stats. 1903, § 496.

[4] Bennett v. Tetherington, 6 Bush, 192. See, also, Ky. Stats., § 494.

[5] Ky. Stats. 1903, § 495.

[6] Rev. Code, § 2266.

sary, it is required that before the expiration of this time the inscription shall be renewed.[7]

§ 595. **Maine.**—A deed is not effectual as against any person except the grantor, his heirs and devisees, and persons having actual notice, unless it is recorded.[8] Conveyances of the right, title or interest of the grantor, if duly recorded, are as effectual against prior unrecorded conveyances as if they purported to convey an actual title.[9] A deed absolute in form cannot be defeated by a defeasance, as against any other person than the maker, his heirs and devisees, unless such defeasance is recorded in the same office as the deed.[1]

§ 596. **Maryland.**—Deeds must be recorded within six months from their date in the county in which the land lies, and when it lies in more than one county, or the city of Baltimore and a county, then in all the counties in which it is situated.[2] Every deed, after due acknowledgment and registration, takes effect as between the parties from its date, and no deed is valid for the purpose of passing title, unless acknowledged and recorded as provided by statute.[3] When there are two or more deeds for the same land, the deed first recorded, according to law, is preferred, if made *bona fide* and upon a good and valuable consideration.[4] If the recording

[7] Rev. Code, § 3342. See, also, Ky. Stats., § 494.

[8] Rev. Stats. 1871, p. 560, § 8; Rev. Stats. 1883, p. 604, § 8; Rev. Stats Maine, 1903, p. 658. See Merrill v. Ireland, 40 Me. 569; Lawrence v. Tucker, 7 Me. 195; Porter v. Sevey, 43 Me. 519; Kent v. Plummer, 7 Me. 464; Goodwin v. Cloudman, 43 Me. 577; Pierce v. Taylor, 23 Me. 246; Rackleff v. Norton, 19 Me. 274; Hanly v. Morse, 32 Me. 287; Veazie v. Parker, 23 Me. 170; Spofford v. Weston, 29 Me. 140; Butler v. Stevens, 26 Me. 484; Roberts v. Bourne, 23 Me. 165, 39 Am. Dec. 614.

[9] Rev. Stats. Maine, 1903, p. 658.

[1] Rev. Stats. 1871, p. 560, § 9; Rev. Stats. Maine, 1903, p. 658.

[2] Rev. Code, § 16.

[3] Rev. Code, §§ 17, 18. See Byles v. Tome, 39 Md. 461; Hoopes v. Knell, 31 Md. 550; Building Assn. v. Willson, 41 Md. 514; Cooke's Lessee v. Kell, 13 Md. 469.

[4] Rev. Code, § 19.

officer should die, and during the interim between his death and the qualification of his successor the time for recording a deed should expire, the successor of the deceased clerk shall record the same at any time within one month after his qualification, and such record will have the same effect as if the deed were recorded within the prescribed time. The succeeding clerk shall, however, indorse thereon the time of the death of the former clerk, and the date of his own qualification, and this indorsement shall be recorded with the deed.[5] Conveyances, except deeds or conveyances by way of mortgages, may be recorded after the time prescribed by statute, and when so recorded, have, as against the grantor, his heirs, or executors, and against all purchasers with notice and against creditors, who shall become so after the recording of such conveyance, the same effect as if recorded within the prescribed time.[6] Where possession is taken, a deed after being recorded (though not recorded within six months), has against all persons from the time of taking possession, the same effect as if recorded in proper time;[7] but as against all creditors who have become so before the recording of the deed, and without notice of its existence, it has effect only as a contract to convey.[8]

§ 597. **Massachusetts.**—Deeds are not valid as against persons other than the grantor, his heirs and devisees, and persons having actual notice, unless they are recorded in the

[5] Rev. Code, § 21.

[6] Rev. Code, § 22.

[7] Rev. Code, § 23.

[8] Rev. Code, 1878, § 24. See, generally, on these sections, Abrams v. Sheehan, 40 Md. 446; Walsh v. Boyle, 30 Md. 267; Owens v. Miller, 29 Md. 144; Glenn v. Davis, 35 Md. 215, 6 Am. Rep. 389; Estate of Leiman, 32 Md. 225, 3 Am. Rep. 132; Administrators of Carson v. Phelps, 40 Md. 97; Nelson v. Hagerstown Bank, 27 Md. 51; Lester v. Hardesty, 29 Md. 50; Wiliard's Executors v. Ramsburg, 22 Md. 206; Horner v. Greoholz, 38 Md. 521; Kane v. Roberts, 40 Md. 590; Leppoc v. National Union Bank, 32 Md. 136; Cockey v. Milne's Lessee, 16 Md. 207; Busey v. Reese, 38 Md. 264.

registry of deeds for the county in which the land is situated.[9] An absolute deed is not affected by a defeasance as against any other person than the maker of the defeasance, his heirs and devisees, and persons having actual notice, unless such defeasance is recorded in the registry of deeds for the county in which the real estate is situated.[1] A conveyance of land, otherwise valid, is as effectual, notwithstanding disseisin or adverse possession, to transfer the title, as if the grantor were actually seised and possessed of such land and vests in the grantee the right of entry and of action for the recovery of the estate.[2]

§ 598. **Michigan.**—Every register of deeds is required to keep an entry book of deeds, divided into six columns, as shown in the note.[3] Every conveyance which is not recorded as provided by statute is void as against subsequent purchas-

[9] Pub. Stats. 1882, p. 732, § 4; Gen. Stats. 1860, p. 466, § 3; Rev. Laws of Mass., 1902, vol. 2, p. 1222. See Stetson v. Gulliver, 2 Cush. 494; Lawrence v. Stratton, 6 Cush. 163; Parker v. Osgood, 3 Allen, 487; Sibley v. Leffingwell, 8 Allen, 584; George v. Kent, 7 Allen, 16; Lamb v. Pierce, 113 Mass. 72; Faxon v. Wallace, 101 Mass. 444; Earle v. Fiske, 103 Mass. 491; State of Connecticut v. Bradish, 14 Mass. 296; Adams v. Cuddy, 13 Pick. 460, 25 Am. Rep. 330; Glidden v. Hunt, 24 Pick. 221; Flynt v. Arnold, 2 Met. 619; Dole v. Thurlow, 12 Met. 157, 163; Pomroy v. Stevens, 11 Met. 244; Curtis v. Mundy, 3 Met. 405; Marshall v. Fisk, 6 Mass. 24, 4 Am. Dec. 76; Stewart v. Clark, 13 Met. 79; Swasey v. Emerson, 168 Mass. 118; Stark v. Boynton, 167 Mass. 443; Smythe v. Sprague, 149 Mass. 310, 3 L.R.A. 822.

[1] Pub. Stats. 1882, p. 734, – 23; Gen. Stats. 1860, c. 89, § 15; Rev. Laws of Mass., 1902, vol. 2, p. 1227. See Foote v. Hartford Ins. Co., 119 Mass. 259; Bayley v. Bailey, 5 Gray, 505; Bryan v. Ins. Co., 145 Mass. 389.

[2] Rev. Laws of Mass., 1902, vol. 2, p. 1222.

[3] Howell's Annotated Stats. 1882, vol. 2, p. 1469, c. 216, § 5674. The form prescribed is as follows:

Date of Reception	Grantors	Grantees	Township where the land lies			To whom delivered [after being recorded] and date [of delivery].	Fees received
			Town.	Range.	Station.		

ers in good faith and for a valuable consideration, whose conveyances are first duly recorded.[4] An absolute deed, defeasible on the performance of certain conditions, is not affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice, unless such defeasance is properly recorded.[5] A revocation of a recorded power of attorney must also be recorded.[6]

§ 599. **Minnesota.**—Deeds are recorded in the office of the register of deeds where the real estate is situated; and every deed not so recorded is void as against any subsequent purchaser, in good faith and for a valuable consideration, whose conveyance is first duly recorded, or as against any attachment levied on the property, or any judgment lawfully obtained at the suit of one against the person in whose name the record title was prior to the recording of the conveyance.[7] The term "purchaser" includes every person to whom any interest in real estate is conveyed for a valuable consideration, and also every assignee of a mortgage, lease, or other conditional estate.[8] A certified copy of the record of a deed may be recorded in any county in the State, with the same force and effect as the original conveyance would have if so recorded.[9] The defeasance of an apparently absolute deed must be recorded in order to be effectual as to persons other than the maker of the defeasance, his heirs and devisees and persons having actual notice.[1]

[4] Howell's Annotated Stats., vol. 2, p. 1473, § 29; Comp. Laws, 1871, pp. 1345, 1346.

[5] Howell's Annotated Stats., vol. 2, § 5686.

[6] Howell's Annotated Stats., vol. 2, § 5692. See Doyle v. Stevens, 4 Mich. 87; Barrows v. Baughman, 9 Mich. 213; Godfrey v. Disbrow, 11 Mich. 260; Warner v. Whittaker, 6 Mich. 133, 72 Am. Dec. 65; Wilcox v. Hill, 11 Mich. 256, 263; Rood v. Chapin, Walk. Ch. 79.

[7] Stats. 1878, p. 537, § 21; Rev. Laws of Minn. 1905, § 3357.

[8] Stats. 1878, § 26.

[9] Stats. 1878, § 33. See Smith v. Gibson, 15 Minn. 89, 99; Coy v. Coy, 15 Minn. 119, 126.

[1] Rev. Laws of Minn., 1905, § 3361.

§ 600. **Mississippi.**—Conveyances are void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless acknowledged or proved, and lodged with the clerk of the chancery court of the proper county for record; but they are valid and binding as between the parties and their heirs, and as to all subsequent purchasers with notice, or without valuable consideration.[2] Every conveyance, covenant, agreement, bond, mortgage and deed of trust take effect as to subsequent purchasers for a valuable consideration without notice and as to all creditors only from the time of delivery for record. A deed which is admitted to record without proper acknowledgment does not furnish notice to subsequent purchasers for a valuable consideration.[3]

§ 601. **Missouri.**—Deeds should be recorded where the real estate is situated.[4] Every deed which is duly acknowledged and recorded, imparts notice from the time of filing the same for record to all persons of its contents, and all subsequent purchasers and mortgagees are deemed in law and in equity to purchase with notice.[5] No deed is valid except between the parties and those who have actual notice, until it is deposited with the recorder for record.[6] A power of attorney when recorded can be revoked only by an instrument in writing duly recorded.[7] If a deed is recorded before a sale

[2] Rev. Code, 1871, p. 503, § 2304; Miss. Code of 1906, § 2787; Chaffe v. Halpin, 62 Miss. 1; Miss. etc. Co. v. R. Co., 58 Miss. 846; Hiller v. Jones, 66 Miss. 636; Woods v. Garnett, 72 Miss. 78.

[3] Miss. Code of 1906, § 2788. See Rev. Code of 1871, §§ 2306, 2308. See Rev. Code, 1880, §§ 1209, 1212. Miss. Code of 1906, § 2793.

[4] Ann. Stats. Mo., 1906, § 923.

[5] Rev. Stats. 1879, vol. 1, p. 114, § 692; Wagner's Stats., 1872, vol. 1, p. 277, § 25; Ann. Stats. Mo. 1906, § 924. See Geer v. Mo. etc. Co., 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 489; Smith v Boyd, 162 Mo. 146, 62 S. W. 439.

[6] Rev. Stats. 1879, vol. 1, p. 114, § 693; Wagner's Stats. 1872, vol. 1, p. 277, § 26; Ann. Stats. Mo., 1906, § 925. See Finley v. Babb, 173 Mo., 257, 73 S. W. 180; Genoway v. Maize, 163 Mo., 224, 63 S. W. 698; Edwards v. R. Co., 82 Mo. App. 96; Harrison v. South etc. Co. 95 Mo. App. 80, 68 S. W. 963.

[7] Rev. Stats. 1879, vol. 1, p. 114,

on execution, it is good as against a judgment, although not recorded until after the judgment was rendered.[8]

§ 602. **Montana.**—Instruments entitled to be recorded must be recorded by the county clerk of the county in which the real property affected thereby is situated. An instrument is deemed recorded when, being duly acknowledged, or proved and certified, it is deposited in the county clerk's office with the proper officer for record. Grants absolute in terms are to be recorded in one set of books, and mortgages and securities in the nature of mortgages, in another.[9] The acknowledgment of a married woman to an instrument purporting to be executed by her must be taken the same as that of any other person.[1] A conveyance by a married woman has the same effect as if she were unmarried.[2] Officers taking and certifying acknowledgments, or proof of instruments for record must authenticate their certificates by affixing their signatures followed by the names of their offices; also, their seal of office, if by the laws of the State or country where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals.[3] Every conveyance of real property entitled to record, from the time it is filed with the county clerk for record, is constructive notice of its contents to subsequent purchasers and mortgagees.[4] Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or encumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded. The

§ 695; Wagner's Stats. 1872, vol. 1, p. 277, § 28; Ann. Stats. Mo., 1906, § 931.

[8] Davis v. Ownsby, 14 Mo. 170, 55 Am. Dec. 105; Valentine v. Havener, 80 Mo. 133.

[9] Civil Code, 1895, §§ 1590–1592.

[1] Civil Code, 1895, § 1606.

[2] Civil Code, 1895, § 1607.

[3] Civil Code, 1895, § 1613.

[4] Civil Code, 1895, § 1640.

term "conveyance," embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to real property may be affected, except wills. No instrument containing a power to convey or execute instruments affecting real property which has been recorded, is revoked by any act of the party by whom it was executed unless the instrument containing such revocation is also acknowledged or proved, certified, and recorded in the same office in which the instrument containing the power was recorded.[5] An unrecorded instrument is valid as between the parties and those who have notice of it.[6]

§ 603. **Nebraska.**—Every deed is considered recorded from the time of delivery to the clerk, and takes effect from such time, and not before, as to all creditors and subsequent purchasers, in good faith without notice, and is adjudged void as to all such creditors and subsequent purchasers without notice whose conveyances are first recorded, provided that these conveyances are valid between the parties.[7] A deed is not considered lawfully recorded unless previously it has been duly acknowledged or proved.[8] It is no objection to the record of a deed that no official seal is appended to the recorded acknowledgment of it, "if, when the acknowledgment or proof purports to have been taken by an officer having an official

[5] Civil Code, 1895, § 163.

[6] Civil Code, 1895, § 1644.

[7] Comp. Stats. 1881 (Brown), p. 389, §§ 15, 16; Comp. Stats. 1885, p. 477, § 16; Cobbey's Ann. Stats., Neb., vol. 2, 1903, § 10215, 10216. See Hare v. Murphy, 60 Neb. 135, 82 N. W. 312; Schott v. Dosh, 49 Neb. 195, 68 N. W. 346, 59 Am. St. Rep. 531; Rumery v. Loy, 61 Neb. 755, 86 N. W. 478; Blair Bank v. Stewart, 57 Neb. 58, 77 N. W. 370; Hock v. Bowman, 42 Neb. 89, 60 N. W. 391.

[8] Comp. Stats. 1881 (Brown), p. 390, § 17; Comp. Stats. 1885, p. 478, § 17. See Comp. Stats. 1885, c. 18, § 73, §§ 15–18, Laws of 1887, c. 30; Cobbey's Ann. Stats. Neb., vol. 2, 1903, § 10217. See Warnick v. Latta, 44 Neb. 808, 62 N. W. 1097; Keeling v. Hoyt, 31 Neb. 453, 48 N. W. 66.

seal, there be a statement in the certificate of acknowledgment or proof that the same is made under his hand and seal of office, and such statement shall be presumptive evidence that the affixed seal was attached to the original instrument."[9] The copy of a record or of a recorded deed authenticated in such manner as to entitle it to be read in evidence, may, when the loss of the original deed and of the record is proved, be again recorded, and such record has the same effect as the original.[1] An unrecorded mortgage is entitled to priority over a subsequent conveyance made by the mortgagor without consideration.[2] Where, through mistake, there is an omission of a part of the lands in the record described in a mortgage, and a judgment is recovered subsequently against the mortgagor, the lien of the judgment creditor nust be postponed to the equity of the mortgagee.[3] By a law enacted in 1887, registers of deeds are elected in all counties having a population of eighteen thousand and over, who have all the powers and perform all the duties formerly performed by county clerks.[4]

§ 604. Nevada.—Conveyances to operate as notice to third persons must be recorded in the office of the recorder of the county where the land is situated, but are valid and binding between the parties without registration. A conveyance, from the time it is filed with the recorder for record, imparts notice to all persons of its contents, and subsequent purchasers

[9] Comp. Stats. 1881 (Brown), p. 390, § 20; 1885, p. 478, p. 478, § 20; Cobbey's Ann. Stats. Neb., vol. 2, 1903, § 10220.

[1] Comp. Stats. 1881 (Brown), § 21; Comp. Stats. 1885, p. 477, § 21; Cobbey's Ann. Stats. Neb., vol. 2, 1903, § 10221.

[2] Merriman v. Hyde, 9 Neb. 120.

[3] Galway v. Malchow, 7 Neb. 289, overruling Bennett v. Fooks, 1 Neb. 465. See, generally, Mansfield v. Gregory, 8 Neb. 435; Berkley v. Lamb, 8 Neb. 392; Harrall v. Gray, 10 Neb. 189; Edminster v. Higgins, 6 Neb. 269; Metz v. State Bank etc., 7 Neb. 171; Jones v. Johnson Harvester Co., 8 Neb. 451; Lincoln etc. Assn. v. Haas, 10 Neb. 583; Hooker v. Hammill, 7 Neb. 234; Colt v. Du Bois, 7 Neb. 394; Dorsey v. Hall, 7 Neb. 465.

[4] Laws 1887, p. 362.

and mortgagees are deemed to purchase with notice.[5] Every conveyance which is not thus recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance is first duly recorded.[6] A power of attorney when once recorded can be revoked only by an instrument of revocation duly recorded.[7] By filing such a revocation for record, it becomes absolute without actual notice to the attorney. It operates as notice to all persons dealing with him.[8]

§ 605. **New Hampshire.**—No deed of real estate is valid to hold the same against any person but the grantor and his heirs only, unless attested, acknowledged, and recorded as provided by statute.[9] "Any deed not acknowledged by the grantor, but in other respects duly executed, may be recorded, and for sixty days after such recording shall be as effectual as if duly acknowledged."[1] If a person who has a deed neglects or refuses to allow it to be recorded for the space of thirty days, after being requested to do so in writing by any person having an interest in the estate, any justice upon complaint may issue his warrant and cause such person to be brought before him for examination; and if sufficient cause for this neglect or refusal is not shown, the justice may order such deed to be recorded, and may commit the holder to jail until the order is performed.[2]

§ 606. **New Jersey.**—A deed is void and of no effect against a subsequent judgment creditor or *bona fide* purchaser

[5] Comp. Laws, 1873, vol. 1, p. 82, §§ 252, 253; Comp. Law, 1861–1900, §§ 2663, 2664. See Crosier v. McLaughlin, 1 Nev. 348; Virgin v. Brubaker, 4 Nev. 31; Grellett v. Heilshorn, 4 Nev. 526.

[6] Comp. Laws, 1873, vol. 1, § 254; Comp. Law, 1861–1900, § 2667.

[7] Comp. Laws, 1873, vol. 1, § 256; Comp. Law, 1861-1900, § 1667.

[8] Arnold v. Stevenson, 2 Nev. 234.

[9] Gen. Laws, 1878, p. 323, c. 135, § 4.

[1] Gen. Laws, 1878, § 7.

[2] Gen. Laws, 1878, § 11.

or mortgagee for a valuable consideration without notice, unless the deed is recorded, or filed for record with the clerk of the court of common pleas of the county containing the land, within fifteen days after the time the deed is signed, sealed, and delivered; but the deed is nevertheless valid and operative between the parties and their heirs.[3] Where, by reason of a failure to record a deed within fifteen days after its delivery, title to the property is acquired by a third party, the documentary evidence will entitle such party to recover the premises, unless the party claiming under the first deed can show that the other had notice of it. The burden of proof rests upon the party who claims under the first deed.[4] Where there are two deeds, if the one which was given is recorded within fifteen days after its delivery, it will have priority over the second, although the second was recorded first.[5] A deed which is not recorded is valid as against an attaching creditor having notice thereof before judgment.[6] Recordation of unrecorded deeds may be compelled by one having an interest in the estate.[7]

§ 607. **New Mexico Territory.**—Deeds are recorded in the office of the archives of the county where the real estate is

[3] Revision of 1877, p. 155, § 14; Law of 1887, ch. 164. But see Pub. Stats. and Session Laws 1901, p. 437.

[4] Coleman v. Barklew, 3 Dutch. 357; Lewis v. Hall, 3 Halst. Ch. 107; Freeman v. Elmendorf, 3 Halst. Ch. 475; Vreeland v. Claflin, 9 Green, C. E. 313; Blair v. Ward, 2 Stockt. Ch. 119; Holmes v. Stout, 2 Stockt. Ch. 419; Sanborn v. Adair, 29 N. J. Eq. 368.

[5] Den v. Rechman, 1 Green (13 N. J. L.), 43.

[6] Garwood v. Garwood, 4 Halst. 193. See, also, Diehl v. Page, 2 Green, Ch. 143; Cornelius v. Giberson, 1 Dutch. 1; Losey v. Simpson, 3 Stockt. Ch. 246; Lee v. Woodworth, 2 Green Ch. 37; Hoy v. Bramhall, 19 N. J. Eq. 564, 97 Am. Dec. 687; Nichols v. Peak, 1 Beasl. 70; Wells v. Wright, 7 Halst. 131; Van Doren v. Robinson, 1 Green, C. E. 256; Mellon v. Mulvey, 8 Green, C. E. 198; Annin v. Annin, 9 Green, C. E. 185.

[7] Pub. Stats. and Session Laws, 1901, p. 437.

situated. After registration a deed gives notice of the time of its being registered to all persons mentioned in it, and all purchasers and mortgagees are considered as having purchased under such notice. A deed is not valid except as to the parties interested, and those who have actual notice, until it is deposited in the office of the clerk to be registered.[8] A power of attorney which has been recorded can be revoked only by a revocation duly recorded.[9]

§ 608. **New York.**—Deeds are conclusive as against subsequent purchasers from the grantor or from his heirs claiming as such, except against subsequent purchasers in good faith, and for a valuable consideration, who shall acquire a superior title by a conveyance that shall have been first duly recorded.[1] Different sets of books are provided for the recording of deeds and mortgages; in one of these, all conveyances absolute in their terms, and not intended as mortgages or as securities in the nature of mortgages, are to be recorded, and in the other set such mortgages and securities shall be recorded. A deed, which by any other instrument in writing shall be intended only as a mortgage, though it may be an absolute conveyance in form, shall be treated as a mortgage; and the person for whose benefit the deed is made will not derive any advantage from its registration, unless every writing operating as a defeasance or explanatory of its character as a mortgage is also recorded with the deed and at the same time.[2] A copy of a record, or of a recorded deed, attested in such manner as would entitle it to be read in evidence, may, if the loss of the original and the record be proven, be again re-

[8] Gen. Laws, 1880, p. 236, c. 44, §§ 14–16. Laws of 1887, c. 10; Comp. Laws 1897, §§ 3953, 3954, 3955, 3956.

[9] Gen. Laws, 1880, § 19; Comp. Laws 1897, § 3963.

[1] Rev. Stats., vol. 2, p. 1119, § 165; Rev. Stats., vol. 2, p. 1138, § 1; Fay's Dig. of Laws, 1876, vol. 1, p. 580.

[2] Rev. Stats., vol. 2, p. 1138, §§ 2, 3.

corded, and such record shall have the same effect as the original record.[3]

§ 609. **North Carolina.**—A deed is not good and available in law unless it is acknowledged and proved in the manner required by law, and registered in the county where the land lies within two years after the date of the deed. All deeds thus executed and registered are valid without livery of seisin or other ceremony.[4] Deeds of gift must also be registered within two years after execution, else they are void.[5] A deed of trust or mortgage is not valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor or mortgagor, but from the time of registration of such deed of trust or mortgage in the county in which the land is situated.[6] An error in the registration of

[3] Rev. Stats., vol. 2, p. 1148, § 51; Fay's Dig., vol. 1, p. 586, § 50; 3 Rev. Stats., 7th ed., pp. 2215, 2216. But see Revisal of 1905, vol. 1, § 980, et seq. See, also, Revisal of 1905, vol. 1, § 979. See, generally, Newton v. McLean, 41 Barb. 285; Fort v. Burch, 6 Barb. 60; Schutt v. Large, 6 Barb. 373; Truscott v. King, 6 Barb. 346; Westbrook v. Gleason, 79 N. Y. 23; Lacustrine etc. Co. v. Lake Guano etc. Co., 82 N. Y. 476; Hoyt v. Thompson, 5 N. Y. 347; Judson v. Dada, 79 N. Y. 373; Page v. Waring, 76 N. Y. 463.

[4] Code, vol. 1, p. 490, § 1245; Code, §§ 1252, 1254. See Morris v. Ford, 2 Dev. Eq. 412; Walker v. Coltraine, 6 Ired. Eq. 79; Doak v. State Bank, 6 Ired, 309; Osborne v. Ballew, 7 Ired. 415; Williams v. Griffin, 4 Jones, 31; Walston v. Brasswell, 1 Jones Eq. 137; Freeman v. Hatley, 3 Jones, 115; Johnson v. Pendergrass, 4 Jones, 479; Latham v. Bowen, 7 Jones, 337; Hare v. Jernigan, 76 N. C. 471; King v. Portis, 81 N. C. 382; McMillan v. Edwards, 75 N. C. 81; Salms v. Martin, 63 N. C. 608; Linker v. Long, 64 N. C. 296; Hogan v. Strayhorn, 65 N. C. 279; Love's Executors v. Habbin, 87 N. C. 249; Ivevy v. Granberry, 66 N. C. 223; Triplett v. Witherspoon, 74 N. C. 475; Riggan v. Green, 80 N. C. 286, 30 Am. Rep. 77; Henley v. Wilson, 81 N. C. 405; Davis v. Inscoe, 84 N. C. 396; Mosely v. Mosely, 87 N. C. 69; Isler v. Foy, 66 N. C. 547; Paul v. Carpenter, 70 N. C. 502; Wilson v. Sparks, 72 N. C. 208; Starke v. Etheridge, 71 N. C. 240; Holmes v. Marshall, 72 N. C. 37; Buie v. Carver, 75 N. C. 559; McCall v. Wilson, 101 N. C. 598.

[5] Code, vol. 1, p. 490, § 1252.

[6] Code, vol. 1, § 1254. See Revisal, 1905, vol. 1, § 982. See, also,

an instrument may be corrected by the clerk of the superior court, upon petition.[7]

§ 609a. **North Dakota.**—Any instrument or judgment affecting the title to or possession of real property may be recorded, and when entitled to record must be recorded by the register of deeds of the county in which the real property affected thereby is situated. The register is required in all cases to indorse the amount of his fee for the recording on the instruments recorded.[8] An instrument is considered recorded when properly acknowledged, or proved and certified, it is deposited in the register's office with the proper officer for record.[9] Grants absolute in terms and mortgages are to be recorded in separate books.[1] A conveyance by a married woman has the same effect as if she was unmarried, and may be acknowledged in the same manner.[2] Officers taking and certifying acknowledgments or proof of instruments for record must au-

§§ 5038, 5041. See Smith v. Washington, 1 Dev. Eq. 318; Skinner v. Cox, 4 Dev. 59; Leggett v. Bullock, Busb. 283; Moore v. Collins, 4 Dev. 384; Dewey v. Littlejohn, 2 Ired. Eq. 495; McKinnon v. McLean, 2 Dev. & B. 79; Metts v. Bright, 4 Dev. & B. 173, 33 Am. Dec. 683; Norwood v. Marrow, 4 Dev. & B. 442; Barnett v. Barnett, 1 Jones, Eq. 221; Simpson v. Morris, 3 Jones, 411; Barrett v. Cole, 4 Jones, 40; Green v. Kornegay, 4 Jones, 66, 67 Am. Dec. 261; Dukes v. Jones, 6 Jones, 14; Newell v. Taylor, 3 Jones, Eq. 374; Saunders v. Ferrell, 1 Ired. 97; Halcombe v. Ray, 1 Ired. 340; Doak v. State Bank, 6 Ired. 309; Johnson v. Malcolm, 6 Jones, Eq. 120; Morning v. Dickerson, 85 N. C. 466; Parker v. Scott, 64 N. C. 118; McCoy v. Wood, 70 N. C. 125; Robinson v. Willoughby, 70 N. C. 358; Blevins v. Barker, 75 N. C. 436; Edwards v. Thompson, 71 N. C. 177; Moore v. Ragland, 74 N. C. 343; Starke v. Etheridge, 71 N. C. 340; Harris v. Jones, 83 N. C. 317; King v. Portis, 77 N. C. 25; Todd v. Outlaw, 79 N. C. 235; Capehart v. Biggs, 77 N. C. 261; Purnell v. Vaughan, 77 N. C. 268; Beaman v. Simmons, 76 N. C. 43.

[7] Code, vol. 1, § 1266. See Jones v. Physioc, 1 Dev. & B. 173; Oldham v. Bank, 85 N. C. 240.

[8] Rev. Code, 1895, §§ 3563-3567; Rev. Codes, 1905, § 5005.

[9] Rev. Code, 1895, § 3568; Rev. Codes, 1905, § 5006.

[1] Rev. Code, 1895, § 3570; Rev. Codes, 1905, § 5008.

[2] Rev. Code 1895, § 3578; Rev. Codes 1905, § 5016.

thenticate their certificates by affixing to them their signatures, followed by the names of their offices; also, their seals of office, if by the laws of the territory, State or country where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals. Judges and clerks must authenticate their certificates by affixing to them the seal of the proper court, and mayors of cities by the seal thereof.[3] Every conveyance of real property other than a lease for a term not exceeding one year, is void as against subsequent purchasers or encumbrancers, including an assignee of a mortgage, lease, or other conditional sale of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.[4] The term "conveyance," as used in the code, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to any real property may be affected except wills, statutory contracts for the sale or purchase of real property and powers of attorney.[5] No instrument conferring a power to convey or execute instruments affecting real property which has been recorded is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded in the same office in which the instrument containing the power was recorded.[6]

§ 610. **Ohio.**—Powers of attorney must be recorded in the office of the recorder of the county where the land lies, prior to the execution of the deed made in pursuance of it.[7] A deed not recorded, is deemed fraudulent, so far as relates

[3] Rev. Code 1895, § 3568; Rev. Codes 1905, § 5028.

[4] Rev. Code 1895, § 3594; But see Rev. Code 1905, § 5038.

[5] Rev. Code, 1895, § 3595; Rev. Codes 1905, § 5039.

[6] Rev. Code 1895, § 3596; Rev. Codes 1905, § 5040.

[7] Rev. Stats. 1880, vol. 1, p. 1033, § 4132. Laws of 1885, p. 230; Bate's Ann. Stats. § 4131.

to any subsequent *bona fide* purchaser, having at the time of purchase no knowledge of the existence of the deed.[8]

§ 611. **Oregon.**—A deed is considered as recorded at the time it is received by the recorder for record.[9] Every deed which is not recorded within five days after its execution is void against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance is first duly recorded.[1] A deed absolute in terms, defeasible by a deed of defeasance, is not affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice, unless the defeasance is recorded in the office of the recorder of the county where the land lies.[2]

§ 611a. **Oklahoma.**—Every conveyance of real property, other than a lease not exceeding one year, is void as against subsequent purchasers and encumbrancers, including an assignee of a mortgage, lease, or other conditional sale of the property, or any part thereof, who becomes such in good faith and for a valuable consideration, and whose conveyance is first duly recorded. Dower and curtesy are abolished. Conveyances must be recorded with the register of deeds of the county in which the land affected thereby is situated.[2a]

[8] Bate's Ann. Stats. § 4134. See Doe v. Bank of Cleveland, 3 McLean, 140; Lessee of Cunningham v. Buckingham, 1 Ohio, 265; Lessee of Allen v. Parish, 3 Ohio, 107; Smith v. Smith, 13 Ohio St. 532; Northrup's Lessee v. Brehmer, 8 Ohio, 392; Leiby's Executors v. Wolf, 10 Ohio, 83; Stansell v. Roberts, 13 Ohio, 148, 42 Am. Dec. 193; Mayham v. Coombs, 14 Ohio, 428; Lessee of Irvin v. Smith, 17 Ohio, 226; Price v. Methodist Episcopal Church, 4 Ohio, 515; Spader v. Lawler, 17 Ohio, 371, 49 Am. Dec. 461; Bloom v. Noggle, 4 Ohio St. 45; Bercaw v. Cockerill, 20 Ohio St. 163.

[9] Gen. Laws, p. 518, § 24; Ann. Codes & Stats. § 5357. But the time during which deeds were allowed to be filed was changed in 1885.

[1] Gen. Laws, § 26; Ann. Codes & Stats. § 5359. See Crossen v. Oliver, 37 Ore. 521, 61 Pac. 885.

[2] Gen. Laws, § 28. Annotated Laws, 1887, §§ 3024–3029; Ann. Codes & Stats. § 5361. See Security, etc., Co. v. Loewenberg, 38 Or. 172, 62 Pac. 647.

[2a] See § 1195, Comp. Laws 1909, noting slight changes from law as stated in text.

§ 612. **Pennsylvania.**—Deeds executed within the State should be recorded in the office for recording deeds in the county in which the land is situated within six months after execution; and if not so recorded they will be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless recorded before the proving and recording of the deed or conveyance under which the subsequent purchaser or mortgagee claims.[3] If executed without the State, they must be so recorded within twelve months after their execution.[4]

§ 613. **Rhode Island.**—Deeds, mortgages, and deeds of trust are void, unless they are duly acknowledged and recorded; but, between the parties and their heirs, they are nevertheless valid and binding.[5] They are recorded in the office of the town clerk of the town where the land lies.

[3] Purdon's Dig. (Brightly), p. 321, § 71. See as to statute relating to Philadelphia only, Purdon's Ann. Dig., p. 2110, § 5.

[4] Purdon's Dig. (Brightly), § 72. See on the question of notice, Chew v. Barnett, 11 Serg. & R. 389; Harris v. Bell, 11 Serg. & R. 39; Krider v. Lafferty, 1 Whart. 303; Randall v. Silverthorn, 4 Barr. 173; Hetherington v. Clark, 6 Casey, 393; Boggs v. Warner, 6 Watts & S. 469; Miller v. Cresson, 1 Watts & S. 284; Green v. Drinker, 7 Watts & S. 440; Parke v. Chadwick, 8 Watts & S. 96; Kerns v. Swope, 2 Watts, 75; Epley v. Witherow, 7 Watts, 167; Lewis v. Bradford, 10 Watts, 67; Rankin v. Porter, 7 Watts, 387. As to the parties bound by an unrecorded conveyance, see Nice's Appeal, 54 Pa. St. 200; Adams' Appeal, 1 Penn. & W. 447; Speer v. Evans, 47 Pa. St. 141; Mellon's Appeal, 32 Pa. St. 121; Britton's Appeal, 45 Pa. St. 172. *Bona fide* purchasers: Hoffman v. Strohecker, 7 Watts, 90, 32 Am. Dec. 740– Potli v. Anstatt, 4 Watts & S. 307; Bracken v. Miller, 4 Watts & S. 102; Union Canal Co. v. Young, 1 Whart. 410, 432, 30 Am. Dec. 212; Sailor v. Hertzog, 4 Whart. 264; Jacques v. Weeks, 7 Watts, 261; Snider, 3 Phila. 160; Plummer v. Robertson, 6 Serg. & R. 179. On the question of priority, see Brooke's Appeal, 64 Pa. St. 127; Lightner v. Mooney, 10 Watts, 407; Bratton's Appeal, 8 Pa. St. 164; Foster's Appeal, 3 Pa. St. 79; Ebner v. Goundie, 5 Watts & S. 49; Safe Deposit & Trust Co. v. Kelly, 159 Pa. St. 82; Fries v. Null, 154 Pa. St. 573.

[5] Public Stats. 1882, p. 443, c. 173, § 4; Gen. Stats. 1872, p. 350, § 4; Gen. Laws Rev. 1909, p. 875. See Harris v. Arnold, 1 R. I. 125; Thurber v. Dwyer, 10 R. I. 355.

§ 614. **South Carolina.**—Conveyances, if made within the State, must be recorded within six months from their execution; if by a resident of any other State, within twelve months; and if made without the limits of the United States, then within two years. If not recorded within these periods, respectively, they are valid and legal only as to the parties themselves and their heirs, but are void and incapable of defeating the right of persons claiming as creditors, or under subsequent purchases recorded in the manner prescribed by statute.[6] A mortgage is not valid so as to affect the rights of subsequnt creditors or purchasers for a valuable consideration without notice, unless it is recorded within sixty days from its execution.[7] The conveyance (except original grants) first registered is deemed to be the first conveyance, notwithstanding the execution of any conveyance not before registered.[8]

§ 614a. **South Dakota.**—All instruments affecting the title to real property must be recorded with the register of deeds of the county in which the property lies, and every such conveyance other than a lease for a term of years is void as against a subsequent purchaser or encumbrancer in good faith and for a valuable consideration whose conveyance is first recorded. The registry laws include assignments of mortgages, leases, and conditional sale.[9]

[6] Rev. Stats. 1873, p. 422, § 1; A. A. 1876; 16 Stat. 92. But see Code of Laws 1902, Vol. 1, p. 940, et seq. and note changes.

[7] Rev. Stats. 1873, § 2. But see change by Rev. Stats. 1893, § 1776. See Code of Laws, 1902, Vol. 1, p. 940, et seq.

[8] Rev. Stats. 1873, p. 424, § 6. A. A. 1876; 16 Stat. 92. See Williams v. Beard, 1 S. C. 309; McFall v. Sherrard, Harp. 295; Massey v. Thompson, 2 Nott & McC. 105; Steele v. Mansell, 6 Rich. 437; Tart v. Crawford, 1 McCord, 265; Dawson, Rice Eq. 243; Boyce v. Shiver, 3 S. C. 515; Stokes v. Hodges, 11 Rich. Eq. 135.

[9] C. C. §§ 651, 671, C. L. 3272, 3293. See Rev. Codes 1903, p. 734, §§ 986, 987. See, also, Parrish v. Mahoney, 10 S. D. 276; Merrill v. Luce, 6 S. D. 354; Betts v. Letcher, 1 S. D. 193.

§ 615. **Tennessee.**—Deeds are registered in the county where the land lies, unless it lies partly in two or more counties, and then it may be registered in either. If the deed embraces several tracts of land lying in different counties, it shall be registered in each of the counties where any of the tracts lie. A deed is not good and available in law as to strangers, unless it is acknowledged and registered by the register of the county where the land lies. Deeds have effect between the parties and their heirs and representatives without registration; but as to other persons who have not actual notice, only from the time they are noted for registration, on the register-books of the register, unless otherwise expressly provided.[1] When so registered, they are notice to all the world from the time at which they are noted for registration. The deed first registered or noted for registration has preference over one of earlier date, but noted for registration subsequently, unless in a court of equity it is proven that the party claiming under the subsequent deed had full notice of the earlier one.[2] Conveyances not so acknowledged and registered, or noted for registration, are null and void as against existing or subsequent creditors of, or *bona fide* purchasers from, the makers without notice.[3]

§ 616. **Texas.**—Deeds are void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they are acknowledged and filed with the recording officer, to be recorded as required by law; but they are valid as between the parties and their heirs, and as to all subsequent purchasers with notice, or without valuable consider-

[1] Stats. 1871 (Thompson & Steger), § 2072.

[2] Notice to a trustee is notice to the principal: Myers v. Ross, Head, 59.

[3] Stats. 1871 (Thompson v. Steger),§§ 2005, 2032, 2072, 2073, 2075; Code M. & V. 2887, 2888. See Thomas v. Blackmore, 5 Yerg. 113, 124; May v. McKeenon, 6 Humph. 209; Vance v. McNairy, 3 Yerg. 176, 24 Am. Dec. 553; Shields v. Mitchell, 10 Yerg. 8; Hays v. McGuire, 8 Yerg. 92.

ation.[4] Deeds take effect as to all subsequent purchasers, for a valuable consideration, without notice, and as to all creditors, from the time when they are delivered to the clerk for record, and from that time only.[5]

§ 617. **Utah.**—Deeds must be acknowledged before they are entitled to record. They are valid as against the parties and those who have actual notice without registration, but to impart notice to third persons must be recorded. Deeds not recorded are void against subsequent purchasers in good faith and for a valuable consideration, when such subsequent purchasers have their deeds first duly recorded. Notice of the contents of a deed is given to every person from the time it is filed for record. A power of attorney, when recorded, can be effectually revoked only by having the revocation also recorded.[6]

§ 618. **Vermont.**—Deeds must be attested by two or more witnesses, and are recorded in the clerk's office of the town where the lands lie. If there is no town clerk they are recorded by the clerk of the county.[7] A deed is not effectual in law to hold the land conveyed against any person but the grantor and his heirs, unless it is acknowledged and recorded as provided by statute.[8] A deed made under a power of attorney has no effect, and is not admissible in evidence, unless such power of attorney is signed, sealed, attested, and acknowl-

[4] Rev. Stats. 1879, p. 625, § 4332; Paschal's Dig., vol. 1, p. 836, § 4988.

[5] Rev. Stats. 1879, p. 626, § 4334.

[6] Laws, 1853, c. 75. See Laws, 1867, c. 28. See Comp. Laws, 1907, §§ 1999, 2000, 2001, 1974, 1975.

[7] Rev. Laws, 1880, pp. 338, 339, §§ 1927, 1929.

[8] Rev. Laws, 1880, p. 339, § 1931. See Ludlow v. Gill, Chip. N. 63; Morris v. Ludlow, 1 Chip. D. 49; Barney v. Currier, 1 Chip. D. 315; 6 Am. Dec. 739; Stewart v. Thompson, 3 Vt. 255; Brackett v. Wait, 6 Vt. 411; Harrington v. Gage, 6 Vt. 532; Corliss v. Corliss, 8 Vt. 373; Pratt v. Bank of Bennington, 10 Vt. 293, 33 Am. Dec. 201; Barnard v. Whipple, 29 Vt. 401, 70 Am. Dec. 422; Sterling v. Baldwin, 42 Vt. 306; Sprague v. Rockwell, 51 Vt. 401.

edged and recorded in the office where the deed is required to be recorded.[9]

§ 619. **Virginia.**—Deeds of trust and mortgages are not effectual against creditors and subsequent purchasers for a valuable consideration without notice, except from the time at which they are duly admitted to record.[1] Every contract relating to real estate shall, from the time it is duly admitted to record, be as valid against creditors and purchasers as if the contract were a deed conveying the estate.[2]

§ 620. **Washington.**—Conveyances are valid as against *bona fide* purchasers from the time they are filed for record, and when so filed the record is filed to give notice to all the world.[3] When a deed is made by a commissioner appointed by the court the conveyance shall be recorded in the office in which by law it should have been if made by the parties whose title is conveyed by it.[4]

§ 621. **West Virginia.**—Deeds are void as to creditors and subsequent purchasers for a valuable consideration without notice until they are duly admitted to record in the county where the property embraced in the deed is situated. Where two or more instruments affecting the same property are ad-

[9] Rev. Laws, 1880, § 1935. See Oatman v. Fowler, 43 Vt. 462.

[1] Code, 1873, c. 114, §§ 4–9; Code, §§ 2463, 2464, 2467. See Va. Code, 1904, § 2465. See, also, Chapman v. Chapman, 91 Va. 397, 21 S. E. 813; Price v. Wall, 97 Va. 335, 33 S. E. 599, 75 Am. St. Rep. 788. See Beverly v. Ellis, 1 Rand. 102; Beck's Administrators v. De Baptists, 4 Leigh, 349; Bird v. Wilkinson, 4 Leigh, 266; Lane v. Mason, 5 Leigh, 520; Glazebrook's Administrators v. Ragland's Administrators, 8 Gratt. 344; McClure v. Thistle's Executors, 2 Gratt. 182.

[2] Code, 1887, § 2464. See Va. Code, 1904, § 2464. See, also, Braxton v. Bell, 92 Va. 229, 23 S. E. 289; Craig v. Williams, 90 Va. 500, 18 S. E. 899, 44 Am. St. Rep. 934.

[3] Laws of 1877, p. 312; 1 S. & C., § 1439.

[4] Code of Washington, 1896, § 4981.

mitted to record in the same county on the same day, the one first admitted to record has priority as to the property situated in such county. By the terms "creditors" and "purchasers" are embraced not only those from the grantor, but also those who, but for the deed or other conveyance, would have title to the property conveyed, or a right to subject it to the payment of their debts.[5]

§ 622. Wisconsin.—Every conveyance which is not recorded as provided by law is void as against subsequent purchasers in good faith and for a valuable consideration, whose conveyances shall be first duly recorded.[6] A deed absolute in form is not defeated by a deed of defeasance as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice, unless the defeasance is recorded in the office of the register of deeds of the county where the lands are.[7] A power of attorney, when recorded, can be revoked effectually only by recording the instrument of revocation.[8] A deed executed in 1868 passes the legal title to land in Wisconsin, though not acknowledged or attested, as those formalities are only essential to entitle it to record.[9]

[5] Code 1887, c. 74, §§ 5, 8, 9.

[6] Rev. Stats., 1878, p. 641, § 2241. See Evarts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314; Evarts v. Agnes, 6 Wis. 453; Hodson v. Treat, 7 Wis. 263; Myrick v. McMillan, 13 Wis. 133; Deuster v. McCamus, 14 Wis. 307; Stewart v. McSweeney, 14 Wis. 468; Straight v. Harris, 14 Wis. 509; Gee v. Bolton, 17 Wis. 604; Fery v. Pfeiffer, 18 Wis. 510; Wyman v. Carter, 20 Wis. 107; Ely v. Wilcox, 20 Wis. 523, 91 Am. Dec. 436; Shove v. Larsen, 22 Wis. 142; Schnee v. Schnee, 23 Wis. 377, 99 Am. Dec. 183; Hay v. Hill, 24 Wis. 235; Stevens v. Brooks, 24 Wis. 326; Wickes v. Lake, 25 Wis. 71; The International Life Ins. Co. v. Scales, 27 Wis. 640; Smith v. Garden, 28 Wis. 685; Fallas v. Pierce, 30 Wis. 443; Gilbert v. Jess, 31 Wis. 110; Hoyt v. Jones, 31 Wis. 389; Ehle v. Brown, 31 Wis. 405; Austin v. Holt, 32 Wis. 478; Quinlan v. Pierce, 34 Wis. 304.

[7] Rev. Stats., § 2243.

[8] Rev. Stats., § 2246.

[9] Leinenkugel v. Kehl, 73 Wis. 238.

§ 623. **Wyoming.**—Conveyances under seal attested by two or more witnesses, and properly acknowledged, are recorded in the office of the register of deeds of the county in which the land is situated. All conveyaces so recorded are notice to any subsequent purchasers, from the time the instrument is delivered at the office of the register of deeds for registration.[1]

§ 624. **Effect of statutes giving time to record deeds —Valid from delivery.**—Where, by the provisions of the statute, a purchaser is allowed a specified time after the execution of the deed in which to procure its registration, the deed takes effect as it would if such statutes did not exist; that is, from its delivery. It is valid from delivery as against subsequent purchasers. A deed thus recorded within the statutory period will prevail over the deed of a person who purchased the property after the execution of the former deed, but before it was filed for registration.[2] Speaking of the statute of Mississippi, which allows three months after execution for the registration of conveyances, except deeds of trust and mortgages, and provides that if so recorded they shall be valid from delivery, the court say: "The lodging with the clerk of any of the instruments enumerated in the act for record (except deeds of trust and mortgages), within three months after execution, makes such instruments valid from date of delivery, so as to prevail against a purchaser or creditor who has acquired a right subsequent to the date of delivery, although prior to the time of deposit of the instrument with the clerk. In other words, filing the deed with the clerk within three months makes the benefit of registration relate back to the day of delivery, so as to prevail against intermediate con-

[1] Compiled Laws, 1876, p. 284, c. 40, §§ 1, 3; Rev. Stats., §§ 15–21; Rev. Stats., 1899, §§ 2761, 2754 et seq.

[2] Dale v. Arnold, 2 Bibb, 605; Claiborne v. Holmes, 51 Miss. 146. See, also, Stanzell v. Roberts, 13 Ohio, 148, 43 Am. Dec. 193; Mayham v. Coombs, 14 Ohio, 428.

veyances or encumbrancers. Deeds of trust and mortgages, however, have no relation back to any act or date; and notice to subsequent purchasers and creditors begins from the time they are filed with the clerk for record. If the instruments to which three months are allowed for record are not registered within the time, they operate to give notice from the time they are lodged with the clerk." [3]

§ 625. **Protection of grantee.**—These statutes giving a specified time from the execution of a conveyance in which to record it are intended for the benefit of the grantee. He may, by recording his deed within the stipulated time, have it take effect from its execution. If he neglects to file it for record within this time, it is not void. In a case in Indiada, it was contended that a deed should not go upon the records, unless placed there within the time specified by statute, and that it would not be notice to one who should purchase the property after it was recorded. But the court answered: "This construction we cannot adopt; we think a man could not be considered as standing in the position of a purchaser in good faith, who should buy and take a title in view of a recorded deed of an already outstanding title; but that he would be buying with notice, that is the record would be notice to subsequent purchasers." [4] The Supreme Court of the United States passing on the statute of South Carolina allowing conveyances to be recorded within three months from their date said: "With regard to the position insisted upon in the answers, that the antenuptial settlement was void for the failure to record it within three months from its date in conformity with the law of South Carolina; that position, however maintainable it might be, so far as the instrument was designed

[3] Claiborne v. Holmes, 51 Miss. 146, 150, per Simrall, J.

[4] Meni v. Rathbone, 21 Ind. 454. See, also, De Lane v. Moore, 14 How. 253, 14 L. ed. 409; Belk v. Massey, 11 Rich. 614; Irvin v. Smith, 17 Ohio, 226; Steele v. Mansell, 6 Rich. 437; Mallory v. Stodder, 6 Ala. 801.

to operate by mere legal or constructive effect on creditors and purchasers becoming such before it was recorded, or in the event of its never being recorded, cannot be supported to the extent that, by the failure to record it within the time prescribed by the statute, the deed would thereby be void to all intents and purposes. Such a deed would, from its execution, be binding at common law *inter partes,* though never recorded; and if, after the expiration of the time prescribed by statute, it should be reacknowledged and then recorded, either upon such reacknowledgment or upon proof of witnesses, it would, from the period of that reacknowledgment and admission to record, be restored to its full effect of notice, which would, by construction, have followed from its being recorded originally within the time prescribed by law." [5]

[5] De Lane v. Moore, 14 How. 253, 265, 14 L. ed. 409, 414. The court states that its views are sustained by numerous decisions, which it cites. In Steele v. Mansell, 6 Rich. 437, 454, it is said: "In the confidence which parties repose in each other, hundreds of deeds are never registered, and thousands are not registered within six months. If a deed was registered before the right of a creditor or purchaser arose, of what consequence can it be, that the registration was delayed until the six months had expired? Being without registration good as to the party who made it, the deed might, as to all other persons, be considered as if it had been executed on the day it was registered—in other words, as if it had been re-executed or acknowledged on the day. So if that party should have been dead on the day of registration, the deed good as to his heirs might be considered as if it had been then confirmed by them. Even if infancy, coverture, or other disability should prevent the supposition of confirmation on the day of registration, why should not the deed, binding as to all the world then existing, acquire by such registration such indefeasibility, as thence arises, against that part of the world which afterward sets up opposing rights subsequently acquired? By delaying beyond a prescribed time, the grantee in a deed has lost the right to insist that the tardy registration shall have relation to the date of the deed so as to prevail against intervening claims, but why should he lose the benefit of registration from the day it was made? As regards notice to be obtained by search of a registry, the same search which would disclose a deed registered within a prescribed time, would disclose one registered after the expiration of the time; and the same fraud or disappointment of past expectation, which would arise from a first deed being registered between the search

and the execution of a second one, might ensue whether the registration of the first one was or was not within a prescribed time from its date. If it should be decided that registration after the time does not avail against a subsequent deed executed after this registration and registered in time, a *bona fide* purchaser, whose conveyance was registered after the expiration of six months, say only seven months, from its date, and whose grantor had afterward lived many years solvent and honest, might, when these years were past, be deprived of his land, because at last his grantor had fallen into embarrassment, and, under execution against him, the land had been sold. If it should be held that the judgment against the grantor had not preference over the conveyance tardily registered, and that notice to a purchaser at sheriff's sale under the judgment would, as to him, stand in the place of regular registration, then the right of the fair owner by former purchase to hold his land would depend upon his viligance in giving actual notice of his conveyance whenever the land was offered for sale by the sheriff, until it might happen that a sale could be made, when notice could not be brought home to a purchaser, who would probably have got a bargain by reason of the very efforts the owner had made to save his rights. Human sagacity could not foretell the extent of disastrous influence which such a decision would have upon the land titles of the State." See, also, Wood v. Owings, 1 Cranch, 239, 2 L. ed. 94.

CHAPTER XXII.

REGISTRATION OF DEEDS.

§ 626. In general.
627. In England.
628. Registration in the United States.
628a. Estoppel by delay in recording.
628b. Constitutionality of retroactive recording acts.
629. Registration not necessary between the parties.
629a. Duty of purchaser to examine the records.
630. Registration of mortgages in book of deeds.
631. Mortgagee considered a purchaser.
632. Pre-existing debt.
633. Assignee of mortgage considered a purchaser.
634. Judgment creditors.
635. In some States judgment creditor considered within the registry acts.
636. Actual notice subsequent to the lien in these States.
637. Purchasers at execution sale.
638. Purchasers at such sale with notice.
639. Rights of judgment creditor as purchaser—Comments.
640. General rule — Judgment creditor is not bona fide purchaser.
641. Contrary rule in Iowa.
641a. In other States.
§ 642. Comments.
643. Mortgage for purchase money.
643a. Third person advancing money.
643b. Execution at same time not essential.
644. Administrator's deed and prior unrecorded mortgage.
645. Compliance with preliminary requirements.
646. Illustration—Attesting witnesses.
646a. Statutes requiring payment of taxes prior to registration.
646b. Such statutes held to be constitutional.
646c. Comments.
647. Attachment at time of ac knowledgment.
648. Incapacity to take acknowledgment.
649. Omission of name of grantee.
650. Description of land.
650a. Christian names in record.
650b. Nickname.
651. Illustrations of description insufficient to give constructive notice.
652. Illustrations where purchaser bound, though description inaccurate.

§ 653. Description by impossible sectional number.
654. Distinction between description in deed and in mortgage.
655. Comments.
656. Instruments not entitled to registration.
657. Illustrations.
658. Want of delivery.
658a. Showing deed forgery against decedent.
659. Equitable mortgages.
660. Assignment of mortgage.
661. In some States, defective deeds if recorded impart notice.
662. In Kansas.
663. Registration in wrong county.
664. Land in two counties.
665. Registration of copy of deed in proper county.
666. Certified copy of deed recorded in wrong county as evidence.
667. Presumption of actual notice from examination of records.
668. Comments.
669. Change of boundaries of county.
669a. Purchaser for nominal consideration as purchaser for value.
670. Purchaser under quitclaim deed—Comments.
671. View that such purchaser is not entitled to the protection of the registry acts.
672. View that such purchaser is entitled to the full protection of the registry laws.
673. Comments.
§ 674. Intention in quitclaim deed to pass grantor's interest only.
675. Another illustration.
676. Reservation in quitclaim deed as affecting prior void or voidable deed.
676a. Quitclaim deed as color of title.
677. Record partly printed.
678. Interest of recording officer.
679. Time at which deed is held to be recorded.
680. Mistake of copying deed in record—Conflicting views—Comments.
681. View that grantee is not affected by mistake in copying deed.
682. Reasonable precaution.
683. Contrary view that purchaser is bound by what appears upon record.
684. Fuller presentation of this view.
685. Views of Mr. Pomeroy.
686. Comments.
687. Effect of mistake in copying deed when considered recorded as soon as filed.
688. Effect of mistake where opposite view prevails.
689. Continued.
690. Destruction of record.
691. Proof of deed where record is destroyed.
692. Index as part of the record—Comments.
693. View that deed improperly indexed does not give constructive notice.
694. Decisions in Iowa on this question.

§ 695. View that mistake in index has no effect upon record.
696. Comments.
697. Liability of recording officer for error.
697a. Duty of recording officer.
697b. Required to perform statutory duty only.
697c. Liability of officer for negligence.
697d. Damages.
697e. Damages must be caused by official default.
697f. When statute of limitations begins to run.
698. Correction of mistake in record.
699. Reformation of deed—Correcting record.
700. Copy of seal.
701. Filing deed with person in charge of office.
702. Comments.
703. Registration of deeds when State is in rebellion.
704. Payment of fees.
705. Proof of time at which deed is recorded.
706. Withdrawing deed filed for record.
707. Constructive notice.
708. Deposit subject to further order.
709. Priority between deeds recorded on same day.
710. Facts of which the record gives notice.
710a. Presumption of knowledge of rights of others.
711. Notice of unrecorded deed from notice of power of sale.
712. Record is not notice to prior parties.
713. Record is notice only to purchasers under the same grantor.
714. Illustrations.
715. Record of deed subsequent to mortgage not notice to mortgagee.
716. Subsequent purchaser should notify mortgagee.
717. Actual notice.
718. Notice of unrecorded deed.
719. Unrecorded deed and recorded purchase money mortgage.
720. Comments.
721. Subsequently acquired title inuring to benefit of grantee.
722. Comments.
723. How far back purchaser must search.
724. Correct rule.
724a. Admission in evidence of copy of record from other states.
724b. Statute of United States as to admission of copy of record.
724c. What is a record under this statute.
724d. Requirements of statute to be observed.
724e. Not the only method of proof.

§ 626. **In general.**—The design of the registration acts is to afford a convenient means of giving knowledge of the contents of conveyances affecting the title to real property. The title to personal property is transferred by a change of possession. The title to real estate is conveyed by deed. But

the owner of the legal title may not be in the possession of the premises, and the record supplies notice to all of his rights. Although a purchaser may have no actual notice of previously recorded deeds, yet he is bound to take notice. The record is open to his inspection, and priority of title is determined, aside from the question of notice to be hereafter considered, by priority of record. The conveyance which is first recorded takes precedence, although it may not have been the deed first executed. Between the original parties, except in a few States, the force and validity of deeds are not affected by registration. But in contemplation of law, every one has notice of all deeds conveying from one person to another any interest in land, and any rights subsequently acquired must be subordinate to those which the records disclose. It is presumed that the records will show every claim, title, or encumbrance upon every piece of land within the jurisdiction of the recording office. An opportunity is thus given to every intending purchaser to ascertain in whom the legal title lies, and to what encumbrances it is subject, and if he sees fit to rely upon the representations of others without consulting the record, he does so at his own peril. He cannot be considered an innocent purchaser in law, although he may be so in fact, for "the registry laws would be useless, unless subsequent purchasers were bound to take notice of a deed previously recorded." [1]

§ 627. **In England.**—In England there is no general system of registration that prevails throughout the entire kingdom. In certain counties, systems of registration have been provided by different acts of Parliament. By the statute of seventh of Anne, which provides for the registration of conveyances in the county of Middlesex, it is declared that every deed shall be "adjudged fraudulent and void against any subsequent purchaser or mortgagee, for valuable consideration,

[1] Buchanan v. International Bank, 78 Ill. 500, 503; Hager v. Spect, 52 Cal. 579; Call v. Hastings, 3 Cal. 179; Mesick v. Sunderland, 6 Cal. 297. And see Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260; Woodworth v. Guzman, 1 Cal. 203; Bird v. Dennison, 7 Cal. 297.

unless such memorial be registered, as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim."[2] At an early date it was determined under the English registry acts that their object was to prevent imposition upon subsequent purchasers and mortgagees by setting up prior secret conveyances and fraudulent encumbrances, but that if the purchaser had notice of a prior conveyance, then that was a secret conveyance by which he was not injured, and against which it was not the object of the act to protect him.[3] But by this was meant actual notice. Nothing is said in the statutes about notice, and the rule became established that a subsequent purchaser who has acquired the legal estate was not charged with notice of a prior conveyance from its registry alone.[4] In England, the notice must be so clearly proved as to render the act of taking and and registering a conveyance,

[2] The different registry acts in England are: West Riding of Yorkshire, 5 Anne, c. 18; East Riding of Yorkshire and Kingston on Hull, 6 Anne, c. 35; North Riding of Yorkshire, 8 George II, c. 6; Middlesex, 7 Anne, c. 20; Irish Act, 6 Anne, c. 2.

[3] Le Neve v. Le Neve, 1 Amb. 436. Speaking of this doctrine of notice, Lord Eldon in this case says that "the ground of it is plainly this, that the taking of a legal estate after notice of a prior right makes a person *mala fide* purchaser; and not that he is not a purchaser for a valuable consideration in every respect. This is a species of fraud and *dolus malus itself;* for he knew the first purchaser had the clear right of the estate, and after knowing that he takes away the right of another person by getting the legal estate." See, also, Tunstall v. Trappes, 3 Sim. 301; Hines v. Dodd, 2 Atk. 275; Cheval v. Nichols, Strange, 664.

[4] Wiseman v. Westland, 1 Younge & J. 117; Ford v. White, 16 Beav. 120; Hodgdon v. Dean, 2 Sim. & St. 221; Morecock v. Dickens, Amb. 678; Underwood v. Lord Courtown, 2 Schoales & L. 40; Bushell v. Bushell, 1 Schoales & L. 90. In Ford v. White, *supra,* the Master of the Rolls, speaking of the effect of the registry acts on the question of notice, said: "Nobody regrets more than I do the effect of the decisions which have qualified the act. The legislature never intended that any notice should nullify it, the object being that all encumbrances should rank according to their priority on the register. The court, however, has held that where a person who has obtained a security has notice of a prior encum-

in prejudice to the known title of another, an act of fraud. And Sir William Grant regretted that the rule had been even extended that far. "It has been much doubted," said he, "whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance." [5] But the courts in that country have held that in certain cases actual notice of a prior registered conveyance may be presumed on the part of a subsequent purchaser, when it is proven that he has made an examination of the proper records.[6]

§ 628. **Registration in the United States.**—In this country, in all of the States, there are statutes which provide for the registration of conveyances affecting the title to real property, after they have been properly acknowledged. An abstract of these was given in the preceding chapter. These statutes have been looked upon with favor by the courts. They embrace equitable estates and interest in land, as well as legal.[7]

brance, it is inequitable to allow him to obtain a priority over the first encumbrancer by the mere priority of registration. The decisions establish this and they must not be departed from, otherwise many titles would be destroyed."

[5] In Wyatt v. Barwell, 19 Ves. 438. And see Rolland v. Hart, Law R. 6 App. 678; Davis v. Earl of Strathmore, 16 Ves. 419.

[6] Lane v. Jackson, 20 Beav. 535; Hodgson v. Dean, 2 Sim. & St. 221.

[7] Parkist v. Alexander, 1 Johns. Ch. 394; Alderson v. Ames, 6 Md. 52; Doyle v. Teas, 4 Scam. 202; Worley v. State, 7 Lea (Tenn.), 382; Bellas v. McCarty, 10 Watts, 13; Digman v. McCollum, 47 Mo. 372; Russell's Appeal, 3 Harris, Shriver, 3 Md. Ch. 381; Siter v. McClanachan, 2 Gratt. 280; Wilder v. Brooks, 10 Minn. 50, 88 Am. Dec. 49; Hunt v. Johnson, 19 N. Y. 279. In Bellas v. McCarthy, 10 Watts, 13, 25, Rogers, J., said: "To put equitable titles on a different footing from legal titles would be intolerable in Pennsylvania, where we have no means of compelling the conveyance of the legal title, and where one-third or perhaps one-half of the estates are in the same predicament. And this has been the view taken of the act in the numerous cases which have been cited, to notice which particularly would swell this opinion to an unreasonable extent. The Act of 18th of March, 1775, is not confined to deeds, but directs that every recorder of deeds, etc., shall keep a

The record gives notice to all the world; and the doctrine of actual notice, not derived from an inspection of the record, as will be more fully treated of in a subsequent part of this treatise, also generally prevails in this country. If by the provisions of a statute, deeds of trust and mortgages have no validity as against purchasers and creditors until they have been registered, they become operative only after they have been registered and notice, therefore, does not supply the place of registration.[8] Where the priority of mortgages is fixed by

fair book in which he shall immediately make an entry of every deed or *writing* brought into his office to be recorded. The language of the act is sufficiently comprehensive to embrace equitable as well as legal titles, and the record of an equitable title is notice to all subsequent purchasers. It is not doubted that a free conveyance duly registered operates to give full effect to the legal and equitable estate conveyed thereby, against a subsequent conveyance of the same legal and equitable estate. Where a person has purchased an equitable title, which he has taken care to put upon the record, in conformity to the directions of the act, it would be difficult to persuade any person that there was any justice in postponing his right in favor of a subsequent purchaser. This, in truth, will not be pretended. And when a purchase has been made of an equitable estate, which has undergone one or more operations by legal conveyances, which have been immediately recorded, why should a second be postponed to a prior purchaser, who has neglected to have his deed recorded, who has neither paid taxes nor taken possession of the property, and who has done no act or thing in assertion of his right, calculated to give notice of his claim? Justice and sound policy would seem to require that in such cases nothing short of clear, positive, and explicit notice should prejudice the right of a second fair and *bona fide* purchaser. But it is said that the defendants have clothed themselves with the legal title, and that where the equities are equal, the maxim is, *qui prior in tempore potior est in jure*. These elementary principles are not denied, but they have no application to the facts of the case. The rule only applies between persons who have been equally innocent and equally diligent. The parties are not in equal equity. One has been viligant and the other sleepy, and this leaves room for the application of the maxim *vigilantibus, non dormientibus jura subveniunt*. And when one of two innocent persons must suffer, the loss should be thrown on him whose negligence caused it."

[8] Robinson v. Willoughby, 70 N. C. 358; Leggett v. Bullock, Busb. 283; Fleming v. Burgen, 2 Ired. Eq. 584.

the order in which they are filed for record, the doctrine of notice, so far as the conveyances of this character are concerned, would not prevail.[9] The notice given by the registry is equivalent to that formerly afforded by livery of seisin.[1]

§ 628a. Estoppel by delay in recording.—In Wisconsin the statute declares any unrecorded conveyance void as against a subsequent purchaser "whose conveyance shall be first duly recorded." Under such statute, however, it was held that a prior purchaser may, by delaying to record his conveyance, become estopped to rely on his conveyance as against one whom he has led to believe in its non-existence and to act thereon although he afterwards gets his conveyance on record before the later one. The decision in this case is based solely

[9] Bercaw v. Cokerill, 20 Ohio St. 163; Stansell v. Roberts, 13 Ohio, 148, 42 Am. Dec. 193. In the former case it is said: "By the Act of March 16, 1838, 'declaratory of the laws upon the subject of mortgages' (S. & C. 469) it is 'declared and enacted that mortgage deeds do and shall take effect and have preference from the time the same are delivered to the recorder of the proper county, to be by him entered upon the record.' Under this statute and that of 1831 on the same subject, it has been uniformly held in a long series of decisions, that a mortgage has no effect, either in law or equity, as against subsequently acquired liens, until its delivery to the recorder of the proper county for record. The result is that mortgages have priority in the order of their respective presentation for record: Magee v. Beatty, 8 Ohio, 396; Stansell v. Roberts, 13 Ohio, 148, 42 Am. Dec. 193; Mayham v. Coombs, 14 Ohio, 428; Holliday v. Franklin Bank of Columbus, 16 Ohio, 533; Woodruff v. Robb, 19 Ohio, 212; White v. Denman, 1 Ohio St. 110; Brown v. Kirkman, 1 Ohio St. 116; Fosdick v. Barr, 3 Ohio St. 471; Bloom v. Noggle, 4 Ohio St. 45; Sidle v. Maxwell, 4 Ohio St. 236; Tousley v. Tousley, 5 Ohio St. 78. And in several of these cases it was expressly held that this rule as to priority, is not affected by the fact that the subsequent mortgage is taken with actual notice to the mortgagee of a prior unrecorded mortgage."

[1] See Bryan v. Bradley, 16 Conn. 474; Williamson v. Calton, 51 Me. 452; Matthews v. Ward, 10 Gill & J. 443; Caldwell v. Fulton, 31 Pa. St. 483, 72 Am. Dec. 760; Higbee v. Rice, 5 Mass. 344, 4 Am. Dec. 63; Blethen v. Dwinel, 34 Me. 135; Wyman v. Brown, 50 Me. 160.

upon principles of estoppel.[2] The court says: "Since the adoption of the system of public registry of conveyances, the custom of prompt registration has been so nearly universal that omissions may well be considered neglect of those precautions customarily taken to assert a grantee's rights in the land, and people generally have become accustomed to believe that all rights will so appear and to act confidently on that assumption; hence such conduct is to be expected by one holding an unrecorded conveyance. The land in question was held by a dealer in real estate, so that the likelihood of its sale was apparent to plaintiff. She must realize that, in event of sale, the record advertised Herman as the person to whom a purchaser must apply, either to clear the title from the lien of the mortgage or for information as to the validity or amount of that lien, and, therefore, negligently placed it in Herman's power to deceive or mislead a purchaser, who, both by law and by custom, would have the right to rely on the record. Her withholding her assignment from record was a persistent declaration to all persons dealing merely with the title to realty that Herman owned the mortgage."[3] A grantee does not abandon the title conveyed by his deed by failing for several years to register it.[4] The great weight of authority undoubtedly holds, under statutes similar to the Wisconsin statute, that an instrument recorded subsequently to another instrument, is ineffective, even though it was executed before the other instrument was recorded.[5]

§ 628b. Constitutionality of retroactive recording acts. —Questions have some times arisen as to the constitution-

[2] Marling v. Mommensen, 127 Wis. 363, 5 L.R.A.(N.S.) 412, 7 A. & E. Ann. Cas. 364.

[3] Marling v. Mommensen, *supra.*

[4] Bond v. Wilson, 129 N. C. 325, 40 S. E. 179.

[5] Crouse v. Michell, 130 Mich. 347, 90 N. W. 32; Burrows v. Hovland, 40 Neb. 464, 58 N. W. 947; Blair State Bank v. Stewart, 57 Neb. 58, 77 N. W. 370; Rumery v. Loy, 61 Neb. 755, 86 N. W. 478; Ames v. Miller, 65 Neb. 204, 91 N. W. 250; Wilhelm v. Wilken, 149 N. Y. 447, 32 L.R.A. 370, 44 N. E. 82.

ality of recording acts which are retroactive as to pre-existing instruments. While questions arising out of the construction of such statutes are outside the scope of this treatise, it may be stated generally that it has been held by a great many cases to be within the undoubted power of state legislatures to pass recording acts by which the elder grantee is postponed to a younger grantee if the prior deed is not recorded within a limited time. The only limitation as to such legislation is that a reasonable time must be given to place the instrument on record after the law becomes effective. If such time is given, however, the law does not impair the obligation of contracts.[6]

§ 629. **Registration not necessary between the parties.** —It is unnecessary to observe that as between the parties, a deed is perfectly valid without registration, unless there is some statute that imperatively requires recording as one of the essential elements of the execution of the deed. The deed is invalid as against certain persons unless recorded, but "as between the parties to a deed, it has been frequently held the title passes, notwithstanding the deed may not have been recorded, or lodged with the clerk for that purpose." [7] "None of the registering acts have been considered as destroying the conveyance as between the parties to it from the omission to record it. The record was only intended for the benefit of purchasers and creditors." [8] "An unregistered deed is in no case void; it is always good as against the grantor and his

[6] Jackson v. Lamphere, 3 Pet. 280, 7 L. ed. 679; Vance v. Vance, 108 U. S. 514, 27 L. ed. 808; Stafford v. Lick, 7 Cal. 479. See Knights of the Maccabees of the World v. Nitsch, 69 Neb. 372, and extended note on the subject, 5 A. & E. Ann. Cas. 257.

[7] McClain v. Gregg, 2 Marsh. A. K. 454; Raines v. Walker, 77 Va. 92; Ray v. Wilcoxon, 107 N. C. 514. Where a married woman obtains the legal title to land by a deed from her husband, she must file it for record, or it will not prevail as against subsequent purchasers without notice; Russell v. Nahl, 2 Tex. Civ. App. 60.

[8] Jackson v. West, 10 Johns. 466.

heirs."[9] And failure of the grantee to register or record his deed does not operate of itself as an abandonment of title.[1] Where the genuineness of the deed was admitted, "it proved," said Mr. Justice Marshall of Kentucky, "a transfer of the title from the grantor to the grantee, and was good evidence of this fact, not only between the immediate parties, but against all the world except purchasers for a valuable consideration with-

[9] Chief Justice Kent, in Jackson v. Burgott, 10 Johns. 457, 6 Am. Dec. 349; Fitzhugh v. Croghan, 2 Marsh. J. J. 429, 19 Am. Dec. 140; Guerrant v. Anderson, 4 Rand. 208; Sicard v. Davis, 6 Peters, 124; Phillips v. Green, 3 Marsh. A. K. 7, 13 Am. Dec. 124; Smith v. Starkweather, 5 Day, 207; Whittemore v. Bean, 6 N. H. 47; Rolls v. Graham, 6 Mon. B. 120; French v. Gray, 2 Conn. 92; Boling v. Ewing, 9 Dana, 76; Hancock v. Beverly, 6 Mon. B. 531; Wade v. Greenwood, 2 Rob. (Va.) 474, 40 Am. Dec. 759; Vose v. Morton, 4 Cush. 27, 50 Am. Dec. 750; Moore v. Thomas, 1 Or. 201; Van Husan v. Heames, 96 Mich. 504; Snow v. Lake, 20 Fla. 656, 51 Am. Rep. 625; Stewart v. Matthews, 19 Fla. 752; Christy v. Burch, 25 Fla. 942; Warnock v. Harlow, 96 Cal. 298, 31 Am. St. Rep. 209; Roane v. Baker, 120 Ill. 308; Leaver v. Spink, 65 Ill. 441; Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 391; Perdue v. Aldridge, 19 Ind. 290; Betts v. Letcher, 1 S. D. 182; Ray v. Wilcoxson, 107 N. C. 514; Brem v. Lockhart, 93 N. C. 191; Stevens v. Morse, 47 N. H. 532; Fitzgerald v. Wynne, 1 D. C. App. 107; Davis v. Lutkiewiez, 72 Iowa, 254; Carleton v. Byington, 18 Iowa, 482; Gibson v. Brown, 214 Ill. 330, 73 N. E. 578; Adams v. Tolman, 77 Ill. App. 179, aff'd in 180 Ill. 61, 54 N. E. 174; Blair v. Whitaker, 31 Ind. App. 664, 69 N. E. 182; Kelly v. Bramblett, 26 Ky. L. Rep. 167, 81 S. W. 249; Willett v. Andrews, 106 La. 319, 30 So. 883; Wilkins v. McCorkle, 112 Tenn. 688, 80 S. W. 834; Morgan v. Snodgrass, 49 W. Va. 387, 38 S. E. 695; Licata v. De Corte, 50 Fla. 563, 39 So. 58. See, also, Tyler v. Currier, 147 Cal. 31, 81 Pac. 319; Perry v. Clift, (Tenn.), 54 S. W. 121; Whalon v. North Platte, etc. Co., 11 Wyo. 313, 71 Pac. 995; Martin v. Bates, 20 Ky. L. Rep. 1798, 50 S. W. 38; McCrum v. McCrum, 127 Iowa, 540, 103 N. W. 771. In re Lane's Estate, 79 Vt. 323, 65 Atl. 102; Mitchell v. Cleveland, 76 S. C. 432, 57 S. E. 33. In Martin v. Quattlebam, 3 McCord, 205, it is said: "On the second question, it is not necessary to the validity of a deed that it should he recorded. Recording only becomes necessary in particular when there are double conveyances. If the same grantor convey to two, he whose deed is duly recorded shall hold." See, also, Phillips v. Hodges, 109 N. C. 248.

[1] Bond v. Wilson, 129 N. C. 325, 40 S. E. 179.

out notice, and creditors."[2] A deed from the State is permitted but not required to be recorded, and is valid against all persons.[3] And a deed executed by one who has title to land is effectual to pass his interest although his title is not of record.[4] But if registration is necessary to the validity of the conveyance, as is sometimes required by statute in the case of proceedings in the sale of land for taxes, then recording becomes a condition precedent and no title passes, unless there has been a strict compliance with the statute.[5] All that registration does is to impart notice. It does not add to its effect as a conveyance.[6]

§. 629a. **Duty of purchaser to examine the records.**— It is the duty of the purchaser to examine the records and whether he performs this duty or not, notice will be imputed to him of every fact which an examination of the records would disclose.[7] If an instrument in the chain of title is missing, and the purchaser, without inspecting or demanding an inspection of such instrument, consummates the purchase, he is chargeable with any fact which such instrument may show by which its validity may be affected.[8] Even through the fault of the abstracter a purchaser has no actual knowledge of a judgment, yet if it is of record, he is charged with notice of

[2] Boling v. Ewing, 9 Dana, 76.

[3] Patterson v. Langston, 69 Miss. 400.

[4] Sowles v. Butler, 71 Vt. 271.

[5] Clark v. Tucker, 6 Vt. 181; Giddings v. Smith, 15 Vt. 344; Morton v. Edwin, 19 Vt. 81. Under a statute which provides that no estate above seven years shall pass or take effect unless the deed conveying the same shall be executed, acknowledged, and recorded, leasehold estates for ninety-nine years do not pass title so as to relieve the grantor from the payment of rent until the deeds conveying such estate have been recorded: Nichel v. Brown, 75 Md. 172.

[6] Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381.

[7] Miller v. Holland, 84 Va. 652, 5 S. E. 701; Fulkerson v. Taylor, 102 Va. 314, 46 S. E. 309; Keesling v. Doyle, 8 Ind. App. 43, 35 N. E. 126; Anderson v. Reid, 14 App. D. C. 54; Healey v. Worth, 35 Mich. 166.

[8] Lyon v. Gombert, 63 Neb. 630, 88 N. W. 774.

it.[9] Generally speaking a person who has placed his deed on record may remain silent and passive so far as notice of it to other persons is concerned.[1] If a person purchases property on which there is a mortgage duly recorded without examining the records, but relying on the statement of the grantor that there was no encumbrance on the lot, he cannot be regarded as a purchaser in good faith. If he erects a building on the lot he will not be allowed compensation for the building on the foreclosure of the mortgage.[2]

§ 630. Registration of mortgages in book of deeds.— According to one line of authority, subsequent *bona fide* purchasers or mortgagees are not bound by the notice given by the registration of a mortgage recorded in a book of deeds.[3] A conveyed land to B as security for a loan, subject to a mortgage to C, the conveyance being recorded as a deed, and a short time afterward, and after the payment of the loan, B purchased the land from A, and on the latter's securing a satisfaction from C of his mortgage, B paid A the whole price

[9] Stastny v. Pease, 124 Iowa, 587, 100 N. W. 482. But see Carey v. Rauguth, 82 Ill. App. 418.

[1] Eastwood v. Standard Mines & Milling Co., 11 Idaho, 195, 81 Pac. 382.

[2] Beach v. Osborne, 74 Conn. 405, 50 Atl. 1019, 1118. See, also, as to notice given by record: Reynolds v. Haskins, 68 Vt. 426, 35 Atl. 349; Pyles v. Brown, 189 Pa. St. 164, 42 Atl. 11, 69 Am. St. Rep. 794; McCusker v. Goode, 185 Mass. 607, 71 N. E. 76; Dalmazzo v. Simmons, 25 Ky. L. Rep. 1352, 78 S. W. 179; Kendall v. J. I. Porter Lumber Co., 69 Ark. 442, 64 S. W. 220.

[3] James v. Morey, 2 Cowen, 246, 14 Am. Dec. 475, 6 Johns. Ch. 417; Calder v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163; White v. Moore, 1 Paige, 551; Clute v. Robison, 2 Johns. 595; Warner v. Winslow, 1 Sand. Ch. 430; Cordeviolle v. Dawson, 26 La. Ann. 534; Brown v. Dean, 3 Wend. 208; Grimstone v. Carter, 3 Paige, 421; 24 Am. Dec. 230; Dey v. Dunham, 2 Johns. Ch. 182; McLanahan v. Reeside, 9 Watts, 508, 36 Am. Dec. 136; Fisher v. Tunnard, 25 La. Ann. 179; Colomer v. Morgan, 13 La. Ann. 202. The record of a deed in the mortgage record is not constructive notice of the deed to subsequent purchasers: Drake v. Reggel, 10 Utah, 376; Abraham v. Mayer, 27 N. Y. Supp. 264; 7 Misc. Rep. 250.

of the land; C had before this time assigned his mortgage to another, D, but the latter had neglected to have his assignment recorded; C received no consideration for executing the release of the mortgage, but B had no notice of this fact, or of the assignment to D. It was held that the lands in the hands of B, and purchasers from him, were discharged from the mortgage, and that although the recording of the deed to B was a nullity in the first instance, yet after he purchased and paid for A's equity in the land, the record of the deed became operative, and the transaction might be considered as equivalent to the delivery of a deed which had been recorded in expectation of a future sale. But it was also held that if the assignment of the mortgage had been recorded while the deed remained as security for A's loan, the land in the hands of B would have been subject to the mortgage thus assigned.[4]

[4] Warner v. Winslow, 1 Sand. Ch. 430. In Dey v. Dunham, 2 Johns. Ch. 182, 189, the Chancellor says: "The deed to the defendant of the fifty lots was on its face an absolute deed in fee, with full covenants, and it was acknowledged and recorded as a deed on the day of its date. It is admitted, however, that the deed was taken in the first instance as a security for the payment of three notes, to the amount of ten thousand dollars, payable in six months, and bearing date about the same time with the deed in January, 1810. Afterward, on the 27th of July, 1810, and about the time that the notes became due, other notes were given in lieu of them, and an agreement under seal executed by the defendant, admitting that the deed of the fifty lots was only held as a security, and that if the substituted notes were paid, the deed was to be given up, and the lots reconveyed. This agreement, operating as a defeasance or explanation of the design of the deed, was never registered, yet it is to be considered in connection with the deed, and relates back to its date, so as to render the deed from its commencement what it was intended to be by the parties, a mere mortgage, securing the payment of the notes. As a mortgage, the deed and the subsequent agreement ought to have been registered, to protect the land against the title of a subsequent *bona fide* purchaser. This is the language of the statute concerning the registry of mortgages; and recording the deed *as a deed* was of no avail in this case, for the plaintiff was not bound to search the record of *deeds*, in order to be protected against the operation of a mortgage." An instrument is recorded when filed for record although it

In Michigan where the statute provides that deeds and mortgages shall be recorded in separate books, it is held that a deed absolute in form, though intended only as security for a loan of money and accompanied by an unrecorded defeasance, is void as to a *bona fide* purchaser if recorded in the book of deeds instead of mortgages.[5] The court says: "It is very clear that, if the statute be construed literally, the instrument in question should have been recorded as a mortgage. It cannot be questioned that this deed was, by the parties to it, intended as a security. It would seem, therefore, that, unless the complainant's contention that the statute should be construed to mean that deeds, appearing to the register of deeds to be intended as security, are the only ones included in this phrase, the record was not made as the statute directs. It is strenuously insisted that the word 'intended' should be interpreted as referring to something which is apparent in the language or form of the instrument, and not dependent on the hidden mental process going on in the mind of either the grantor or the grantee, or both. The contention would have great force if the mere deposit of the paper for record constituted notice to subsequent purchasers, but it has been held that the statute (section 8988) above quoted puts the burden upon the person offering the paper for record of seeing to it that the instrument is properly recorded." [6] "It is difficult to imagine a case in which the grantee in a deed would not be aware of the fact that such deed was intended as security. It is then within the power of the party offering the instrument for record to comply with the statute, if the statute be given the construction for which the defendant's counsel con-

may not be copied into the proper book: Watkins v. Wilhoit, 104 Cal. 395.

[5] Grand Rapids etc. Bank v. Ford, 143 Mich. 402, 107 N. W. 76, 114 Am. St. Rep. 668.

[6] Barnard v. Campau, 29 Mich. 162; Gordon v. Constantine Hydraulic Co., 117 Mich. 620, 76 N. W. 142.

tend." In a great many other states, however, the rule is that a deed absolute in terms, if recorded in a book of deeds, will impart notice even though it is intended as a mortgage. The reason is that a person desirous of ascertaining whether title to real property was affected or not, would not confine his search to a book of mortgages alone.[7] It is held in Nevada that the statute of that State concerning conveyances has no provisions similar to those of the statutes of New York, under which it is held in the latter State, that the record of a deed absolute upon its face, but intended as a mortgage, gives no notice to subsequent purchasers. In Nevada, subsequent purchasers and encumbrancers are deemed to have constructive notice under the statute of every conveyance affecting real estate, properly recorded.[8] In Ohio, the statute requiring mortgages to be recorded in a set of books denominated "record of mortgages," is considered to be merely directory to the recorder. It was therefore held that a mortgage deed delivered to the officer for registration, and recorded in a record-book called the "record of deeds," and indexed in both the index to the volume and the general index with the letters "mtg." annexed, is operative as a mortgage against a subsequent purchaser for value, although he had no actual notice of such

[7] Hazeltine v. Espey, 13 Ore. 301, 10 Pac. 423; Kennard v. Mabry, 78 Tex. 151, 14 S. W. 272. To the same effect: see Equitable Bldg., etc. Ass'n. v. King, 48 Fla. 252, 37 So. 181; Merchants State Bank v. Tufts, 14 N. D. 238, 103 N. W. 760; Marston v. Williams, 45 Minn. 116, 47 N. W. 644. See, also, Cumps v. Kiyo, 104 Wis. 656, 80 N. W. 937; Security etc. Co. v. Loewenberg, 38 Ore. 159, 62 Pac. 647; De Wolf v. Strader, 26 Ill. 225; Christie v. Hale, 46 Ill. 117; Harrison v. Phillips Academy, 12 Mass. 456; Mobile Bank v. Tishomingo etc. Inst., 62 Miss. 250.

[8] Grellett v. Heilshorn, 4 Nev. 526. To operate as constructive notice, it has been held, the instrument must be recorded in the proper book: Deane v. Hutchinson, 40 N. J. Eq. 83; Parsons v. Lent, 34 N. J. Eq. 67; Shaw v. Wilshire, 65 Me. 485. But where a deed is considered recorded as soon as filed, see Swenson v. Bank, 9 Lea, 723; Cluder v. Thomas, 89 Pa. St. 343.

mortgage.[9] Where the statute does not require that mortgages shall be recorded in special books kept for that purpose, the rule quite generally prevails that a mortgage need not be recorded in a book of mortgages. Thus in a case recently decided by the Supreme Court of Florida the recording of a mortgage in a book of miscellaneous records was held sufficient.[1] The record, however, is protection as to *bona fide* purchasers or encumbrancers of a mortgagee, in whose favor an absolute deed, intended as a mortgage, has been recorded.[2]

[9] Smith Executor v. Smith, 13 Ohio St. 532. See, also, Salter v. Baker, 54 Cal. 140; Huffman v. Blum, 64 Tex. 334; Sleffian v. Bank, 69 Tex. 513; Cook v. Parham, 63 Ala. 456; Fargason v. Edrington, 49 Ark. 207; Chapman v. Miller, 130 Mass. 289; Brophy v. Brophy, 15 Nev. 101. Although the requirement of the statute, that a deed intended as a mortgage shall be recorded as a mortgage, is not complied with, it is valid between the parties: James v. Morey, 2 Cowen, 246, 14 Am. Dec. 475. The record becomes operative if, however, the mortgagee subsequently purchases the equity of redemption, or obtains it by any other means: Warner v. Winslow, 1 Sand. Ch. 430. A miscellaneous record-book used by the officer for the registration of exceptional instruments and properly indexed, is a proper record-book, and constructive notice is given to third persons by the record in it of a deed of standing timber: Mee v. Benedict, 98 Mich. 260, 22 L.R.A. 641, 39 Am. St. Rep. 543.

[1] Ivey v. Dawley, 50 Fla. 537, 7 A. & E. Ann. Cas. 354. In this case the court says: "In Switzer v. Knapps, 10 Iowa, 72, it was held that the 'record of a quitclaim deed is sufficient and operates as notice when such deed is recorded in the book of mortgages, the evidence not showing whether that book was used for recording purposes only, or whether it was used to record both absolute deeds and mortgages, and the statute not requiring separate books for these different instruments.' In Farabee v. McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734, it was held that instruments in writing not required by law to be recorded in a particular book may be recorded in any book kept by the recorder.' In the case last cited a mortgage was recorded in a deed book." See, also, Paige v. Wheeler, 92 Pa. St. 282; Farabee v. McKerrihan, 172 Pa. St. 234, 33 A. 583, 51 Am. St. Rep. 734; Switzer v. Knapps, 10 Ia. 72.

[2] Long v. Fields, 31 Tex. Civ. App. 241, 71 S. W. 774; Bailey v. Myrick, 50 Me. 171; Cogan v. Cook, 22 Minn. 137.

§ 631. **A mortgagee is considered a purchaser.**—A mortgagee [3] or a trustee in a deed of trust [4] is a purchaser, as the term is used in the recording acts. Two persons purchased for their joint benefit a quantity of land, contributing equal parts of the purchase money. They mutually agreed that conveyances of the property should be executed to one of them, who subsequently, with the knowledge and consent of the other, obtained from a bank a number of loans. The money thus obtained was expended in improving the property. These loans were secured by trust deeds executed by the party who had the legal title, and he afterward secured a sum of money from another bank, giving a mortgage therefor. The other partner in the joint purchase never exercised any authority or control over the property, and his rights were not evidenced by any writing. He brought an action to obtain a sale of the property, and to have the proceeds distributed among the parties entitled. It appeared that his partner, whom he made one of the defendants, paid the taxes on the property, it being assessed to him, and from the time of the original conveyance, until after the commencement of the action, always dealt with the property as though he were the sole owner. The bank mortgagee had no notice of any interest in plaintiff, and made the loan to his partner upon the faith of the latter's apparent title by deed, under the impression that the property was solely his. The court held that the claims of the plaintiff should be postponed to those of the mortgagee bank.[5]

[3] Moore v. Walker, 3 Lea (Tenn.), 656; Whelan v. McCreary, 64 Ala. 319; Haynsworth v. Bischoff, 6 S. C. 159; Jordan v. McNeil, 25 Kan. 459; Patton v. Eberhart, 52 Iowa, 67; Chapman v. Miller, 130 Mass. 289; Bass v. Wheeless. 2 Tenn. Ch. 531; Weinberg v. Rempe, 15 W. Va. 829.

[4] Kesner v. Trigg, 98 U. S. 50, 25 L. ed. 83; New Orleans Canal etc. Co. v. Montgomery, 95 U. S. 16, 24 L. ed. 346.

[5] Salter v. Baker, 54 Cal. 140. Said the court, per Ross, J.: "There can be no doubt that the equities of the bank are superior to those of the planitiff, who voluntarily permitted the title to the property to be placed in the name of Baker, and for a long series of years allowed him to appear as its

§ 632. **Pre-existing debt.**—But a mortgage to secure a pre-existing debt is not generally considered as a purchase for a valuable consideration. Such a mortgagee, where this is held to be the law, is not entitled to protection against prior equities, although when he took his mortgage he had no notice of them.[6] "Although the plaintiff was a purchaser without

absolute legal and equitable owner, and in all respects to deal with it as his own. The bank, ignorant of any interest in plaintiff, and relying upon the apparent ownership of Baker, loaned him its money, and should, in good conscience, be protected against the now asserted claim of plaintiff: Rice v. Rice, 2 Drew, 73; Richard v. Sears, 6 Ad. & E. 469; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Code Civil Procedure, § 3543." See, also, Singer Mfg. Co. v. Chalmers, 2 Utah, 542; Porter v. Green, 4 Iowa, 571; Seevers v. Delashmutt, 11 Iowa, 174, 77 Am. Dec. 139.

[6] Withers v. Little, 56 Cal. 370; De Lancey v. Stearns, 66 N. Y. 157; Westervelt v. Hoff, 2 Sandf. Ch. 98; Union Dime Savings Inst. v. Duryea, 67 N. Y. 84; Manhattan Co. v. Evertson, 6 Paige, 457; Dickerson v. Tillinghast, 4 Paige, 215, 25 Am. Dec. 528; Padgett v. Lawrence, 10 Paige, 170, 40 Am. Dec. 232; Van Heusen v. Radcliff, 17 N. Y. 580, 72 Am. Dec. 480; Cary v. White, 7 Lans. 1, s. c. 52 N. Y. 138; Coddington v. Bay, 20 Johns. 637, 11 Am. Dec. 342; Stalker v. McDonald, 6 Hill, 93, 40 Am. Dec. 389; Hinds v. Pugh, 48 Miss. 268; Bartlett v. Varner, 56 Ala. 580; Pancoast v. Duval, 28 N. J. Eq. 445; Morse v. Godfrey, 3 Story, 364; Mingus v. Condit, 23 N. J. Eq. 313; Spurlock v. Sullivan, 36 Tex. 511; Wilson v. Knight, 59 Ala. 172; Gafford v. Stearns, 51 Ala. 434; Short v. Battle, 52 Ala. 456; Pickett v. Barron, 29 Barb. 505; Thurman v. Stoddart, 63 Ala. 336; Coleman v. Smith, 55 Ala. 368; Cook v. Parham, 63 Ala. 456; Alexander v. Caldwell, 55 Ala. 517; Schumpert v. Dillard, 55 Miss. 348; Perkins v. Swank, 43 Miss. 349, 360; Lawrence v. Clark, 36 N. Y. 128; Webster v. Van Steenbergh, 46 Barb. 211; Clarke v. Barnes, 72 Iowa, 563; McKamey v. Thorpe, 61 Tex. 653; Funk v. Paul, 64 Wis. 35, 54 Am. Rep. 576; Sweeney v. Bixler, 69 Ala. 539; People's Sav. Bank v. Bates, 120 U. S. 556. See, also, Boxheimer v. Gunn, 24 Mich. 372; Edwards v. McKernan, 55 Mich. 520; Ashton's Appeal, 73 Pa. St. 153; Jones v. Robinson, 77 Ala. 499; Craft v. Russell, 67 Ala. 9; Banks v. Long, 79 Ala. 319; Saffold v. Wade, 51 Ala. 214; Summers v. Brice, 36 S. C. 204; McLeod v. First Nat. Bank, 42 Miss. 99; Johnson v. Graves, 27 Ark. 557; Golson v. Fielder, 2 Tex. Civ. App. 400; Overstreet v. Manning, 67 Tex. 657; Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657; Chance v. McWhorter, 26 Ga. 315; Phelps v. Fockler, 61 Iowa, 340; Koon v. Tramel, 71 Iowa, 132. But a mort-

notice, he was not a purchaser for value, and his conscience was as much bound by the prior equity of the defendant Jacks, as were the consciences of his mortgagors. In fact he occupied no better position than his mortgagors."[7] But this rule is not universally accepted, and in some cases it is held that a mortgagee who in good faith takes a mortgage to secure a pre-existing debt, is entitled to be regarded as a purchaser for a valuable consideration, and to receive all the protection that results from this relation. But this latter view is not sustained by the weight of authority. A mortgagee who has not parted with value is considered to be in no worse position than he was before, and to be bound by the same equities that bound his mortgagor.[8]

gage of this kind is valid between the parties: Turner v. McFee, 61 Ala. 468; Steiner v. McCall, 61 Ala. 413; Brooks v. Owen, 112 Mo. 251; Smith v. Wooman, 19 Ohio St. 145; Paine v. Benton, 32 Wis. 491; Kranert v. Simon, 65 Ill. 344; Machette v. Wanless, 1 Colo. 225.

[7] Withers v. Little, 56 Cal. 370, 373.

[8] Babcock v. Jordan, 24 Ind. 14. Elliott, C. J., said in this case: "The question raised by the reply is this, viz: Is the mortgagee of a mortgage taken in good faith to secure a pre-existing debt regarded as a purchaser for a valuable consideration, and protected as such? The replication under consideration assumes the negative; but the same question has been ruled affirmatively by this court, in the case of Work v. Brayton, 5 Ind. 396. Perkins, J., in delivering the opinion of the court in that case, says: 'The question whether a mortgagee, in a mortgage given for the security of a pre-existing debt, is to be regarded as a purchaser for a valuable consideration has been decided differently by different courts; and there has been a like diversity of opinion upon the analogous question, whether the holder of commercial paper assigned as collateral security for a pre-existing debt is to be treated as a holder for a valuable consideration. The latter of these questions this court decided in the affirmative in Valette v. Mason, 1 Ind. 288; and it would seem that the principle of that case, applied to a mortgage of real estate to secure a like indebtedness, would require that to be regarded as a purchaser for a valuable consideration. . . . If it is not to be so regarded, the titles of purchasers and mortgagees for such a consideration must be of comparatively little value, as they may, at any time, be unexpectedly overrode by secret invisible liens for unpaid purchase money to some former grantors, or by some other, till then

§ 633. **Assignee of a mortgage is considered a purchaser.**—A person who purchases a mortgage is considered as coming within the operation of the registry acts, and is entitled to full protection as a *bona fide* purchaser. The fact that his assignor had notice of prior encumbrances upon the property described in the mortgage, does not affect him if he purchases in good faith and for a valuable consideration, and has his assignment recorded before the registration of the prior deed or encumbrance.[9] The assignee of a mortgage is entitled to the same consideration and as ample protection under the registry acts as a person who buys the equity of redemption.[1] If there is a prior outstanding mortgage at the time the assignment is made, of which the assignor had notice, and it is recorded before the assignment, it will take precedence over the latter. This would also be the case if the prior mortgage was recorded before the assignment was made but

unknown, alleged equitable claims, which might, in their origin, have been without trouble made secure by open recorded instruments that would have been notice to all the world. . . . A pre-existing debt is held to be a valuable consideration by Story in the second volume of his Equity Jurisprudence, pp. 657, 658, and he cites for the doctrine Metford v. Metford, 9 Ves. 100, and Bayley v. Greenleaf, 7 Wheat. 46. In vol. 2, pt. 1, p. 73, of White and Tudor's Leading Cases in Equity, they say: 'Similar decisions were made in Richeson v. Richeson, 2 Gratt. 497, and in Dey v. Dunham, 2 Johns. Ch. 182; though this latter case has not been followed in New York, Kent, in the fourth volume of his Commentaries, p. 154, approves the doctrine, and expresses the conviction that it rests on grounds that will command general assent.' "

[9] Decker v. Boice, 83 N. Y. 215.

[1] Westbrook v. Gleason, 79 N. Y. 23; Smyth v. Knickerbocker L. Ins. Co., 84 N. Y. 589; James v. Johnson, 6 Johns. Ch. 417; Campbell v. Vedder, 1 Abb. App. Dec. 295; Vanderkemp v. Shelton, 11 Paige, 28; Belden v. Meeker, 47 N. Y. 307; Purdy v. Huntington, 46 Barb. 389, 42 N. Y. 334, 1 Am. Rep. 552; Smith v. Huntington, 46 Barb. 389, 42 N. Y. 334, 1 Am. Rep. 552; Smith v. Keohane, 6 Bradw. 585; Turpin v. Ogle, 4 Bradw. 611; McClure v. Burris, 16 Iowa, 591; Bowling v. Cook, 39 Iowa, 200; Cornog v. Fuller, 30 Iowa, 212; Bank v. Anderson, 14 Iowa, 544, 83 Am. Dec. 390; Tradesmen's Building Assn. v. Thompson, 31 N. J. Eq. 536; Stein v. Sullivan, 31 N. J. Eq. 409.

after the registration of the assigned mortgage.[2] While an assignee of a mortgage is not chargeable with notice possessed by his assignor, he is bound by the constructive notice of the record and by the notice supplied by the possession and occupation of another of the premises embraced in the mortgage.[3] In case two assignments of the same mortgage are made, the general rule applies, and priority is given to the one who first records his assignment. In case he paid only a part of the consideration, he is entitled to precedence only to such part.[4] But generally the mortgagee would transfer the note to the assignee, and its absence would be a fact sufficient to put the second purchaser upon inquiry.[5]

§ 634. Judgment creditors.—By the rules of the common law, a judgment creditor was not regarded as a purchaser within the recording laws.[6] Unless this construction has been changed by statute, the same rule would obtain.[7] An attachment lien stands upon the same ground, so far as this question is concerned, as a judgment lien.[8] And generally a judgment

[2] Fort v. Burch, 5 Denio, 187; De Lancey v. Stearns, 66 N. Y. 157.

[3] Bush v. Lathrop, 22 N. Y. 535; Jackson v. Van Valkenburgh, 8 Cowen, 260; Jackson v. Given, 8 Johns. 137, 5 Am. Dec. 328; Trustees of Union College v. Wheeler, 59 Barb. 585.

[4] Wiley v. Williamson, 68 Me. 71; Pickett v. Barron, 29 Barb. 505; Potter v. Strausky, 48 Wis. 235; Jurdy v. Huntington, 46 Barb. 389.

[5] Kellogg v. Smith, 26 N. Y. 18. See Brown v. Blydenburgh, 7 N. Y. 141, 57 Am. Dec. 506. If a part of the mortgaged property is released from the operation of the mortgage, the release, to have full effect, should be recorded. It is considered as a conveyance affecting title to real estate. In case such a release is not recorded, a subsequent assignee of the mortgage, for a valuable consideration and without notice, is not affected by it: Mutual Life Ins. Co. v. Wilcox, 55 How. Pr. 43. The same rule manifestly applies in the case of an unrecorded agreement to release the mortgaged premies, or a part of them: St. John v. Spaulding, 1 Thomp. & C. 483.

[6] Brace v. Marlborough, 2 P. Wms. 491; Finch v. Winchester, 1 P. Wms. 277.

[7] Rodgers v. Gibson, 4 Yeates, 111; Heistner v. Fortner, 2 Binn. 40, 4 Am. Dec. 417; Cover v. Black, 1 Pa. St. 493.

[8] Plant v. Smythe, 45 Cal. 161;

or attaching creditor is not entitled to protection against an unrecorded deed.[9] Where a judgment creditor is not considered a purchaser, an unrecorded mortgage which is valid ex-

Le Clert v. Callahan, 52 Cal. 252; Hackett v. Callender, 32 Vt. 97; Hoag v. Howard, 55 Cal. 564; Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252.

[9] Bell v. Evans, 10 Iowa, 353; Sappington v. Oeschli, 49 Mo. 244; Kelly v. Mills, 41 Miss. 267; Boze v. Arper, 6 Minn. 220; Greenleaf v. Edes, 2 Minn. 264; Evans v. McGlasson, 18 Iowa, 150; Harrall v. Gray, 10 Neb. 186; Thomas v. Kelsey, 30 Barb. 268; Schmidt v. Hoyt, 1 Edw. 652; Buchan v. Summer, 2 Barb. Ch. 165, 47 Am. Dec. 305; Wilder v. Butterfield, 50 How. Pr. 385; Stevens v. Watson, 4 Abb. App. 302; Jackson v. Dubois, 4 Johns. 216; Floyd v. Harding, 28 Gratt. 401; Cowardin v. Anderson, 78 Va. 88; Hoag v. Howard, 55 Cal. 564; Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172; Wilcoxson v. Miller, 49 Cal. 193; Pixley v. Huggins, 15 Cal. 127; Hoag v. Howard, 55 Cal. 564; Plant v. Smythe, 45 Cal. 161; Packard v. Johnson, 51 Cal. 545; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543; Mansfield v. Gregory, 11 Neb. 297; Courtnay v. Parker, 21 Neb. 582; Hubbard v. Walker, 19 Neb. 94; Dewey v. Walton, 31 Neb. 819; Galway v. Malchow, 7 Neb. 285; Hart v. Farmers and Mechanics' Bank, 33 Vt. 252; Hackett v. Callender, 32 Vt. 97; Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316; Stillwell v. McDonald, 39 Mo. 282; Draper v. Bryson, 26 Mo. 108, 69 Am. Dec. 483; Black v. Long, 60 Mo. 181; Potter v. McDowell, 43 Mo. 93; Masterson v. Little, 75 Tex. 682; Holden v. Garrett, 23 Kan. 98; Plumb v. Bay, 18 Kan. 415; Northwestern Forwarding Co. v. Mahaffey, 36 Kan. 152; Foltz v. Wert, 103 Ind. 404; Wright v. Jones, 105 Ind. 17; Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 381; Heberd v. Wines, 105 Ind. 237; Boyd v. Anderson, 102 Ind. 217; Hays v. Reyer, 102 Ind. 524; Orth v. Jennings 8 Blackf. 420; Shryock v. Waggoner, 28 Pa. St. 430; Cover v. Black, 1 Pa. St. 493; Knell v. Green St. Building Assn., 34 Md. 67; Hoy v. Allen, 27 Iowa, 208; Patterson v. Lindner, 14 Iowa, 414; Phelps v. Fockler, 61 Iowa, 340; Welton v. Tizzard, 15 Iowa, 495; First Nat. Bank v. Hayzlett, 40 Iowa, 659; Norton v. Williams, 9 Iowa, 528; Duncan v. Miller, 64 Iowa, 223; Churchill v. Morse, 23 Iowa, 229, 99 Am. Dec. 422; Sigworth v. Meriam, 66 Iowa, 477; Withnell v. Courtland Wago County, 25 Fed. Rep. 372; Vaughn v. Schmalsle, 10 Mont. 186, 10 L.R.A. 411; McAdow v. Black, 4 Mont. 475; Kelly v. Mills, 41 Miss. 267; Welles v. Baldwin, 28 Minn. 408; Dutton v. McReynolds, 31 Minn. 66; Forepaugh v. Appold, 17 B. Mon. 625; Righter v. Forrester, 11 Bush, 278; Morton v. Robards, 4 Dana, 258; Pearson v. Davis, 41 Neb. 608, 59 N. W. Rep. 885. In Sappington v. Oeschli, *supra*, the court said: "Ever since the decision in the case of Davis v. Ownsby, 14 Mo. 170, 55 Am. Dec.

cept as against *bona fide* purchasers and mortgagees for value and without notice, it has been decided a number of times, has preference over a judgment lien.[1] Speaking of the effect of a judgment lien upon the real estate of a debtor, Chief Justice Wright of Iowa observed: "It is the *property* of the *debtor,* which is bound by the attachment from the time of service, and not the property of another. So, also, the judgment is a lien upon the real estate owned by the defendant at the time of its rendition, and not upon that owned by another. It is true that the phrase 'real estate' includes lands, tenements, and hereditaments and all rights thereto and interests therein, equitable as well as legal, but the judgment lien only extends to the interest owned by the defendant. If he has no interest, legal or equitable, there is nothing upon which the judgment can rest; nothing to which the lien can attach. Again, while principles of public policy have dictated the equitable rule, that relief should not generally be granted against a *bona fide*

105, it has been the settled law of this State, that the title of a *bona fide* purchaser or mortgagee under a deed or mortgage not recorded, is good against creditors at large, and is also good against sales under judgments, and executions, if the deed or mortgage is duly recorded before such sales. This has been the uniform ruling of this court since the decision referred to: See Valentine v. Havener, 20 Mo. 133; Stilwell v. McDonald, 39 Mo. 282; Porter v. McDowell, 43 Mo. 93; Reed v. Ownby, 44 Mo. 204"; McCalla v. Knight Investment Co., 77 Kan. 770, 14 L.R.A.(N.S.) 1258, 94 Pac. 126; Mahoney v. Salsbury, 83 Neb. 488, 119 N. W. 144, 131 Am. St. Rep. 647. A judgment creditor is not a *bona fide* purchaser: Owens v. Atlanta Trust etc. Co., 122 Ga. 521, 50 S. E. 379; Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380; Clark v. Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; Glen v. Morris-Glyndon, 100 Md. 479, 60 Atl. 608; Roberts v. Robinson, 49 Neb. 717, 68 N. W. 1035, 59 Am. St. Rep. 567; Dimmick v. Rosenfeld, 34 Ore. 101, 55 Pac. 100; Smith v. Gott, 51 W. Va. 141, 41 S. E. 175; Woodhurst v. Cramer, 29 Wash. 40, 69 Pac. 501.

[1] Hoy v. Allen, 27 Iowa, 208; Pixley v. Huggins, 15 Cal. 127; Burgh v. Francis, 1 Eq. Cas. Abr. 320, pt. 1; Patterson v. Linder, 14 Iowa, 414; Welton v. Tizzard, 15 Iowa, 495; Jackson v. Dubois, 4 Johns. 216; Holden v. Garrett, 23 Kan. 98; Righter v. Forrester, 1 Bush, 278; Orth v. Jennings, 8 Blackf. 420.

purchaser without notice, yet the rule has no place in favor of a judgment creditor, though he may have no notice of the outstanding equity. And the reason of this exception seems to us very cogent and satisfactory. The ordinary purchaser pays a new consideration. Not so with the judgment creditor. Such creditor comes in *under* the debtor, and not, as does the purchaser, *through* him. The consequences is that the creditor is entitled to the same rights as the *debtor* had, and no more. By his purchase he stands in the place of the debtor. And the same rule applies to a third person purchasing at the sheriff's sale, with notice of the outstanding title."[2] In a later case in the same State, Day, J., said: "It is now the settled law of this State that an attachment or judgment lien does not take precedence over a prior unrecorded deed or mortgage of which the creditor had no notice."[3] Where a deed is executed before the rendition of a judgment against the grantor, but not recorded, it is good as against a sheriff's sale made on the judgment, if it is placed on record before the sheriff's deed.[4]

§ 635. **In some States judgment creditor is considered within the registry acts.**—In other States of the Union, a judgment lien has priority over an unrecorded deed or mortgage, of which the judgment creditor had no notice at the time his lien attached.[5] In Alabama, the court, speaking of

[2] In Norton v. Williams, 9 Iowa, 528, 531. See, also, Schmidt v. Hoyt, 1 Edw. Ch. 652; First Nat. Bank of Tama City v. Hayzlett, 40 Iowa, 659; Churchill v. Morse, 23 Iowa, 229, 92 Am. Dec. 422; Evans v. McGlasson, 18 Iowa, 150; Morton v. Robards, 4 Dana, 258; Burn v. Burn, 3 Ves. 582; Hayes v. Thode, 18 Iowa, 51; Hoy v. Allen, 27 Iowa, 208. And see McKee v. Sultenfuss, 61 Tex. 325.

[3] In First Nat. Bank etc. v. Hayzlett, 40 Iowa, 659.

[4] Wilcoxson v. Miller, 49 Cal. 193; Schoeder v. Gurney, 73 N. Y. 430; Apperson v. Burgett, 33 Ark. 328. But see Simpkinson v. McGee, 4 Lea (Tenn.), 432.

[5] Hill v. Paul, 8 Miss. 479; Guiteau v. Wisely, 47 Ill. 433; Pollard v. Cocke, 19 Ala. 188; Humphreys v. Merrill, 52 Miss. 92; McCoy v. Rhodes, 11 How. 131; Vreeland v. Claflin, 24 N. J. Eq. 113; Reichert v. McClure, 23 Ill. 516; McFadden v. Worthington, 45 Ill. 362; Massey v. Westcott, 40 Ill. 160; Young v.

the registry act in force in that State, says: "If the deed is not recorded within six months, nor until after a judgment is rendered against the vendor, the subsequent registration of

Devries, 31 Gratt. 304; Eidson v. Huff, 29 Gratt. 338; Grace v. Wade, 45 Tex. 523; Cavanaugh v. Peterson, 47 Tex. 198; Andrews v. Matthews, 59 Ga. 466; Mainwaring v. Templeman, 51 Tex. 205; Firebaugh v. Ward, 51 Tex. 409; Anderson v. Nagle, 12 W. Va. 98; Parkersburg Nat. Bank v. Neal, 28 W. Va. 744; Corpmann v. Backastow, 84 Pa. St. 363; McKeen v. Sultenfuss, 61 Tex. 325; Ranney v. Hogan, 1 Un. Cas. 253; Arledge v. Hail, 54 Tex. 398; Grimes v. Hobson, 46 Tex. 416; Stevenson v. Texas Ry. Co., 105 U. S. 703, 26 L. ed. 1215; Baker v. Woodward, 12 Or. 3; Dickey v. Henarie, 15 Or. 351; United States v. Griswold, 7 Saw. 311; Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657; Westervelt v. Voorhis, 42 N. J. Eq. 179; Sharp v. Shea, 32 N. J. Eq. 65; Hoag v. Sayre, 33 N. J. Eq. 552; King v. Paulk, 85 Ala. 186, 4 So. Rep. 825; Barker v. Bell, 37 Ala. 354; Howell v. Brewer (N. J. Ch.), 5 Atl. Rep. 137; Wilcox v. Leominster Nat. Bank, 43 Minn. 541, 19 Am. St. Rep. 259, 45 N. W. Rep. 1136; Lamberton v. Merchants' Bank, 24 Minn. 281; Berryhill v. Smith, 59 Minn. 285, 61 N. W. Rep. 144; Mississippi Valley Co. v. Chicago St. L. & N. O. R. Co., 58 Miss. 896, 38 Am. St. Rep. 348; Moor v. Watson, 1 Root, 388; Guerrant v. Anderson, 4 Rand, 208; Heermans v. Montague (Va., March 30, 1890), 20 S. E. Rep. 899; Butler v. Maury, 10 Humph. 420; Hitz v. National Metropolitan Bank, 111 U. S. 722, 28 L. ed. 577; Gallagher v. Galletley, 128 Mass. 367; Coffin v. Ray, 1 Met. 212; Paine v. Mooreland, 15 Ohio, 435, 45 Am. Dec. 585; Holliday v. Franklin Bank, 16 Ohio, 533; Mayham v. Coombs, 14 Ohio, 428; Holliday v. Franklin Bank, 16 Ohio, 533; Fosdick v. Barr, 3 Ohio St. 471; Tousley v. Tousley, 5 Ohio St. 78; White v. Denman, 16 Ohio, 59, 1 Ohio St. 110; Van Thorniley v. Peters, 26 Ohio St. 471; Main v. Alexander, 9 Ark. 112, 47 Am. Dec. 732; Hawkins v. Files, 51 Ark. 417; Munford v. McIntyre, 16 Ill. App. 316; McFadden v. Worthington, 45 Ill. 362; Columbus Buggy Co. v. Graves, 108 Ill. 459; Roane v. Baker, 120 Ill. 308, 11 N. E. Rep. 246; Feinberg v. Stearns, 56 Fla. 279, 47 So. 797, 131 Am. St. Rep. 119; Gary v. Newton, 201 Ill. 170, 66 N. E. 267; Smith v. Willard, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313; Belcher v. Curtis, 119 Mich. 1, 77 N. W. 310, 75 Am. St. Rep. 376; Hall v. Sauntry, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497, London v. Bynum, 136 N. C. 411, 48 S. E. 764; White v. Provident Nat. Bank, 27 Tex. Civ. App. 487, 65 S. W. 498; Walker v. Douris, (Tex.) 61 S. W. 725; Price v. Wall, 97 Va. 334, 33 S. E. 599, 75 Am. St. Rep. 788; Blakemore v. Wise, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781; Jones v. Byrne, 94 Va. 751, 27 S. E. 591.

the deed does not relate back so as to defeat the lien of the judgment, but the statute avoids this deed in favor of the judgment creditor who has no notice of such deed, either actual or constructive, at or before the rendition of such judgment. A notice acquired before the sale, but after the lien attaches, cannot operate to divest the lien or affect the title of a purchaser under the judgment."[6] In Illinois, the rule was established at an early day, that under the statutes of that State, a purchaser, and a judgment creditor possessing a lien, stood upon the same equity, and were equally entitled to protection against prior unrecorded deeds of which they had no notice. From this, the conclusion follows, that a judgment lien attaches to whatever interest the records disclose the judgment debtor to have, if the judgment creditor has not actual notice from other sources. His lien is not restricted to the interest that the debtor actually has, but will take precedence over a prior unrecorded deed.[7]

§ 636. **Actual notice subsequent to the lien in these States.**—In those States where a judgment lien is consid-

[6] Pollard v. Cocke, 19 Ala. 188, 195. See Daniels v. Sorrells, 9 Ala. 436; Fash v. Ravesies, 32 Ala. 451; De Vendell v. Hamilton, 27 Ala. 156.

[7] Massey v. Westcott, 40 Ill. 160. Said Mr. Justice Lawrence: "It is insisted that Till and Knevels, even if they had no notice, are not entitled to protection as judgment creditors, because they have parted with nothing, and have less equity than would a subsequent purchaser. Under our statutes a purchaser and a judgment creditor having a lien stand upon the same equity, and this has been so held ever since the Act of 1833, and the case of Martin v. Dryden, 1 Gilm. 216. The same remark applies to another point made by appellant's counsel, to wit, that the lien of a judgment attaches only to whatever interest in land the judgment debtor may, in fact, have, and does not take precedence of a prior purchaser claiming under an unrecorded deed. This has been so held in some of the States, but under our Act of 1833, it is the settled law of this State that a judgment lien attaches to whatever interest in real estate the records disclose in the judgment debtor, in the absence of actual notice from other sources." See, also, McFadden v. Worthington, 45 Ill. 362; Guiteau v. Wisely, 47 Ill. 433.

ered as within the registry laws, the lien of the judgment creditor becomes perfect at the time it attaches, unless he had notice of the prior unrecorded deed. If he acquires notice subsequently, he is not affected by it. The notice must be brought home to him before he acquired his lien. Simrall, C. J., said that the statute of Mississippi may receive this paraphrase: "A purchaser must record his deed at his peril, for if he does not, it shall be void as to that creditor of the vendor who acquires a lien on the property before he gets notice of the sale. Within the meaning of the words, as construed by the courts, the creditor has established his right to satisfaction of his debt out of the property if he has obtained a lien before he receives notice of the conveyance." "There is but one class of creditors who may avoid an unregistered deed—those who have obtained *liens* without notice; subsequent notice no more affects them than it would a purchaser who got the title before notice." [8]

§ 637. Purchasers at execution sale.—It is settled by the weight of authority that a purchaser at an execution sale, other than the judgment creditor himself, is a *bona fide* purchaser for a valuable consideration, and entitled to the protection of the registry acts. He occupies the same position, and is entitled to the same rights as a purchaser from the grantor at a private sale. If he had, at the time of the sale, no actual or constructive notice of the claims of third persons, he takes the premises, as would any other purchaser, freed from all equities of which he had no actual notice, and which the proper records failed to disclose.[9] "And though our stat-

[8] Loughridge v. Bowland, 52 Miss. 546, 558.

[9] Ehle v. Brown, 31 Wis. 414; Morrison v. Funk, 23 Pa. St. 421; Garwood v. Garwood, 9 N. J. L. 193; Den v. Richman, 13 N. J. L. 43; Paine v. Moorland, 15 Ohio, 435, 45 Am. Dec. 585; Jackson v. Chamberlin, 8 Wend. 625; Ayres v. Duprey, 27 Tex. 605, 86 Am. Dec. 657; McNett v. Turner, 16 Wall. 352, 21 L. ed. 341; Savery v. Browning, 18 Iowa, 246; Runyan v. McClellan, 24 Ind. 165; Davis v. Ownsby, 14 Mo. 170, 55 Am. Dec. 105. See, also, Evans v. McGlasson, 18 Iowa, 150; Waldo v. Rus-

ute," said Chief Justice Savage, "does not save the rights of judgment creditors, and the judgment alone is unavailing as an encumbrance against an unrecorded deed, yet when that judgment is enforced, and a sale is made upon execution, and the sheriff's deed is first recorded, the purchaser becomes a *bona fide* purchaser, and in that character, is entitled to the property in preference to the grantee in the unrecorded deed. Such is my understanding of the law, and such is the current of authority as I read the cases." [1] In an early case in New Jersey, Drake, J., said: "There is no well-founded distinction between purchasers at sheriff's sale, and purchasers at private sale. The term 'purchaser' is equally applicable to both, and good policy requires that the former should be protected as well as the latter." [2] In a case in Wisconsin, the court intimated that if mortgaged premises were, at the time of the sale, occupied by a tenant of the grantee, this circumstance was perhaps sufficient to put the purchaser on inquiry, and to affect him with notice of the interest of the grantee under the unrecorded deed. But the court held that if the purchaser at the foreclosure sale took possession of the premises, protection would be given, under the registry law, to one who afterward bought the land of the execution purchaser in good faith, for value, before the adverse deed was recorded.[3] It is, how-

sell, 5 Mo. 387; Draper v. Bryson, 26 Mo. 108, 69 Am. Dec. 483; Scribner v. Lockwood, 9 Ohio, 184; Jackson v. Post, 15 Wend. 588; Fords v. Vance, 17 Iowa, 94; Stilwell v. McDonald, 39 Mo. 282; Thomas v. Vanlieu, 28 Cal. 616; Holmes v. Buckner, 67 Tex. 107; Lee v. Bermingham, 30 Kan. 312; Feinberg v. Stearns, 56 Fla. 279, 47 So. 797, 131 Am. St. Rep. 119. But see McCalla v. Knight Investment Co., 77 Kan. 770, 14 L.R.A.(N.S.) 1258, 94 Pac. 126.

[1] In Jackson v. Chamberlin, 8 Wend. 625, 626.

[2] In Den v. Richman, 1 Green, 43, 59.

[3] Ehle v. Brown, 31 Wis. 405. Mr. Chief Justice Dixon, on application for rehearing, discussed the rights of purchasers at execution sales at considerable length, and after an examination of the cases, remarked: "There can be no doubt, we think, of the correctness of the position thus generally assumed by the authorities, that the statute is

ever, held in Mississippi that judgment creditors or purchasers at a sheriff's sale are not purchasers for a valuable consideration, but, in contemplation of a court of equity, mere volunteers.[4]

§ 638. **Purchaser at such sale with notice.**—Obviously, a purchaser at an execution sale, where a judgment is not superior to an unrecorded deed, can be in no more favorable position than he would be if he were buying at private sale. We have seen that the law makes no distinction between him and the ordinary purchaser. He is entitled to the same privileges, and he is bound by the same notice. If, therefore, at

to be fairly and liberally construed, so as to prevent and obviate the mischiefs and abuses which it was the design of the legislature to remedy. The statute was made to prevent those who once had title to land from making successive sales, and thereby defrauding one or more of the purchasers which, at common law and without the statute might be done; and, as a means of accomplishing that object, to protect innocent purchasers, buying and paying their money on the credit of the recorded title, who should themselves testify their appreciation of, and proper regard for, the rights of others, by complying with the condition or requirement of the statute in causing their own deeds to be duly recorded. Such is the object, and such is the justice and policy of the law, for the protection of innocent purchasers who have acquired the ostensible title exhibited and shown by the record. For their protection and safety, prior unrecorded conveyances and titles must yield, and must be invalidated. In view of this object and of this policy, and of the manifest justice of the ends to be attained, it would require very urgent considerations indeed to induce us to put a construction upon our registry law against its letter, which would enable a purchaser to keep his deed in his own custody and unrecorded for years, and suffer the title of record of his grantor, and the possession of the land, to pass into the hands of one innocent purchaser for value, whose deed should be first recorded, or, as in this case, into and through the hands of several such purchasers in succession, and yet, after all this had been done, then to record his deed, and assert and maintain his paramount title, and uproot and destroy that of one or all of such innocent purchasers."

[4] Kelly v. Mills, 41 Miss. 267, overruling Kilpatrick v. Kilpatrick, 23 Miss. 124, 55 Am. Dec. 79. See McCalla v. Knight Investment Co., 77 Kan. 770, 14 L.R.A.(N.S.) 1258, 94 Pac. 126.

the time of the sale, he has actual notice of the rights of others, or constructive notice, by the registration before sale of the instruments evidencing or conferring those rights, or, if the party, equitably entitled to the property, is in possession, the title the purchaser acquires is subject to such rights or interests.[5] "It is the settled doctrine of this court that, under our present registry laws, the lien of a judgment, before sale thereunder, does not take precedence of a prior unrecorded mortgage; and that, if (as in this instance) the mortgage will be recorded before the sheriff's sale, the purchaser at such sale will be affected with notice.[6]

§ 639. **Rights of judgment creditor as purchaser—Comments.**—A purchaser at an execution sale is, as we have shown, entitled to all the protection of the registry laws. If he buys without notice, he is a *bona fide* purchaser, and the deed executed by the sheriff to him will take precedence over a prior unrecorded conveyance of which he had no notice. But suppose the judgment creditor becomes himself a purchaser at the sheriff's sale? He may purchase the property, and the amount of his bid may be in total or partial satisfaction of his claim. Is he entitled to the benefit of the registry laws? Is he protected from all prior unrecorded deeds and encumbrances of which he had no notice at the time of the sale? The question of whether he occupies the position of a stranger, and is entitled to the same privileges and protection, or is to be regarded as a mere volunteer, succeeding to the rights of

[5] Valentine v. Havener, 20 Mo. 133; Byers v. Engles, 16 Ark. 543; Chapman v. Coats, 26 Iowa, 288; Hoy v. Allen, 27 Iowa, 208; Hackett v. Callender, 32 Vt. 97; Priest v. Rice, 1 Pick. 164, 11 Am. Dec. 156; Apperson v. Burgett, 33 Ark. 328; Schroeder v. Gurney, 73 N. Y. 430; Potter v. McDowell, 43 Mo. 93; Righter v. Forrester, 1 Bush, 278; Sappington v. Oeschli, 49 Mo. 244; Black v. Long, 60 Mo. 181; Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316.

[6] Chapman v. Coats, 26 Iowa, 291; Davis v. Ownsby, 14 Mo. 170, 55 Am. Dec. 105.

the judgment debtor only, is one of interest, and one upon which the decisions are not uniform.

§ 640. General rule that judgment creditor is not a bona fide purchaser.—The rule maintained by the weight of authority, is that a judgment creditor who takes the property in part of total satisfaction of his demand, is not a purchaser entitled to protection against unrecorded conveyances. "To constitute a person a *bona fide* purchaser within the meaning of the statute, he must, upon the faith of the purchase, have advanced for it a valuable consideration. If he was a creditor antecedent to the purchase, and paid for the purchase by a credit on his demand, then inasmuch as he has parted with no consideration on the faith of the purchase, he is not a *bona fide* purchaser within the meaning of the statute."[7] A bank became a purchaser at an execution sale of the property of its judgment debtor, and received a certificate of purchase from the sheriff. Subsequently, the bank by an instrument in writing assigned the sheriff's certificate to a third party, releasing to him all its right and title to the land, and authorizing the sheriff to execute a conveyance to him. The latter attempted to obtain a deed from the sheriff, but on account of his absence from home accepted a deed from the judgment debtor, in place of the sheriff's deed. A judgment creditor of the bank afterward obtained a conveyance of the premises from the sheriff on the assumption that they were the property of

[7] Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657; Wright v. Douglas, 10 Barb. 97; Dickerson v. Tillinghast, 4 Paige, 215, 25 Am. Dec. 528; Orme v. Roberts, 33 Tex. 768; McAdow v. Black, 6 Mont. 601, 13 Pac. Rep. 377; Rutherford v. Green, 2 Ired. Eq. 121; Mansfield v. Gregory, 8 Neb. 432; O'Rourke v. O'Connor, 39 Cal. 442; Emerson v. Sansome, 41 Cal. 552; Harral v. Gray, 10 Neb. 186; Carney v. Emmons, 9 Wis. 114; Treptow v. Buse, 10 Kan. 170; National Bank v. King, 110 Ill. 254; Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 381. See, also, cases cited § 634 (*ante*). See Blankenship v. Douglas, 26 Tex. 225, 82 Am. Dec. 608. And see Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543.

the bank. It was held that the deed of the judgment debtor might, by agreement of the parties, be lawfully substituted instead of that of the sheriff, and that by such substitution, the sheriff's sale was virtually subverted, and that officer was divested of all power to convey the premises for the benefit of a third person. It followed as a consequence that the conveyance from the sheriff to the plaintiff was void, and further that the assignee of the bank had the equitable title by the assignment of the sheriff's certificate, and the legal title by the deed of the judgment debtor, and both being united in him, they constituted a perfect title to the premises. The court also held that no stranger could object to the sheriff's conveyance to the bank's assignee, and that to constitute a person a *bona fide* purchaser, he must have advanced a new consideration for the purchase; bidding off the premises and applying the bid on his judgment will not constitute a *bona fide* purchase, for no consideration is *advanced* on the faith of the purchase.[8] This

[8] Wright v. Douglas, 10 Barb. 97. Speaking of the latter proposition, as to whether a judgment creditor is a *bona fide* purchaser, Gridley, P. J., at page 106, said: "It is contended that inasmuch as the deed from Dennis to Dana was not recorded, the plaintiff when he purchased on the judgment obtained in the attachment suit in 1844, was a *bona fide* purchaser. The counsel for the plaintiff argued as though the levy of his attachment was in the nature of a purchase, but that idea cannot be supported. It was only when he purchased his premises on his execution, that he can claim to be a purchaser at all. But I do not think that he can be regarded as a *bona fide* purchaser for two reasons: *First,* to constitute a *bona fide* purchaser, he must have ***advanced the consideration for the purchase.*** It will not constitute a *bona fide* purchase that the creditor bids off the premises and apolies the bid on his judgment. *That* is a precedent debt, and the consideration is not ***advanced*** on the faith of the purchase: 1 Rev. Stats. 746, § 1; Dickerson v. Tillinghast, 4 Paige, 215, 25 Am. Dec. 528; Coddington v. Bay, 20 Johns. 637, 11 Am. Dec. 342. *Second,* I am constrained to say that the plaintiff had notice enough to put him on inquiry, if not to charge him with a knowledge of the defendant's title. The tripartite deed was on record when he purchased at the execution sale. *That* was enough to put him on inquiry as to the exact terms of the deed from Dennis to Dana. Again, it is fair to conclude that the defendant, or some one under whom he claimed, was *in*

principle is analogous to that which prevails where there is an unrecorded mortgage, and the mortgagor conveys the premises to a creditor having no notice of the mortgage, in payment of a precedent debt. It is held that, in such a case, the creditor is not a *bona fide* purchaser within the meaning of the registration laws, so as to entitle his deed to precedence over the prior unrecorded mortgage.[9]

§ 641. **Contrary rule in Iowa.**—In Iowa, there have been several decisions on the question as to whether a judgment creditor, purchasing at a sheriff's sale, is affected by the existence of an unrecorded deed of which he had no notice. In one of these cases the judgment debtor held the legal title to the lands in controversy under an implied trust. After the rendition of judgment against him, but before the filing of a transcript of the judgment in the county in which the lands were situated, he conveyed them to the *cestui que trust,* who neglected the filing of his deed until eight months after the sale by the sheriff to the judgment creditor. The latter purchased without any notice of the deed to the *cestui que trust,* or of his rights in the premises. It was held that the judgment creditor stood on the same footing as any other *bona fide* purchaser, and would be afforded protection from an unrecorded deed, or outstanding equities, of which at the time of his purchase he had no notice.[1] Although it had previously been decided[2] that a judgment creditor, by merging his judgment into a title, without notice of prior equitable claims, became a *bona fide* purchaser, and as such entitled to the same protection as other subsequent purchasers, in the absence, of course, of equitable circumstances, yet, it was said that the course of decision had been vacillating, and the rule could

possession. The defendant was in possession at the commencement of this suit. When did he acquire the possession? Most probably when he took the tripartite deed."

[9] Dickerson v. Tillinghast, 4 Paige, 215, 25 Am. Dec. 528.

[1] Gower v. Doheney, 33 Iowa, 36.

[2] Halloway v. Platner, 20 Iowa, 121, 89 Am. Dec. 517.

not be declared to be established. "It is well settled that a *third person,* who purchases at a sheriff's sale," said Chief Justice Day, "without notice of outstanding equities, is entitled to the same protection as any other purchaser without notice and for value. The rule, however, as to the judgment creditor has oscillated somewhat, and can scarcely yet be regarded as settled in this State." [3] Subsequently it was held in the same

[3] Gower v. Doheney, 33 Iowa, 38. Continuing, the court said: "In Norton, Jewett & Busby v. Williams, 9 Iowa, 529, which was an action of right, it was said that the rule that relief should not generally be granted against a *bona fide* purchaser without notice has no place in favor of a judgment creditor, though he may have no notice of an outstanding equity. As the purchaser in that case, however, was a *third party,* with both *actual* and *constructive* notice of the outstanding deed, which was filed for record after judgment, but *before* the sheriff's sale, this point was not involved in that case, and what is said in regard to it is only a *dictum.* In the case of Parker v. Pierce, 16 Iowa, 227, the question whether a purchaser, at a sale under execution, will take the land discharged of every claim or title, whether arising on an unregistered deed or a mere equity, was expressly left undecided. In the case of Vannice v. Bergen, 16 Iowa, 556, 85 Am. Dec. 531, it was maintained by Justice Dillon, in his dissenting opinion, that a purchaser at a sheriff's sale will take the land discharged of every claim or title, whether arising under an unregistered deed or a mere equity, of which he had no notice at the time of his purchase, and which would be invalid against an ordinary purchaser; and that 'the rule applies equally when the judgment creditor is the purchaser, as when the purchase is made by a stranger.' In the case of Evans v. McGlasson, 18 Iowa, 152, the court united in holding that a judgment creditor, who becomes a purchaser at sheriff's sale, is protected at law against matters of which, at the time of the purchase, he had no notice, and that this rule also obtains in equity, unless there are equities of so strong and persuasive a nature as to prevent its application; and these, if they are relied upon, must be *alleged* and *proved.* As no such equities have been established in the present case, the doctrine of Evans v. McGlasson may be regarded as direct authority for sustaining the title of the plaintiff. But the rights of the judgment creditor received more direct recognition in the case of Halloway v. Platner, 20 Iowa, 121, 89 Am. Dec. 517, in which it was held that when a creditor merges his judgment into a title without actual or constructive notice of prior equities he becomes a purchaser within the meaning of section 2220 of the Revision, and is entitled to equal protection, in the absence of equitable circum-

State, that if the judgment debtor neglects to give notice of appeal until after a sale of the property under the judgment is made, and the judgment creditor becomes the purchaser, he is entitled to the same protection as any other *bona fide* purchaser, if the judgment is afterward reversed, and he, on a new trial, again recovers judgment. This rule was applied in a case where, after the sale on execution, and while the appeal was pending, the judgment debtor sold the property to another person. The latter brought an action to restrain the judgment creditor from selling the property on execution issued on his second judgment. The court held, however, that the judgment creditor had a perfect title, and refused to enjoin the sale.[4]

stances, with any other subsequent *bona fide* purchaser. We attach no importance, under the circumstances of the case, to the delay in obtaining the sheriff's deed. Had the deed been procured and placed upon record at the time of the expiration for redemption, White would, so far as appears, have occupied precisely the same position as now. It is not shown that he has sustained any loss, even to the amount of the filing fee of his deed, from the delay in procuring the sheriff's deed. When Hampton conveyed to him, the judgment was not a lien upon the property conveyed. If the subsequent taking of the property to satisfy Hampton's debt gave White any right of action against him, it does not appear but that he was just as solvent when the sheriff's deed was procured as when the year for redemption relapsed." "It is a wholesome rule of equity that where one of two innocent persons must suffer, the loss will fall upon that party who has been guilty of the first negligence."

[4] Frazier v. Crafts, 40 Iowa, 110. Day, J., delivered the opinion of court, and said: "The case presents this question: May a judgment creditor who purchases real estate at sheriff's sale, before notice of appeal upon which the judgment under which the sale occurred is afterward reversed, but who, when the cause is remanded, recovers another judgment for the whole amount of the first and interest, under any circumstances be considered a *bona fide* purchaser, and be entitled as such to the protection of the provisions of section 341 of the Revision§ Or, in other words, can a judgment debtor whose real estate has been sold to the judgment plaintiff in satisfaction of the judgment before notice of appeal, after the judgment under which the sale occurred has been reversed, and the cause has been remanded for a new trial, and after the sheriff's deed to the judgment

§ 641a. **In other States.**—It is held in Texas, that the lien acquired by a creditor without notice by the judgment and levy of execution is superior to the title founded on an un-

plaintiff has been recorded, sell the real estate to a third party and convey a valid title thereto, notwithstanding judgment is again rendered on a new trial for the full amount of the former judgment? These questions have not hitherto been answered by the adjudications of this court. The case of Twogood v. Franklin, 27 Iowa, 239, upon which appellant seems to rely, differs from the present one in two material respects: (1) The purchase was made after notice of the appeal. (2) The party under whose judgment the sale occurred failed, after the reversal, to recover another judgment. The language upon which appellant relies, 'that, to constitute a *bona fide* purchaser of land, one must have purchased without knowledge, at least actual knowledge, of an appeal, and must have parted with his money, or altered his situation on the strength of such purchase,' expresses merely the views of the writer of the opinion. The only point determined in that case is, 'that a purchase of land at a sheriff's sale by the plaintiff in execution, or his attorney, with actual knowledge of a depending appeal, is at the peril of the purchaser, and the party or his attorney thus buying is not, within the meaning of the statute, a *bona fide* purchaser.' The question now involved may fairly be regarded as *res nova*. No good reason is apparent why, under the circumstances of this case, a judgment plaintiff should not be protected. If, upon the retrial, he had failed to recover judgment, he would stand in an attitude altogether different. Under such circumstances he would be bound to make restitution to the judgment defendant. And so long as the title to the land remained in him, equity would require that he restore the land itself, the very thing improperly received in satisfaction of a judgment which ought never to have been rendered. And if he could thus be required to restore the land to the judgment defendant, he might be compelled to restore it to the vendee of such defendant. But in this case the recovery of a second judgment for the full amount of the first judgment and interest has definitely settled the question that Crafts is under no obligation to make restitution to Clark. If Clark had brought an action to recover the value of the land, it is clear that Crafts might have offset the claim by the second judgment. And if Clark had sought to recover the land itself, and had even succeeded, it would have been in his hands subject to the lien of such judgment. The true principle upon which *bona fide* purchasers, at a judicial sale, are protected in the rights acquired, we apprehend to be that they have a right to rely upon the validity of the judgment, and to invoke its protection for acts done under it whilst it is in force. If this be the

recorded deed, and that a purchaser under the execution with notice, is entitled to all the rights of the creditor. It was said by the court: "Now, if the unrecorded instrument cannot

principle, then there is no reason why a party acting in every respect in good faith and before notice of appeal, should not be protected to the same extent as strangers. In Gower v. Doheney, 33 Iowa, 39 (not cited by either party to this appeal), are reviewed all the previous decisions of this court cited by the appellee upon the question of the protection to be afforded to a judgment creditor, purchasing at a judicial sale, against outstanding equities, and we held that he was entitled to protection against such equities of which he had no notice at the time of his purchase. This decision is put upon the ground that the judgment plaintiff stands upon the same footing as any other purchaser. The principle determined in that case is decisive of this. The doctrine here maintained does not enable a party to retain property acquired under an unjust judgment. If the judgment is ultimately reversed, he must restore the property itself, or its value. Besides the judgment, defendant has it always in his power, by promptly taking an appeal, to prevent the judgment creditor from becoming a *bona fide* purchaser: See Woodcock v. Bennett, 1 Cowen, 711, 734, 13 Am. Dec. 568."

The general rule as to the restitution of property purchased under a judgment is that if third persons become the purchasers, their title is not divested by a subsequent reversal of the judgment. This rule is adopted to encourage bidding at judicial sales, and rests on consideration of public policy: Frost v. McLeod, 19 La. Ann. 69; Farmer v. Rogers, 10 Cal. 335; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459; Gott v. Powell, 41 Mo. 416; Woodcock v. Bennett, 1 Cowen, 711, 13 Am. Dec. 568; Flaster v. Fleming, 56 Ill. 457; Hubbell v. Broadwell's Heirs, 8 Ohio, 120; Coster v. Peters, 7 Robt. 386; Jesup v. City Bank, 15 Wis. 604, 82 Am. Dec. 703; Porter v. Robinson, 3 Marsh. A. K. 253, 13 Am. Dec. 153; Hauschild v. Stafford, 27 Iowa, 301; Dorsey v. Thompson, 37 Md. 25; Wood v. Jackson, 8 Wend. 9, 22 Am. Dec. 603; Lovett v. German Reformed Church, 12 Barb. 67; Leslie v. Richardson, 60 Ala. 563; Marks v. Cowles, 61 Ala. 299; Pitfield v. Gazzam, 2 Ala. 325; Fergus v. Woodworth, 44 Ill. 374; Stinson v. Ross, 51 Me. 556, 81 Am. Dec. 591; Taylor v. Lauer, 26 La. Ann. 307; Stroud v. Casey, 25 Tex. 740, 78 Am. Dec. 556; Irwin v. Jeffers, 3 Ohio St. 389. It is said that the same rule applies to the assignee of the judgment creditor who has become a purchaser: Horner v. Zimmerman, 45 Ill. 14; Vogler v. Montgomery, 54 Mo. 577; Taylor v. Boyd, 3 Ohio, 337, 17 Am. Dec. 603; Guiteau v. Wisely, 47 Ill. 433; Wadhams v. Gay, 73 Ill. 422; McAnsland v. Pundt, 1 Neb. 211. But this is denied in Alabama: Marks v. Cowles, 61 Ala. 299. But the rule that the reversal of a judgment

take effect, but is void as to creditors, it is absurd to say that the creditor's lien does not bind the land to which it applies, or that it cannot be enforced by the sale of the land so bound by it for the payment of the debt, just as if no such instrument existed. And it would be equally as absurd to say that the right acquired by the creditor by his lien, not merely to purchase himself, but to have the lien sold in open market, when once secured can be taken away by the subsequent record of such instrument, or that the party holding such lien can, by subsequent notice, be precluded from the full benefit of his lien for the satisfaction and discharge of his demand, except by becoming himself the purchaser." [5]

§ 642. **Comments.**—In those States where the judgment lien is entitled to precedence over an unrecorded deed or encumbrance, this question cannot arise. If the lien of the judgment is superior, so must be the title acquired by virtue of a sale under the judgment. But in the majority of the States, where the doctrine prevails that a judgment affects only the actual interest of the judgment debtor, and does not take priority over unrecorded conveyances, the judgment creditor is regarded as a mere volunteer. If he takes nothing by his lien, how can he acquire a better right by attempting to convert that lien into a title? The reason that an unrecorded deed is given the preference over the judgment lien, is that the judgment

does not affect a third person who becomes a purchaser, has no application when the purchaser is the judgment creditor himself: Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

[5] Grace v. Wade, 45 Tex. 522. The earlier case of Price v. Cole, 35 Tex. 461, was overruled. See, also, Catlin v. Bennatt, 47 Tex. 165; Grimes v. Hobson, 46 Tex. 416; Mainwarring v. Templeman, 51 Tex. 205; Wallace v. Campbell, 54 Tex. 87; Stevenson v. Texas Ry. Co., 105 U. S. 703, 26 L. ed. 1215. See in other States, Sharp v. Shea, 32 N. J. Eq. 65; Condit v. Wilson, 36 N. J. Eq. 370; Fash v. Ravesies, 32 Ala. 451; Smith v. Jordan, 25 Ga. 687; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62. See, also, White v. Provident Nat. Bank, 27 Tex. Civ. App. 487, 65 S. W. 498; Walker v. Downs, (Tex. Civ. App.) 61 S. W. 725.

creditor is in no more unfavorable position than he was before he obtained his lien. This reason must apply with equal force when he takes a sheriff's deed, without advancing a new consideration. If, however, he bids for the property more than the amount of his judgment, and pays the excess to the judgment debtor, there can be no doubt, as we understand the law, that he would occupy the position of any other purchaser. In such a case, he does advance a new consideration on the faith of the purchase and should accordingly be regarded as a *bona fide* purchaser. Nor would it, in our opinion, make any difference how small the amount was over the judgment. If the judgment debtor received any new consideration whatever from the judgment creditor, this would make the latter a purchaser for value, and entitle him to all the rights and benefits due to a person holding that relation.

§ 643. **Mortgage for purchase money.**—If a mortgage is executed at the time the land is purchased, to secure the payment of the consideration for which the land was sold, such mortgage is entitled to preference over judgments and other debts of the mortgagor, so far as the land thus purchased and mortgaged is concerned.[6] But in order that a mortgage may be entitled to this character of a purchase money mortgage it must be executed at the same time as the deed from the grantor. The preference is lost by allowing an interval of time to elapse between the two transactions, during which the interest of the purchaser is subject to be levied upon.[7] A mortgage of this character is good against

[6] Clark v. Munroe, 14 Mass. 351; Bunting v. Jones, 78 N. C. 242; Phelps v. Fockler, 61 Iowa, 340; Laidley v. Aiken, 80 Iowa, 112, 20 Am. St. Rep. 408; Curtis v. Root, 20 Ill. 53; Roane v. Baker, 120 Ill. 308; Cowardin v. Anderson, 78 Va. 88; Clark v. Butler, 32 N. J. Eq. 644; Stewart v. Smith, 36 Minn. 82, 1 Am. St. Rep. 651; Bolles v. Carli, 12 Minn. 113; Grant v. Dodge, 43 Me. 489; Guy v. Carriere, 5 Cal. 511.

[7] Heuisler v. Nickum, 38 Md. 270; Ahern v. White, 39 Md. 409; Foster's Appeal, 3 Pa. St. 79.

the wife of the mortgagor, even if she is not a party to it.[3] "Courts, indeed, have gone so far as to hold that where a purchaser takes a deed of land, and at the same time executes a mortgage to a third person to secure money used in payment for the land, the mortgage and deed may be regarded as constituting one transaction, and the mortgage will be paramount to the dower right of the wife of the purchaser, although she does not sign the mortgage."[2] As the instruments derive their effect from delivery, it is sufficient if they are delivered at the same time, and the fact that they were executed at different times is immaterial.[1] A mortgage for purchase money is preferred to a homestead exemption.[2] If the conveyance reserves an annual rent, and contains a condition that the grantor may enter and take possession for failure to pay the rent reserved, the transaction partakes so much of the character of a mortgage for the purchase money that the grantee has no power to create an encumbrance superior

[3] Thomas v. Hanson, 44 Iowa, 651; Walters v. Walters, 73 Ind. 425; Birnie v. Main, 29 Ark. 591; Hinds v. Ballou, 44 N. H. 619; Stow v. Tifft, 15 Johns. 458, 8 Am. Dec. 266; Thompson v. Lyman, 28 Wis. 266; Mills v. Van Voorhies, 20 N. Y. 412.

[2] Thomas v. Hanson, 44 Iowa, 651, 653, per Adams, J., citing Clark v. Munroe, 14 Mass. 351; Hazleton v. Lesure, 9 Allen, 24; King v. Stetson, 11 Allen, 407. See, also, Eslava v. Lepetre, 21 Ala. 504, 56 Am. Dec. 266; Bell v. The Mayor of New York, 10 Paige, 49; McGowan v. Smith, 44 Barb. 232; Billingsley v. Neblett, 56 Miss. 537; Jones v. Parker, 51 Wis. 218; Kaiser v. Lembeck, 55 Iowa, 244, 7 N. W. Rep. 519; Kettle v. Van Dyck, 1 Sand. Ch. 76; Young v. Tarbell, 37 Me. 509.

[1] Banning v. Edes, 6 Minn. 402; Mayburry v. Brien, 15 Peters, 21, 10 L. ed. 646; Cake's Appeal, 23 Pa. St. 186, 62 Am. Dec. 328; Summers v. Darne, 31 Gratt. 791; Stewart v. Smith, 36 Minn. 82.

[2] Kimble v. Esworthy, 6 Bradw. (Ill.) 517; Middlebrooks v. Warren, 59 Ga. 230; Guinn v. Spurgin, 1 Lea (Tenn.) 228. See Carr v. Caldwell, 10 Cal. 380, 70 Am. Dec. 740; Allen v. Hawley, 66 Ill. 164; New England Jewelry Co. v. Merriam, 2 Allen, 390; Lane v. Collier, 46 Ga. 580; Amphlett v. Hibbard, 29 Mich. 298; Magee v. Magee, 51 Ill. 500, 99 Am. Dec. 571; Nichols v. Overacker, 16 Kan. 54. And see, also, Greeno v. Barnard, 18 Kan. 518; Pratt v. Topeka Bank, 12 Kan. 570; Hopper v. Parkinson, 5 Nev. 233; Hand v. Savannah etc. R. R. 12 S. C. 314.

to the right of the grantor.[3] But a mortgage for purchase money to have this preference must be taken immediately. It is subordinate to a prior mortgage taken for value and without notice.[4] A mortgage of this character has precedence over a lien for labor and materials supplied to the purchaser.[5] While such a mortgage bars a wife of her right of dower,[6] yet she is not barred by the fact that the mortgage recites it it to be a mortgage for the purchase money, when, by reason of the lapse of time between the deed and the mortgage, it is not.[7] But where the mortgage for the purchase money is not recorded, a deed from the grantor to a third party will not prevail against a subsequent recorded deed from the grantee to a party having no notice of the mortgage or the grantor's second deed.[8]

§ 643a. Third person advancing money.—A mortgage made to a third person who advances the money is treated as a purchase money mortgage, and the holder of it is entitled to the same rights as if the mortgage had been executed to the grantor.[9] Where a son negotiates with his father for the pur-

[3] Stephenson v. Haines, 16 Ohio St. 478.

[4] Houston v. Houston, 67 Ind. 276. Priority is given to a mortgage for purchase money recorded with the deed of purchase over a mortgage made by the purchaser, before the completion of the purchase to secure a loan to be used for making the cash payment, even if this prior mortgage was recorded before the purchase money mortgage to the grantor was recorded: Turk v. Funk, 68 Mo. 18, 30 Am. Rep. 771; City Nat. Bank's Appeal, 91 Pa. St. 163.

[5] Guy v. Carriere, 5 Cal. 511; Strong v. Van Deursen, 23 N. J. Eq. 369; Lamb v. Cannon, 38 N. J. L. 362; Macintosh v. Thurston, 25 N. J. Eq. 369; Virgin v. Brubaker, 4 Nev. 31. See, also, Rees v. Ludington, 13 Wis. 276, 80 Am. Dec. 741. But see Tanner v. Bell, 61 Ga. 584.

[6] Jones v. Parker, 51 Wis. 218; George v. Cooper, 15 W. Va. 666.

[7] Tibbetts v. Langley Mfg. Co., 12 S. C. 465. A deed of trust is considered to be a mortgage: Summers v. Darne, 31 Gratt. 791; Curtis v. Root, 20 Ill. 53; Austin v. Underwood, 37 Ill. 438, 87 Am. Dec. 254.

[8] Thompson v. Westbrook, 56 Tex. 265.

[9] Pearl v. Hervey, 70 Mo. 160; Kaiser v. Lembeck, 55 Iowa, 244;

chase of the latter's land, and with a third person for a loan of money to enable him to make the purchase, and the father executes a deed to the son receiving the money from the stranger to whom the son and wife execute a mortgage to secure repayment of the purchase money, all the acts being contemporaneous and parts of one transaction, the mortgage must be considered in equity as a purchase money mortgage, and, even if it had not been signed by the son's wife, will not be subject to a homestead right or right of dower.[1] When the money is thus advanced by a third person, who takes a mortgage to secure his advances as a part of the same transaction, the lien of the mortgage is superior to that of a prior judgment obtained against the purchaser.[2] A married man bought a lot of land, and to secure the payment of the purchase money executed a mortgage to the vendor, who subsequently obtained a decree of foreclosure. Immediately before the sale was to occur the vendee borrowed of a third person sufficient money to discharge the mortgage and decree, and agreed to give him a mortgage on the lot to secure the money advanced. The latter paid off the decree, and the vendor's mortgage was satisfied; and shortly afterward the vendee complied with this agreement by executing to him a mortgage, but the vendee's wife did not join in the mortgage, although, at the time such third person advanced the money, the premises were occupied

Laidley v. Aikin, 80 Iowa, 112, 20 Am. St. Rep. 408; Mize v. Barnes, 78 Ky. 506; Dillon v. Byrne, 5 Cal. 455; Lassen v. Vance, 8 Cal. 271, 68 Am. Dec. 322; Carr v. Caldwell, 10 Cal. 380, 70 Am. Dec. 740; Curtis v. Root, 20 Ill. 53; Jones v. Parker, 51 Wis. 218; Carey v. Boyle, 53 Wis. 574; Jackson v. Austin, 15 Johns. 477; Dwenger v. Branigan, 95 Ind. 221; Adams v. Hill, 29 N. H. 202; Moring v. Dickenson, 85 N. C. 466. See, also, Butler v. Thornburg, 131 Ind. 277, 31 Am. St. Rep. 433; Stewart v. Smith, 36 Minn. 82, 1 Am. St. Rep. 651; Bradley v. Bryan, 43 N. J. Eq. 396; Cowardin v. Anderson, 78 Va. 88; Rogers v. Tucker, 94 Mo. 346.

[1] Jones v. Parker, 51 Wis. 218.

[2] Laidley v. Aiken, 80 Iowa, 112, 20 Am. St. Rep. 408; Jackson v. Austin, 15 Johns. 477; Stewart v. Smith, 36 Minn. 82, 1 Am. St. Rep. 651.

by the vendee and his wife as a homestead. Not long afterward the vendee died, and the wife claimed the property as a homestead, but the court held the mortgage of the person advancing the money took the place of the vendor's mortgage, and consequently became a valid lien on the premises to the extent that the money was applied to the satisfaction of the original vendor's mortgage.[3]

§ 643b. **Execution at same time not essential.**—It is not necessary that the deed and mortgage should be executed at the same time, or even on the same day, that they may be considerd as contemporaneous, if they form parts of one continuous transaction and are so intended. For the purpose of effectuating the intent of the parties the two instruments will be treated as contemporaneous.[4] Thus, where a mortgage was made three days later than the deed, it was considered, for the purpose of enabling the person advancing the money to occupy the position of a purchase money mortgagor, to have been contemporaneous with the deed.[5] A purchaser exe-

[3] Carr v. Caldwell, 10 Cal. 380, 70 Am. Dec. 740.

[4] Stewart v. Smith, 36 Minn. 82, 1 Am. St. Rep. 651. See, also, Banning v. Edes, 6 Minn. 402; Summers v. Darne, 31 Gratt. 791.

[5] Stewart v. Smith, 36 Minn. 82, 1 Am. St. Rep. 651. Said Mr. Justice Mitchell, speaking for the court: "The rule, as generally stated in the books, is, that to give a purchase money mortgage this precedence, it must have been executed simultaneously, or at the same time, with the deed of purchase. Some ground for a narrow and literal construction of this language is furnished by the fact that the reason usually assigned for the doctrine is the technical one of the mere transitory seisin of the mortgagor, rather than the superior equity which the mortgagee has to be paid the purchase money of the land before it shall be subjected to other claims against the purchaser. But it is evident, both upon principle and authority, that what is meant by this statement of the rule is not that the two acts—the execution of the deed of purchase, and the execution of the mortgage—should be literally simultaneous. This would be almost an impossibility. Some lapse of time must necessarily intervene between the two acts. An examination of the cases will show that the real test is not whether the deed and mortgage were in fact executed at the

cuted a note in part payment of the purchase price, which was afterward transferred to another, who shortly after the transfer, loaned the purchaser an additional sum, took a note and a new mortgage on the same lot, and the purchaser's interest in another lot, and caused the prior mortgage to be canceled and satisfied of record. When suit was brought to foreclose the mortgage, the purchaser's wife intervened and claimed the premises as a homestead, but the court decided that the land was liable for the remainder of the purchase money regardless of the purpose to which it might be devoted, but allowed the mortgagee to make out of the lot claimed as a homestead only the actual amount of the purchase money and interest remaining due, holding that for the excess over such purchase money, he must proceed on his other security, or against the party, but not against the homestead.[6] Where a man who is married occupies property as a tenant, and concludes to purchase, borrowing the whole of the purchase money from another and mortgaging the premises to him to secure the payment of the

same instant, or even on the same day, but whether they were parts of one continuous transaction, and so intended to be, so that the two should be given contemporaneous operation in order to promote the intent of the parties: 1 Washburn on Real Property, *178; Wheatley v. Calhoun, 12 Leigh, 264, 37 Am. Dec. 654; Love v. Jones, 4 Watts, 465; Snyder's Appeal, 91 Pa. St. 477. Hence, it will be found that in some of the cases the fact that the mortgage was executed pursuant to an agreement made prior to the execution of the deed of purchase has been the controlling consideration upon which the mortgage has been given precedence, although not in fact until some time after the execution of the deed. The reason is, that such a state of facts would show that both acts were but parts of the same continuous transaction. As evidence of the fact, such previous agreement would have equal probative force, although it might not be enforceable, because not in writing and within the statute of frauds. Even if such agreement while executory was not enforceable, yet when once executed by the execution of the mortgage, it becomes as effectual as if originally in writing, and in equity will be deemed [if the rights of no innocent purchaser have intervened] as taking effect by relation as of the date of the agreement."

[6] Dillon v. Byrne, 5 Cal. 455.

sum borrowed, although his wife may not sign the mortgage, still the homestead is subject to the mortgage, as the deed and mortgage are to be considered as parts of the same transaction.[7]

§ 644. **Administrator's sale and prior unrecorded conveyance.**—An unrecorded deed or mortgage binds the mortgagor and his administrator.[8] The administrator is a trustee, and succeeds to such rights as the intestate possessed, and no other. An interesting case in which this principle was applied occurred in Indiana. An intestate executed a mortgage on certain real estate to secure the purchase money. This mortgage was not recorded, and the administrator, having no knowledge of its existence, sold the land under an order of court, for the purpose of producing assets to meet claims against the estate, the estate being insolvent. The purchaser at this sale was also ignorant of this mortgage, paid the whole of the purchase money, which was a full and fair price for the property, and took a proper conveyance. The question presented to the court for decision was whether the mortgagee, whose mortgage was not recorded, was entitled to payment out of the proceeds of the real estate in preference to general creditors. The court held that the proceeds of the sale were subject to the mortgagee's lien, and that he was entitled to such preference.[9] The court discussed the question in its various aspects at considerable length. "It is only subsequent purchasers and encumbrancers in good faith who are protected against an unrecorded mortgage. As against all the world besides, the registry imparts no virtue or force whatever to the instrument. As against the mortgagor, and the estate while it remains in his hands, the lien is as perfect without

[7] Lassen v. Vance, 8 Cal. 271.

[8] Andrews v. Burns, 11 Ala. 691. The recording of a deed is not necessary as against the grantor's heirs: Willett v. Andrews, 106 La. 319, 30 So. 883.

[9] Kirkpatrick v. Caldwell, 32 Ind. 299.

registry as it is with it. It is so, also, against his general creditors, while he lives, and after his death. No change was wrought in the rights of the mortgagee with respect to the other creditors by his decease. The administrator was his personal representative, and, of course, took no better right than the intestate had. Indeed, he took no estate whatever in the lands mortgaged, but a duty with reference thereto fell upon him in the prformance of his trust, when it was discovered that its sale would be necessary to satisfy indebtedness. This was to file a petition for such sale, stating, amongst other things, the nature of the intestate's title. This implies some diligence to ascertain the precise fact. Mere ignorance is no excuse for him. It is his duty to know the truth; and, indeed, he is unfaithful to his trust if he fails to inform himself of the entire condition of the whole estate, unless, indeed, proper diligence fails to discover it. This record merely discloses his want of knowledge, and we are not able to preceive why that circumstance should in any manner influence the decision of the question before us. Why should general creditors derive an advantage from the administrator's ignorance of a fact? They have not acted upon it to their injury. If this ignorance was the result of his negligence in making inquiry, and shall profit one creditor at the expense of another, then the rights of creditors in the fund would depend much upon the care and attention which the administrator brings to the performance of his duties; and we suppose this cannot be. We are of the opinion that the fact that the administrator did not know of the existence of the mortgage may be laid out of the case as an element wholly immaterial." "It certainly cannot be of avail to the general creditors that they had no notice of the mortgage. They are not in a position to avail themselves of such want of notice, not being purchasers or encumbrancers." To the argument that, if the mortgagor had sold the land to an innocent purchaser and received the purchase money during his lifetime, the mortgagee would not be permitted to pursue the fund in his hands, but must have

rested content with the result of his remedy at law *in personam*, and hence, as a logical result, could not follow the proceeds in the hands of the administrator, the court replied: "The argument has apparent force, and, indeed, would be convincing if the administrator held the fund as the mortgagor would hold it in the case supposed. In the absence of fraud, the latter would hold it in his own right, but the administrator holds it as a mere trustee, to be disposed of under the control of the court, in the payment of debts, and any surplus by distribution. If the existenc of the mortgage had been stated in the petition for the sale of the land, as it should have been, if known, the court would have ordered the sale subject to the mortgage, or else for the payment thereof, as might have been adjudged best. In the latter case, the administrator's duty would have required him to apply the proceeds of the sale, so far as necessary, to the payment of the mortgage debt; and the court would have enforced this duty. But in the present case the administrator, in applying for power to sell, did not inform the court of the mortgage, and consequently the decree made no provision for it, and the purchaser, being without notice, took title free from the mortgage, paying a corresponding price. The money is in the hands of the administrator, and no equities have intervened in behalf of other creditors. There is no reason, therefore, why the court should not, for the purposes of justice, follow the proceeds, still in reach, and subject them to the lien which originally subsisted against the land, as is habitually done in other cases of trusts, where the trustee has either willfully or ignorantly violated his duty by disposing of the trust estate." [1]

§ 645. **Compliance with preliminary requirements.**— To entitle a deed to be recorded, all preliminary requirements

[1] Kirkpatrick v. Caldwell, *supra*, per Frazer, C. J. And see Stewart v. Mathews, 19 Fla. 752.

must be complied with. It must be properly executed and acknowledged. If the deed is defective in any of these particulars, the rule is firmly established, that spreading it upon the record does not give constructive notice of its contents.[2] "Without an acknowledgment, the recording of the deed could have no effect as to notice, for the statute requires the deed to

[2] Pope v. Henry, 24 Vt. 560; Stevens v. Hampton, 46 Mo. 408; Galt v. Dibrell, 10 Yerg. 146; Lewis v. Baird, 3 McLean, 56; McMinn v. O'Connor, 27 Cal. 238; Holliday v. Cromwell, 26 Tex. 188; Chouteau v. Jones, 11 Ill. 300, 50 Am. Dec. 460; Whitehead v. Foley, 28 Tex. 268; Walker v. Gilbert, 1 Freem. Ch. 85; Blood v. Blood, 23 Pick. 80; Herndon v. Kimball, 7 Ga. 432, 50 Am. Dec. 406; Isham v. Bennington Iron Co., 19 Vt. 230; Suiter v. Turner, 10 Iowa, 517; Reynolds v. Kingsbury, 15 Iowa, 238; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Brinton v. Seevers, 12 Iowa, 389; Mummy v. Johnson, 3 Marsh. A. K. 220; Schults v. Moore, 1 McLean, 523; Ely v. Wilcox, 20 Wis. 523, 91 Am. Dec. 436; Brown v. Lunt, 37 Me. 423; Edwards v. Brinker, 9 Dana, 69; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Johns v. Reardon, 3 Md. Ch. 57; De Witt v. Moulton, 17 Me. 418; Stevens v. Morse, 47 N. H. 532; Harper v. Reno, 1 Freem. Ch. 323; Graham v. Samuel, 1 Dana, 166; Barney v. Little, 15 Iowa, 527; Cockey v. Milne, 16 Md. 200; White v. Denman, 1 Ohio St. 110; Hodgson v. Butts, 3 Cranch, 140, 2 L. ed. 391; Sumner v. Rhodes, 14 Conn. 135; Carter v. Champion, 8 Conn. 549, 21 Am. Dec. 695; Work v. Harper, 24 Miss. 517; Thomas v. Grand etc. Bank, 9 Smedes & M. 201; Strong v. Smith, 3 McLean, 362; Green v. Drinker, 7 Watts & S. 440; Parkist v. Alexander, 1 Johns. Ch. 394; Heister v. Fortner, 2 Binn. 40, 4 Am. Dec. 417. See, also, Kerns v. Swope, 2 Watts, 75; Graves v. Graves, 6 Gray, 391; Shaw v. Poor, 6 Pick. 88, 17 Am. Dec. 347; Harper v. Barsh, 10 Rich. Eq. 149; Cheney v. Watkins, 1 Har. & J. 527, 2 Am. Dec. 530; Tillman v. Cowand, 12 Smedes & M. 262; Burnham v. Chandler, 15 Tex. 441; Bossard v. White, 9 Rich. Eq. 483; Brydon v. Campbell, 40 Md. 331; Bass v. Estill, 50 Miss. 300; Fleming v. Ervin, 6 W. Va. 215; Dussaume v. Burnett, 5 Iowa, 95; McKean v. Mitchell, 35 Pa. St. 269, 78 Am. Dec. 335; Galpin v. Abbott, 6 Mich. 17. A deed is not duly recorded unless the record shows that the certificate of proof or acknowledgment is sufficient: Merriman v. Blalack, (Tex. Civ. App.) 121 S. W. 552. The omission of the words "before me" by the recorder of deeds in his transcription of a certificate of acknowledgment attached to a deed, does not make the record of the deed ineffectual to give constructive notice to third persons of the transfer: Sis v. Boarman, 11 App. Cas. (D. C.) 116.

be executed and acknowldged and then recorded, to operate as constructive notice. And if this acknowledgment be defective in not showing that the person who took the acknowledgment had a right to take it, the act does not appear to be official, and is not a compliance with the statute. And where a purchaser is to be charged with constructive notice from the mere registration of a deed, all the substantial requisites of the law should be complied with. As well might it be contended that a recorded deed without an acknowledgment would be notice, as that it would be notice with a defective acknowledgment." [3] An instrument is not entitled to

[3] Schults v. Moore, 1 McLean, 520, 527; Wood v. Cochrane, 39 Vt. 544; Jones v. Berkshire, 15 Iowa, 248, 83 Am. Dec. 412; Todd v. Outlaw, 79 N. C. 235. And see McMinn v. O'Connor, 27 Cal. 238. See Masterson v. Todd, 6 Tex. Civ. App. 131, 24 S. W. 682. Where an agreement is made between a landowner and a water company, creating a lien on land for water supplied, the acknowledgment of the agreement by the landowner entitles it to record, and its registration imparts notice to subsequent purchasers under him of the lien: Fresno Canal etc. Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112. And see Spect v. Gregg, 51 Cal. 198. Where it is necessary that a conveyance should be sealed, an instrument to which a seal is not affixed is not entitled to be recorded: Racouillat v. Sansevain, 32 Cal. 376; Racouillat v. Rene, 32 Cal. 450. In the latter case, Sawyer, J., said: "The instrument of April 13, 1851, is not under seal, and whether properly acknowledged in other respects or not, was not entitled to record under the act concerning conveyances as it stood at the date of the instrument. The record, therefore, did not impart constructive notice of its contents to anybody; and unless Rene had actual notice of the contract embraced in the instrument, he was not affected by it." But see Wallace v. Moody, 26 Cal. 387. If the instrument, however, was sealed in a proper manner when it was executed, it is not invalidated by a subsequent loss of the seal, unless the seal was removed before it was presented for registration, and the party who attempts to invalidate the instrument has the burden of proof: Van Riswick v. Goodhue, 50 Md. 57. If the statute requires a conveyance to be attested by two witnesses to entitle it to registration, and a conveyance is thus witnessed, but is recorded by mistake without copying the attestation, the record, as it is, is not constructive notice; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Frostburg v. Brace, 51 Md. 508; Potter v. Strausky, 48 Wis. 235; Gardner v. Moore, 51 Ga.

record when it purports to have been signed and acknowledged by a firm, and in a firm name. It must appear by which member of the firm this was done.[4] Where a deed of a corporation is duly sealed, and is in all respects properly recorded, except that the record fails to show a copy of the seal, or any device representing it, such record is valid and sufficient to operate as notice, if it represents on its face, in any other way, that the deed was in fact sealed.[5]

§ 646. **Illustrations—Attesting witnesses.**—This principle is most often applied in the case of defective acknowledgments. But all other requirements of the statute antecedent to registration must be complied with to make the record notice. If, for instance, a mortgage with only one subscribing witness is, by the provisions of a statute, void as a legal mortgage, the registration of such an instrument will not raise the presumption of notice to a purchaser from the mortgagor.[6] In Con-

268; Hastings v. Cutler, 24 N. H. 481; Morrill v. Morrill, 60 Vt. 74, 6 Am. St. Rep. 93; Carler v. Campion, 8 Conn. 549, 21 Am. Dec. 695. A record of a mortgage is notice to subsequent purchasers in favor of a person who holds an assignment of the mortgage duly recorded, if the acknowledgment is in proper form and the defect is not apparent, as where the officer who took it acted out of his jurisdiction: Heilbrun v. Hammond, 13 Hun, 474. "The authentication of the notary's seal is just as essential to a perfect acknowledgment as is his signature; and, when the deed lacks this, it cannot be properly recorded": Koch v. West, 118 Ia. 468, 92 N. W. 663, 96 Am. St. Rep. 394; Pitts v. Seavey, 88 Ia. 336, 55 N. W. 480; Kreuger v. Walker, 80 Ia. 733, 45 N. W. 871; Hiles v. Atlee, 90 Wis. 72, 62 N. W. 490.

[4] Sloan v. Owens etc. Machine Co., 70 Mo. 206. The seal of the officer taking the acknowledgment is essential to its due registration: Masterson v. Todd, 6 Tex. Civ. App. 131.

[5] Heath v. Big Falls Cotton Mills, 115 N. C. 202.

[6] Harper v. Barsh, 10 Rich. Eq. 149; Thompson v. Morgan, 6 Minn. 292; White v. Denman, 16 Ohio, 59; Van Thorniley v. Peters, 26 Ohio, St. 471; Hodgson v. Butts, 1 Cranch, C. C. 488; New York Life Ins. etc. Co. v. Staats, 21 Barb. 570; Frostburg Mut. Building Assn. v. Brace, 51 Md. 508; Gardner v. Moore, 51 Ga. 268; Van Riswick v. Goodhue, 50 Md. 57; Ross v. Worthington, 11 Minn. 438, 88 Am.

necticut the same question was similarly decided. The court carefully considered the question, and held that the registration of a deed, defective in having but one legal witness, was not constructive notice of such conveyance. The considerations by which the court was governed in arriving at this conclusion are fully stated in the portion of the opinion quoted in the note.[7]

Dec. 95; Van Thorniley v. Peters, 26 Ohio St. 471; White v. Magarahan, 87 Ga. 217; Potter v. Stransky, 48 Wis. 235; Morrill v. Morrill, 53 Vt. 74, 38 Am. Rep. 659. See, also, State v. Cowhick, 9 Wyo. 93, 60 Pac. 265.

[7] Carter v. Champion, 8 Conn. 549, 21 Am. Dec. 695. Said Williams, J.: "The question then comes to this: Is the registering of a defective deed constructive notice so as to bind third persons? Here it is to be remarked, that the registering of a deed is a legislative regulation, founded indeed upon the best principles of policy for the security of titles, but still depending for its effect upon the true construction of the statute. Our statute has prescribed the manner in which deeds of land shall be executed; that they shall be attested by two witnesses, acknowledged before a magistrate, and, to make them effectual against third persons, shall be recorded. The deed to be recorded, then, is the deed spoken of in the statute; that is, a deed executed according to the statute, not the instrument merely which the common law would denominate a deed, but the instrument which has the statute requisites to give it validity as a deed; because no other instruments are recognized as grants and deeds of 'houses and lands,' the statute being express that no grant or deed of land shall be valid unless written, subscribed, witnessed, and acknowledged, as aforesaid. In one case only, a provision is made for a deed not completed according to the requisites of the statute; and that is where the grantor refuses to make an acknowledgment. Then, in conformity to a similar provision in the civil law, the grantee may leave a copy of his deed, with a claim of title, with the register, which secures his title until a legal trial has been had. This exception shows that in all other cases, the deeds completed in the manner required by statute were intended. That this is not a deed of that character, the whole object of the bill shows. Is the recording, then, of such an instrument of any effect? It may, indeed, be evidence tending to prove *actual* notice; but when the fact of actual notice is negated, as it is in this case, can the record have any effect upon third persons? Now, if this be a rule of policy, adopted by the legislature, the court is not to extend it to the cases not within its provisions, and should it be extended to the case on trial, I know not where we are to stop, or what line to draw. If

§ 646a. Statutes requiring payment of taxes prior to registration.—In some States it is provided by statute that a deed cannot be recorded unless it appears by a proper certificate that the taxes charged upon the land have been paid, and that no outstanding tax liens or titles exist. These statutes have been attacked as being unconstitutional, for attempting to interfere with the acquisition and disposition of property, and as taking property without due process of law. On this question there is a divergence of opinion. The views of one court are thus expressed: "If the law provided a means by which the validity of the tax could be determined before payment, and protected the party meanwhile by providing for a temporary receipt of the deed, or otherwise, it probably could be sustained as constitutional, even though it should put the

it be said that no prudent man will stop without looking at the record, that may be said as truly in any other case as in this, and would be equally applicable to any other defect. But, in point of fact, we know purchases are often made, where from the distance of the record, or a reliance upon the integrity of the grantor, no such examination is made, and although this is no excuse for a party, where his case is within the act, yet it may have been the reason why the legislature did not extend the provisions of the act to cases of this kind. But whatever may have been their reasons, it is sufficient for me that they have not done so."

Where an instrument is required to be acknowledged before two justices of the peace, the record of an instrument acknowledged before one justice only is not notice: Duffphey v. Frenaye, 5 Stewt. & P. 215. The record of a conveyance of a married woman is not notice when the acknowledgment is not taken separate and apart from her husband; Armstrong v. Ross, 20 N. J. Eq. 109. If a statute requires that a certificate of the official character of the officer shall accompany the certificate of acknowledgment, this must be done to make the record notice; but the certificate may be obtained afterward, and if properly recorded the conveyance is considered as recorded from the time at which this certificate is filed: Reasoner v. Edmundson, 5 Ind. 393; Ely v. Wilcox, 20 Wis. 523, 91 Am. Dec. 436. An instrument is not entitled to registration where the certificate of acknowledgment designates the persons who make the acknowledgment as "grantors of the within indenture," omitting the statement that they are known to the officer to be the persons who executed the conveyance: Fryer v. Rockefeller, 63 N. Y. 268.

burden of proving the illegality of the tax upon the grantee, which, however, would look like an unnecessary hardship, when we consider the power possessed by the State to enforce the collection of its revenues. In the case of small illegal charges, the act in question practically inaugurates a system of petty robbery by the State, for the costs of a suit to recover small sums paid would prevent parties from bringing them. It is not a taking by due process of law, and it conflicts in a measure with the constitutional provision declaring that private property shall not be taken for public purposes without just compensation having been first made or paid into court for the owner. The act is rather judicial than legislative in character. It, in effect, declares or adjudges all taxes shown by the records as a charge upon real estate to be lawful, or it practically authorizes the State to compel payment of illegal demands. The constitutional provision declaring that no person shall be deprived of life, liberty, or property without due process of law, is not limited to judicial proceedings, but extends to every proceeding which may interfere with those rights, whether judicial, administrative, or executive." [8]

§ 646b. **Such satutes held to be constitutional.**—On the other hand, similar statutes have been held to be constitutional on the ground that the legislature has power to provide for the manner of transferring title to real estate, and for the registration of conveyances. The statute, it is said, may provide what instruments shall be recorded, and how they shall be executed and authenticated so as to entitle them to registration, and may prescribe any other rule, regulation, or condition of a legislative character that may be deemed wise.[9]

[8] State ex rel. Baldwin v. Moore, 7 Wash. 173, 34 Pac. Rep. 461.

[9] State v. Register of Deeds of Ramsey Co., 26 Minn. 521, 6 N. W. Rep. 337. The statute referred to in this case provided, "When any deed, plat of any townsite, or instrument affecting the same, or any other conveyance of real estate, is presented to the county auditor for transfer, he shall ascertain from the books and records in his office if

In Michigan, where a statute of similar import exists, it was contended that the law was void, because, among other reasons, it was an unwarrantable infringement of property rights. But the court, per Mr. Justice Grant, said it thought otherwise, and continued: "Mere inconvenience, however great, is not sufficient to defeat a law. That is a consideration for the legislature, and not for the court. The State may enact stringent measures to enforce the collection of the public revenue. The law provides ample remedies for the property owner to contest the validity of the tax assessed against him. He may pay the tax under protest, and at once bring suit to recover it back. He may appear in court when the State brings suit to foreclose its lien, and there contest its validity. The register of deeds is a constitutional officer, but the conditions under which deeds are entitled to record are entirely within the discretion of the legislature, and the court cannot declare them void because they are harsh. Besides, the recording of the deed is not necessary to pass title. The registry law is only designed to record and preserve evidence of title. Title passes upon the execution of the deed, and possession under it is notice to all of the rights of the grantee in possession." [9a]

there be delinquent taxes due upon the land described therein, or if it has been sold for taxes; and if there are delinquent taxes due, he shall certify to the same; and upon the payment of such delinquent or other taxes that may be in the hands of the county treasurer for collection, he shall transfer the same, and note upon every deed of real property so transferred, over his official signature, 'taxes paid and transfer entered'; or if the land described has been sold or assigned to an actual purchaser for taxes, 'paid by sale of land described within'; and, unless such statement is made upon such deed or other instrument, the register of deeds shall refuse to receive or record the same. A violation of the provisions of this section by the register of deeds shall be deemed a misdemeanor, and, upon conviction thereof, he shall be punished by a fine of not less than one hundred dollars, nor exceeding one thousand dollars."

[9a] Van Husan v. Heames, 96 Mich. 504, 56 N. W. Rep. 22. That payment of tax must be made: See Martin v. Bates, 20 Ky. L. Rep. 1798, 50 S. W. 38; Chadwick v. Gulf etc. Co., 74 Fed. 616, 20 C. C. A. 563; State v. Weld, 66 Minn. 219, 68 N. W. 1068.

§ 646c. **Comments.**—We have gone into this matter somewhat fully because the tendency of modern legislation is to provide methods for speedily enforcing the payment of taxes, and to abolish, so far as statutes can effect the object, the strict rules by which every step in a tax proceeding was formerly measured. Statutes requiring all taxes to be paid before any instrument affecting real estate shall be recorded, seem to supply an easy and efficacious way of forcing the payment of taxes. Whatever may be said against the policy of such legislation on the ground that it compels the payment of taxes, although they may be invalid, and leaves the person paying to the doubtful remedy of recovering the money in a suit,[1] still, in our mind, these are not just objections to their constitutionality. The right to have a deed recorded is purely one of statutory origin. For the purpose of providing a uniform and convenient method of giving notice of claims to real estate, where actual notice does not exist, the State has provided a means for registering instruments affecting the title to land. The State has made the observance of certain preliminary requirements essential to the complete effect of the record. It prescribes that the instrument shall be acknowledged and in what manner. It may prescribe that the deed shall be attested by witnesses, shall be subject to a stamp tax, and may likewise prescribe any other condition. If a person does not wish to record a deed, it cannot be said that he has lost any constitutional privilege. His title is in no manner affected. The title passes by the execution and delivery of the conveyance, and if he assumes possession, his rights are complete. If he desires to avail himself of certain statutory privileges, by which he may be enabled to give constructive notice of his interest, he is not deprived of this right, but must exercise it on compliance with the conditions prescribed. The State is under no obligation to provide a registry law at all. It is true that in every State in the Union registry laws are in force, but this is

[1] See §§ 1349–1351, *post*.

only because public convenience has found them necessary. But so far as any principle of constitutional law is involved, all these laws might be repealed. If they can be absolutely repealed, the State certainly has power to modify them by determining what instruments shall be recorded, and by declaring the conditions which those wishing to obtain the benefit of the registry laws must observe. If one of these conditions be the payment of all taxes antecedently levied, the State, in our judgment, has power to prescribe it, and such a provision, on this ground, cannot be held to be unconstitutional.

§ 647. **Attachment at time of acknowledgment.**—A deed was acknowledged before a register of deeds, and given to him to be recorded. At the same instant, the real estate described in the deed was attached by a creditor of the grantor. On the ground that the deed could not be recorded without a certificate of the acknowledgment, and it must have required some time to write out the certificate, the attachment was held to have priority over the deed.[2] The court said : "It was not in a state to be considered as recorded until after the attachment was made. It should not only be acknowledged, but the certificate of acknowledgment should be completed before the delivery of the register, in order that such delivery shall constitute a record. The certificate of acknowledgment is to be a part of the record. It is not sufficient that the register is informed of the acknowledgment; the object of recording is to give notice to others. Until this certificate was affixed, the fact that the deed was acknowledged, and in the register's hands, could not be noticed." [3]

[2] Sigourney v. Larned, 10 Pick. 72.

[3] Sigourney v. Larned, *supra*. Continuing, the court said: "By the statute (Stats. 1783, c. 37, § 4), a deed, to have effect against any but the grantor and his heirs, and to entitle it to be recorded, must be acknowledged by such grantor before a justice of the peace. Here Mr. Ward acted in the double capacity of justice of the peace and register of deeds. He could not consider the deed as in his official

§ 648. **Incapacity to take acknowledgment.**—Under the statute in Missouri, a justice of the peace in one county has no power to take and certify the acknowledgment of an instrument conveying lands in another county. If an acknowledgment is taken by such an officer under these conditions, the acknowledgement is a nullity, and the deed imparts no notice, although it may have been recorded.[4] As has been explained in a previous section, a party in interest is disqualified from taking an acknowledgment. If, however, he does take the acknowledgment, and the instrument shows upon its face the fact that he is interested, its registration is improper, and does not impart notice. But it is held that, when the instrument upon its face does not disclose this fact, it is the duty of the register to receive and record it. Under this state of facts, it will, notwithstanding there may be some hidden defect, operate as notice.[5]

custody in the latter capacity, until he had done his office in taking the acknowledgment of the grantor in the former, which must necessarily take some time. The exact time when the certificate was made does not distinctly appear; but the probability is that it was not done till the next morning. But we do not decide the case upon that ground; had the magistrate proceeded instantly to write the certificate of acknowledgment, it must have taken some time during which the attachment took effect. Where, in a controverted question of property, the parties stand upon equal grounds in point of equity, the legal title shall prevail; and, in such cases, slight circumstances are sufficient to determine that priority upon which we think the preferable legal title depends. Here we think the attachment was prior in time, and the maxim, *prior in tempore, potior in jure,* must decide in favor of the attaching creditor."

[4] Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533.

[5] Stevens v. Hampton, 46 Miss. 404. A court of equity cannot correct a mistake in a certificate of acknowledgment, in which the grantee instead of the grantor appeared to be the person who made the acknowledgment, so as to make the record of the deed operative from the beginning. It is impossible in such a case to determine whether the mistake was committed in writing the wrong name in the certificate, or in taking the acknowledgment of the wrong person: Wood v. Cochrane, 39 Vt. 544.

§ 649. **Omission of name of grantee.**—A conveyance, although it has been recorded, in which the name of the grantee is omitted, is not constructive notice to subsequent purchasers. As an illustration of this rule, a case may be cited where the name of the mortgagee was left blank in a mortgage, and the court said, with reference to this defect: "The question in this case is not as to whether there might be an implied authority between the mortgagor and the mortgagee to fill up the blank and make the instrument complete. The question is, as to the effect of the record of the instrument in its imperfect condition, as constructive notice to a subsequent purchaser of the property. It has been frequently held that slight omissions in the acknowledgment of a deed destroy the effect of the record as constructive notice. A *fortiori,* it seems to us, should so important and vital an omission as that of the name of the grantee have that effect." [6]

§ 650. **Description of land.**—As the object of the registry acts is to enable purchasers to obtain accurate information respecting the title to any particular piece of land, it is

[6] Disque v. Wright, 49 Iowa, 538, 540, per Day, J. The court cited the case of Chauncey v. Arnold, 24 N. Y. 330, as being in point. If a conveyance is recorded without the signature of the grantor, though it may, in fact, have been signed, and the omission to record it an error, yet the record in such a case is not constructive notice: Shepherd v. Burkhalter, 13 Ga. 443, 58 Am. Dec. 523. If the transposition of the name of the parties is apparent, as where the mortgagee's name is by mistake written in the blank for the mortgagor, and the latter's name in the blank for the mortgagee, but it is signed by the proper party, and purports to secure a debt from the party who signs to the other, and is properly acknowledged by the person who signs it, subsequent purchasers from the mortgagor by its record are charged with notice of the mistake: Beaver v. Slanker, 94 Ill. 175. But see Seibold v. Rogers, 110 Ala. 438, 18 So. 312; Townsend etc. Co. v. Allen, 9 Kan. App. 230, 59 Pac. 683. The record of a conveyance is a nullity, where the certificate of acknowledgment fails to state that the officer is personally acquainted with the party acknowledging, if such a statement is required by statute: Kelsey v. Dunlap, 7 Cal. 160; Peyton v. Peacock, 1 Humph. 135. See,

essential to the accomplishment of this object that the description of the land in the conveyance should be reasonably certain and sufficient to enable subsequent purchasers to identify the premises intended to be conveyed.[7] In many cases the description is so inaccurate or misleading that courts have no hestitancy in declaring it insufficient to charge purchasers with constructive notice. In others, while the description is erroneous, yet it may be expressed in such a manner, or may be connected with such attendant circumstances, that a purchaser is deemed to be put upon inquiry, and, if he fails to prosecute this inquiry, he is chargeable with all the notice he might have obtained had he done so. We call attention in the following sections to instances in which these principles have been applied.

§ 650a. **Christian names in record.**—Generally speaking the first or Christian name of a person should appear for the protection of an innocent purchaser. But there are numerous cases to the effect that constructive notice may be imparted by the record if sufficient is shown to lead the inquirer to the knowledge sought to be given, and for the purpose of binding a purchaser with constructive notice the knowledge of the inquirer outside of the record and every fact which might be disclosed by the records if the inquiry had been prosecuted may be considered. Thus a mortgage appearing on the record as signed "S. M." Johnson is sufficient to show its execution by "Samuel M." Johnson.[8] Where the Christian name of a per-

also, Thurman v. Cameron, 24 Wend. 87; Johnson v. Walton, 1 Sneed, 258.

[7] Rodgers v. Kavanaugh, 24 Ill. 583; Port v. Embree, 54 Iowa, 14; Barrows v. Baughman, 9 Mich. 213; Eggleston v. Watson, 53 Miss. 339; Wolfe v. Dyer, 95 Mo. 545; Holloway v. Platner, 20 Iowa, 121, 89 Am. Dec. 517; Nelson v. Wade, 31 Iowa, 49; Green v. Witherspoon, 37 La. Ann. 751; Wright v. Lancaster, 48 Tex. 250; Murphy v. Hendricks, 57 Ind. 593; Adams v. Edgerton, 48 Ark. 419.

[8] Miltonvale etc. Bank v. Kunle, 50 Kan. 420, 26 S. W. 821, 34 Am. St. Rep. 129. The court in this case quoted with approval the following from 16 Am. & Eng.

son is Francis, a judgment indexed under the name of Frank charges purchasers with notice.[9] If nothing appears to show that more than one person of the same name exists, a mistake in the initial of the middle name of a party to a conveyance does not necessarily destroy the effect of the record as notice.[1]

Ency. of Law 122: "Absolute accuracy in spelling names is not required in documents or proceedings either civil or criminal; that if the name as spelled in the document, though different from the correct spelling thereof, conveys to the ear, when pronounced according to commonly accepted methods, a sound practically identical with the sound of the correct name as thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error."

[9] Burns v. Ross, 215 Pa. 293, 7 L.R.A.(N.S.) 415, 64 Atl. 526. But it was held in the same State that a judgment given by "Daniel J. Murphy" but signed "Daniel Murphy" and indexed as such, did not constitute a lien upon property held by him in the name of Daniel J. Murphy as against a purchaser who sought for liens only against "Daniel J. Murphy."

[1] Fincher v. Hanegan, 59 Ark. 151, 24 L.R.A. 543, 26 S. W. 821. In a case in Alabama, a mortgage was executed by "W. N. McDonald" but in the book of records the name appeared "W. H. McDonald." It was contended that the mistake in the middle name or initial was immaterial. The court held, that when a person signs his name by using initials* instead of writing the full names, the initials taken together in their regular order, should for the purpose of signature be regarded as the Christian name. On this point the court said: "It is the rule in modern business dealings to sign the initials only of one's Christian name. Such being the case, it is very necessary for the speedy transaction of business that the initials should be correctly given, where one so signs his name, before one should be held to know who the person signing was, merely from the record of his conveyance. It is true that some courts have held otherwise, contending that the property described, together with the identity of the surname, was sufficient to put the subsequent purchaser on notice of facts which, if followed up, would lead to knowledge of the real fact. But is it not a better rule to require the person taking a conveyance to see that it is correctly signed than to permit him to take a conveyance incorrectly signed, and charge some subsequent purchaser who has been misled by the name signed to pay for property twice, or pay for it once and then lose it? There are but twenty-six letters in our alphabet, and one of these must constitute the initial of every name in the land. The same letter is the initial of a vast number of different names; hence it can be easily seen that

§ 650b. Nickname.—An owner of land to whom property has been conveyed by a nickname may transfer it by his true name and the purchaser will acquire a valid title notwithstanding its difference from the name in the record.[2] But a judgment against "May Alley" will not bind subsequent purchasers when the title was vested in the name of "Mary A. Allely."[3] Where the Christian name of a woman is Helen a judgment indexed as Ellen is not notice.[4] But notice was held to have been imparted where a conveyance executed in the name of "J. A." Stringham was indexed as "A. J." Stringham and in the caption of the instrument it appeared to have been made by "Almira J. Stringham."[5] In Illinois the rule was declared to be that a purchaser would be protected by the title appearing of record, unless it could be shown that he had notice of some fact to the contrary.[6] In California it was decided that the omission by the clerk of the Christian name of a judgment debtor, or his failure to write the names in alphabetical order would not prevent the docketing from having full force of creating a judgment lien on the real property of the judgment debtor.[7] The substitution of one letter in a surname for another letter is not considered a fatal error.[8]

where a person signs his Christian name by initials only, each initial should be correctly written. The common rule of but one Christian name and one surname, and that a wrong middle initial or name is immaterial (if the rule applies to initials), will certainly not answer the modern requirements of business with reference to recorded conveyances being notice to the world of the conveyancer and the property conveyed." First National Bank v. Hacoda Mercantile Co., 53 So. 802.

[2] Fallon v. Kehoe, 38 Cal. 44, 99 Am. Dec. 350.

[3] Phillips v. McKaig, 36 Neb. 853.

[4] Thomas v. Desney, 57 Iowa, 50.

[5] Huston v. Seeley, 27 Iowa, 183.

[6] Grundies v. Reid, 107 Ill. 304.

[7] Hibberd v. Smith, 50 Cal. 511.

[8] Jenny v. Zehnder, 101 Pa. 206. See for numerous cases decided on the facts appearing in each case: Davis v. Steeps, 87 Wis. 472, 23 L.R.A. 818, 41 Am. St. 51, 58 N. W. 796; Wook v. Darby, 13 Pa. Co. Ct. 269; Miltonvale State Bank v. Kuhnle, 50 Kan. 420, 31 Pac. 1057, 34 Am. St. Rep. 129; Gillespie v.

§ 651. Illustrations of description insufficient to give constructive notice.—The description in a deed of land was: "Lying as follows, viz., beginning at a servisberry corner, thence north to white oak, thence east to white oak, thence south to limestone quarry, thence to a white oak; all these trees are marked for the purpose of running off the above-described land." The description omitted all reference to the township, county, or State in which the land was situated. The court conceded that this deed and an actual transfer of possession would pass a good title, but held that the record of it was not notice to a purchaser at a judicial sale, nor sufficient to put him upon inquiry.[9] A purchaser is not charged with constructive notice of a mortgage, describing certain lots upon a town plat

Rogers, 146 Mass. 612, 16 N. E. 711; Green v. Meyers, 98 Mo. App. 438, 72 S. W. 128; Avery v. Texas Loan Agency, (Tex. Civ. App.) 62 S. W. 793; Johnson v. Hess, 126 Ind. 298, 9 L.R.A. 471, 25 N. E. 445; Bankers' Loan & Investment Co. v. Blair, 99 Va. 606, 39 S. E. 231, 86 Am. St. Rep. 614; Johnson v. Wilson, 137 Ala. 468, 34 So. 392, 97 Am. St. Rep. 52; Aultman v. Ward, 50 Neb. 442, 69 N. W. 935; Hutchinson's Appeal, 92 Pa. 186; Wood v. Reynolds, 7 Watts & S. 406; Crouse v. Murphy, 140 Pa. 335, 12 L.R.A. 58, 21 Atl. 358, 23 Am. St. Rep. 232.

[9] Banks v. Ammon, 27 Pa. St. (3 Casey) 172. The opinion of the court was delivered by Knox, J., who on this point said: "The rule of *caveat emptor* applies to a purchaser at a judicial sale, but he is not bound to see what is not to be seen. He is protected by the recording acts, and secret defects in a title apparently good, are for him no defects at all. Notice may be by record, by possession, or it may be given directly to the person sought to be charged with it, either by writing or verbally. In the case before us, at the time of the Orphan's Court sale, the possession was in the heirs at law of Joseph Hutchison, and there was no proof of actual notice to the purchaser that Andrew Banks held a life estate in the premises sold. Was the record of the deed of 14th August, 1832, notice of the estate of Banks? We think not. There is nothing in the description to bring home notice to the purchaser of the identity of the land. Neither township, county, nor State is given for its locality; nor is the number of the tract or the amount of acres mentioned. No boundaries, courses, or distances referred to; all that is required to fill the description is to find one servisberry, three white oaks, a limestone quarry, with the trees marked in some manner. One about to purchase at a judicial sale, finding such a deed upon record,

which had not been recorded, when the lots were described by different numbers in a plat recorded afterward, and the mortgagee was not in possession of the premises. A party is not put upon inquiry by the absence of a town plat from the record till after the date and record of a conveyance of lots contained in it, so as to charge him with a knowledge of the facts that it was possible for him to ascertain by continuing such inquiry.[1] Certain property should have been described as "lot one in block six." It was, however, by mistake, described in the deed as "lot and six," a part of the words of the correct description being omitted. A purchaser at a judicial sale, it was held, would take priority over a senior purchaser holding a deed in which the property was thus inaccurately described, unless at the time of his purchase he had such notice as would put a reasonably prudent man upon inquiry.[2] A conveyance of "all the estate, both real and personal," to which the grantor "is entitled in law or in equity, in possession, remainder, or reversion," is operative as a transfer of the grantor's whole estate. But it is held that the registry of a deed in which the land conveyed is described in such general terms, is not notice in law to a subsequent purchaser from the grantor of the

might safely assume that it did not apply to land of which the grantor died seised."

[1] Stewart v. Huff, 19 Iowa, 557. Said Cole, J.: "The plaintiffs might have protected themselves perfectly, and secured a priority for their mortgage by causing the plat of Dyersville, then in existence, to be duly recorded. Without such recorded plat there was one link wanting in their chain of title upon the record. The only means of supplying this defect in their record title was to take possession of the property, or otherwise bring actual or constructive notice to the defendant, of the existence of the missing link. There is no finding of such fact, nor could the mortgage of certain lots in a town plat not upon record be construed into a notice of a claim upon other lots in a plat afterward made and recorded; nor can the absence from record of a town plat till after the date and record of a mortgage of lots therein, in any just or legal sense be held to put a party upon inquiry so as to charge him with knowledge of facts within the possible range of such inquiry."

[2] Nelson v. Wade, 21 Iowa, 49. See Jones v. Bamford, 21 Iowa, 217.

existence of the deed; such a purchaser is not affected by actual notice of a deed of this character, and of its contents, unless he had notice also that the deed embraced the land purchased by him. It is also held that the proof of such notice must be sufficient to affect the conscience of the purchaser, and not merely to put him upon inquiry.[3] In Minnesota, under certain provisions of the statute, a mortgage may be foreclosed by "advertisement." But it is essential to the exercise of this right that the mortgage shall be "duly recorded."[4] Certain premises were described in a mortgage as the "west half of the southeast quarter of section 14." But the premises were described in the registry as the "west half of the northeast quarter of section 14." It was held that the mortgage was not "duly recorded," on account of the error in the record, and that a foreclosure of the same could not be had by advertisement.[5] A mortgage was executed to the State of Indiana for a loan of school funds. The premises affected were described by subdivisions, but the county and State in which they were situated were not named. The mortgagor brought an action to quiet title against a purchaser at a sale made by the county auditor. The court held that the mortgage was void for uncertainty in the description of the land, and that a sale by the auditor was consequently a nullity and conveyed no title to the purchaser.[6]

[3] Mundy v. Vawter, 3 Gratt. 518.

[4] Gen. Stat. Minn., c. 81, §§ 1, 2.

[5] Thorp v. Merrill, 21 Minn. 336. And see Ross v. Worthington, 11 Minn. 438, 443, 88 Am. Dec. 95; Morrison v. Mendenhall, 18 Minn. 232, 236.

[6] Murphy v. Hendricks, 57 Ind. 593. Said Biddle, C. J., for the court: "The vast territory lying northwest of the Ohio River was surveyed upon a system of base and meridian lines, under various acts of Congress, and this congressional survey is part of the public law which we must notice. Without naming the State or county, or without something by which the State and county could be ascertained, the description of the land in this mortgage would be just as applicable to the same township and range in reference to any other base and meridian line in the several States northwest of the Ohio River, as it is to the base and meridian lines by which the survey of the lands in the State of Indiana

§ 652. Illustrations where purchaser bound, though description inaccurate.—In a conveyance filed for record, the land was described as "the south half of the southeast quarter of section 15, town. 8 north, range 43 east, of the fourth principal meridian." The correct description should have been "the south half of the southeast quarter of section 15, in town. 43 north, range 8 east, of the third principal meridian," the numbers of the township and range having been transposed, and there being no land in the county corresponding to the description in the deed. It was held, however, that notwithstanding the misdescription, the registry laws were applicable, and that a purchaser was put upon inquiry and charged with knowledge of the conveyance of the premises.[7] The owner of a northeast corner of a lot of land sold it, but in the deed it was described as the northwest corner of the lot, which was the property of another. The grantee subsequently sold the land to third persons in payment of an antecedent debt, but, following the description in his deed, made the same mistake in his conveyance to the second grantees. When the mistake was discovered, the grantor and the grantee in the first deed, for the purpose of correcting the error in the

were [was] made. It is, impossible to ascertain, therefore, from the face of the mortgage, or from anything to which the mortgage refers, in what State or county the land described therein lies. As the mortgage is the basis of title in the appellants, we think it too uncertain to uphold their claim. In addition to the case cited, which we regard as being in point, the following authorities fully support the same principle: Porter v. Byrne, 10 Ind. 146, 71 Am. Dec. 305; The Eel River Draining Assn. v. Topp, 16 Ind. 242; Munger v. Green, 20 Ind. 38; Gano v. Aldridge, 27 Ind. 294; Key v. Ostrander, 29 Ind. 1; German etc. Ins. Co. v. Grim, 32 Ind. 249, 2 Am. Rep. 341; Harding v. Strong, 42 Ill. 148, 89 Am. Dec. 415, and 3 Wash. Real Prop. (4th ed.), pp. 384–412." See, also, Cochran v. Utt, 42 Ind. 267. For other cases involving similar questions to those mentioned in this section, the reader is referred to Galway v. Malchow, 7 Neb. 285; Brotherton v. Levingston, 3 Watts & S. 334; Lally v. Holland, 1 Swan, 396; Martindale v. Price, 14 Ind. 115.

[7] Partridge v. Smith, 2 Biss. 183. See, also, Polk v. Chaison, 72 Tex. 500.

former deeds, joined in a deed to the second grantees, of the northeast corner of the lot, its correct description. It was held that the second grantees were entitled to the land in equity as against a person who had purchased it, with notice of the error, under a judgment obtained against the original grantor after the execution of the first deed, but before the second deed correcting the error was made.[8] A lot was described in a mortgage by the number "eighteen," instead of its correct number "eight." A subsequent mortgage was executed, in which the lot was correctly described, but the second mortgagee had notice of the mistake in the first mortgage. It was held that the lien of the first mortgage attached to lot "eight," and that it was entitled to priority over the subsequent mortgage.[9] A mortgage was executed which described the land affected as "beginning two hundreds north of the southwest quarter of section number 34," but omitted by mistake the word "rods," after the word "hundreds." But the deed by which the mortgagor held the land, and which was recorded, contained a correct description of the land, describing it as beginning two hundred rods from the same corner mentioned in the mortgage. A subsequent mortgagee had knowledge that the land was occupied by the mortgagor as his homestead for a long period of time. It was held that the record, with the other facts, charged the subsequent mortgagee with notice of the prior mortgage and of the land intended to be affected.[1]

[8] Gouverneur v. Titus, 6 Paige, 347.

[9] Warburton v. Lauman, 2 Greene, 420, 424.

[1] Bent v. Coleman, 89 Ill. 364, 7 Am. Rep. 366. Said Mr. Justice Breese: "A person about to purchase this tract of land would naturally inquire into the title of the vendor; he would ascertain his source of title. This is the ordinary and usually the first inquiry. By turning to the records he would discover his vendor purchased the land of James Corunda, and received a deed therefor on April 11, 1855, in which the land was described as follows: Commencing two hundred *rods* north of the southwest corner, etc., containing forty acres of land. This deed was filed for record on April 13, 1855, and recorded May 4, 1855, and thereby open to the inspection of

§ 653. Description by an impossible sectional number.—If the premises are described by an impossible sectional number, the record of the deed, it follows in accord with

all persons. This reference, which a person of the most ordinary prudence would make, would have satisfied a searcher for the truth that there was a mistake in the description, and in this case the more especially, as all the mortgagees holding by mortgages subsequent, knew the land mortgaged was the homestead of their grantor. It was a well-improved tract, inclosed by a growing hedge, with a comfortable dwelling and other structures of a permanent and valuable character. The mortgagor occupied it from the time of his purchase from Corunda to the date of the last mortgage, something like twenty years. Appellant was familiar with the place, being a frequent visitor there, and knew when she took her mortgage it was his home place, and the record would have told her it was the forty acres he purchased of James Corunda." A court of equity may reform a mortgage which omits a parcel of land which the parties intend to include, and the parcel omitted will be free from a judgment lien created after the execution of the mortgage: White v. Wilson, 6 Blackf. 448, 39 Am. Dec. 437. A conveyance described the land as "lot four of block one of the La Fontaine farm lying south of the river road, and fronting on Detroit river, being now used and occupied with the steam sawmill thereon, by the parties of the first part." It appeared, however, that that portion of the La Fontaine farm had been platted into four lots or blocks, which had not been subdivided; the mill was situated on the one numbered four on the plat; the others were fenced in and occupied with the mill. The court held that the words "of block one," of the above description, should be rejected, and that when the error in a conveyance is apparent, the record is notice to subsequent purchasers: Anderson v. Baughman, 7 Mich. 69, 74 Am. Dec. 699. See Tousley v. Tousley, 5 Ohio St. 78. A subsequent judgment lien is not entitled to priority because there has been an error in the description of a prior deed or mortgage: Welton v. Tizzard, 15 Iowa, 495; Gillespie v. Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559; Sevarts v. Stees, 2 Kan. 236. For various instances on which omissions and inaccuracies in the description have been held immaterial, and not to affect the validity of a conveyance, because the land was sufficiently described to enable it to be identified, see Thornhill v. Burthe, 29 La. Ann. 639; Consolidated Associated Planters v. Mason, 24 La. Ann. 518; Ellis v. Sims, 2 La. Ann. 251; Boon v. Pierpont, 28 N. J. Eq. 7; Slater v. Breese, 36 Mich. 77; Shepard v. Shepard, 36 Mich. 173; Baker v. Bank, 2 La. Ann. 371; Bank v. Barrows, 21 La. Ann. 396; Marcotte v. Coco, 12 Rob. (La.) 167; Bank v. Denham, 7 Rob. (La.) 39.

the foregoing decisions, is sufficient to put a purchaser from the same grantor upon inquiry. He might, by pursuing such inquiry, obtain actual knowledge of the prior deed. "Let it be granted," said Mr. Justice Breese, "that it was inaccurately recorded, the point we then make is, the record disclosed the fact that a deed for a tract of land with an impossible sectional number, in township thirty-four north, range three east, of the third principal meridian, was recorded, the names of the parties thereto distinctly appearing. Now, a party dealing with the grantor in such a deed would have his attention arrested by this singular description, and he would naturally be led to inquiry. The record afforded him abundant data, which, properly used and diligently inquired into, would inevitably lead him to the fact of the existence of the deed." [2]

§ 654. **Distinction between description in deed and mortgage.**—In Connecticut, it was intimated that a distinction exists between the sufficiency of a description of land in a deed and that of land in a mortgage. In the case in which this suggestion was made there were several mortgagors, and some of the parcels of land belonged to one of the signers, and some were the property of others. The mortgage described the land conveyed as "four certain farms situated in the town of Canaan, and bounded and described as follows," the farms being then separately described, and the description concluded in this language: "Also all such other lands as we, the grantors, or either of us, own or have any interest in, situate in said town of Canaan; reference being at all times had to the land records of said Canaan, and to the probate records for the district of Sharon, for more particular description of the same." There was another piece of land belonging to one of the grantors not adjacent to or connected with the farms described in the conveyance. On a bill to foreclose the mortgage, it was held by a majority of the court,

[2] Merrick v. Wallace, 19 Ill. 486, 498.

the court standing three to two, that this last-mentioned piece was not conveyed by the mortgage.[3] Mr. Justice Pardee, who spoke for the majority of the court, said: "Whatever might be held with regard to the sufficiency of such a description in an ordinary deed intended merely to convey title, yet we think such a description clearly insufficient in the case of a mortgage. It is a fixed principle of our law that mortgage deeds should give subsequent creditors of the mortgagor definite information as to the debt due to the mortgagee, and as to the particular property pledged for its payment. It is only by knowing what the property is that they can learn its value, and it is as important to them to know its value as to know the amount of the debt for which it is mortgaged; and they are entitled to the law of registration in obtaining this information. To be told that the mortgage covers all the real estate which the grantor owns in the town of Hartford, is to impose upon them the examination of many thousand pages of records; for it is to be borne in mind that the grantor himself may have received his titles by the same general description, and from many different grantors. The recognition by the courts of such a mortgage as valid would be equivalent to the abrogation of the recording system, so far as mortgages are concerned. It is not unreasonable to require of the mortgagee that his deed should mention a name, or a locality, or point to a monument, or a particular deed, or refer to some book or page. It would be only his proper contribution to the upholding of a system which confers great benefits upon the public. We are of opinion, therefore, that the general description in this mortgage was not sufficient to convey the interest of Mrs. Scott, the owner, to the mortgagees. We are not prepared to say that we should apply the same rule without qualification, to a deed that was intended only as a conveyance of title. The policy of our law with regard to the definite information to be given to creditors and purchasers by mortgages, does not ap-

[3] Herman v. Deming, 44 Conn. 124.

ply to ordinary conveyances. Here, however, comes in the policy of the law with regard to records of titles, which is applicable to all recorded conveyances, whether by absolute deed or mortgage." [4]

[4] Herman v. Deming, *supra.* Continuing, the justice said: "In North v. Belden, 13 Conn. 380, 35 Am. Dec. 83, this court said: 'It has ever been the policy of our law that the title to real estate should appear upon record, that it might be easily and accurately traced. This policy has added greatly to the security of our land titles, and has prevented much litigation which would otherwise have arisen.' And Swift in his Digest, vol. 1, p. 122, lays it down that 'it is essential that the land to be conveyed should be so located, butted, bounded, and described in the deed, as that it can be known where it lies, and be distinguished from any other tract of land, or there must be such reference to some known and certain description as will reduce the matter to certainty.' If we were to give judicial sanction to this form of conveyance, we should practically put an end to the recording system. If we say that such general language, following as here a particular description, does more than strengthen and secure what has gone before it, that it is sufficiently descriptive to support a distinct and independent grant of additional estate, and that it meets the requirements of that system, we should establish a precedent upon which grantees would hereafter rely, and from which the court would find it difficult to recede. After a succession of such conveyances, land records would cease to furnish any information; the same confusion would result as would come from the removal of all fences, mere-stones, and other monuments, which indicate the location of separating lines. The rule of law which declares that to be certain which can be made certain is not complied with in such a deed. The rule demands a reference and pointing to particular documents or records. If we say that such a reference is sufficiently explicit for the town of Canaan, and the probate district of Sharon, we say that it is proper for the town and probate district of Hartford, with its fifty thousand pages of records. A search through and an examination of these does not come within any reasonable interpretation of the rule. We are aware that courts have confirmed grants made in this general form; for instance, in 1814, in Jackson v. De Lancey, 11 Johns. 365, the court subjected to the operation of a deed made in 1770, a tract of land which was not otherwise described therein than in the following clause: 'And all other lands, tenements, and hereditaments belonging to said William Alexander, Earl of Stirling. within the province of New York.' This was made to rest upon the principle that grantors and grantees may make and take such conveyances as are satisfactory to themselves; and the principle is doubtless deduced from

§ 655. **Comments.**—We have not been able to find any other decision in any other State where this precise question has arisen. But we doubt that any valid ground exists for the distinction sought to be made. Certainly a correct description of the land affected would seem to be as essential in one case as in the other, and whenever language is used which is sufficient to show the intention of the parties, it should receive the same construction, whether the land to which it is applied is conveyed by an absolute deed or is mortgaged.

§ 656. **Instruments not entitled to registration.**—The registry acts authorize the recording of certain specified instruments, and their registration operates as notice. But the fact that an instrument is recorded is not sufficient to raise the presumption of notice, unless it be an instrument whose registration is authorized by statute. Otherwise the voluntary recording of it would be a nullity. The law on this subject is aptly stated by Mr. Justice Flandrau: "It is competent for the government to prescribe rules for the conveyance of lands

English decisions made without reference to any system of recording the transfer of title to real estate, made in cases where there was an actual delivery of possession by the grantor to the grantee in the presence of freeholders of the county. This gave actual notice to the public, and stood in the place of constructive notice by a record; the open, corporeal investiture upon the land itself, was equivalent to a record of specific boundaries. And the principle is not of universal application; as a matter of fact the law does put some limitations upon the freedom of grantors and grantees in the matter of transferring the title to real estate; for instance, there must be two witnesses to the signature of the grantor; he must acknowledge that it is his free act or deed before a magistrate, and the magistrate must certify to this fact. These may be considered as invasions of the absolute right of the owner to make the conveyance in a form satisfactory to himself. But as it is not necessary to the disposition of the case that we decide this point, we leave it open for future consideration, if any case shall arise that shall call for a decision of it. We are of the opinion that the mortgage in question did not convey to the petitioners any title to or interest in the lot of land belonging to Mrs. Scott, and that there is error in the judgment complained of."

within its jurisdiction, whether by deed, will, or otherwise, and it can impose such restrictions as are deemed for the best interests of its subjects. It may provide that the title to lands shall not pass unless the deed or will is upon paper, stamped by the State. It may declare that the instrument shall be attested by one, two, or more witnesses; and none of these requirements involve a greater exercise of authority than to say tested by one, two, or more witnesses; and none of these requirements involve a greater exercise of authority than to say that the conveyance shall be in writing, as there is no reason except the statutes why a man should not pass his real as well as his personal estate by parol merely. That statutes requiring certain solemnities to attend the execution of conveyances are imperative, and must be complied with to give validity to them, is illustrated by the action of courts in annulling wills and conveyances of land frequently for the want of a seal or other essential formality. That our legislature has always considered a departure from the statute forms as invalidating conveyances, is found in the fact that a series of acts have been passed, year after year, to save such as are defectively executed, while the same legislatures have steadily adhered to the forms first prescribed, and even added greater restrictions. When a party desires to purchase or take an encumbrance upon land, his guide as to the title is the records of the county, and it is a well-settled rule that the record of a deed is notice only of its contents so far as the record discloses it. If the record contain any instrument which is not authorized to be recorded, either from the nature of its subject matter, or a defect in its execution, it is a mere nullity, and is not notice for any purpose."[5] An instrument does not give notice,

[5] In Parret v. Shaubhut, 5 Minn. 323, 328, 80 Am. Dec. 424; Burnham v. Chandler, 15 Tex. 441. See, also, Commonwealth v. Rhodes, 6 Mon. B. 171, 181; More v. Hunter, 6 Ill. (1 Gilm.) 317; Bossard v. White, 9 Rich. Eq. 483; Reed v. Coale, 4 Ind. 283; Brown v. Budd, 2 Cart. 442; Lewis v. Baird, 3 McLean, 56; Galpin v. Abbott, 6 Mich. 17; Mott v. Clark, 9 Barr. 400, 49 Am. Dec. 566;

although recorded, which does not conform to the recording laws.[6]

§ 657. Illustrations.—One partner conveyed to his copartner his entire interest in the partnership property as security for a debt. It was held that the registration of the mortgage would operate as constructive notice as against subsequent creditors and purchasers of the lien created on the interest of the mortgagor in the property. But the court held that it could not have this effect, so far as any restraint or limitation was imposed by it on the authority of the mortgagor as a partner.[7] "This principle of constructive notice from

Graves v. Graves, 7 Gray, 391; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Ludlow v. Van Ness, 8 Bosw. 178; Villard v. Robert, 1 Strob. Eq. 393; Monroe v. Hamilton, 60 Ala. 227. In Moore v. Hunter, *supra*, it is said: "The United States are the owners of all the vacant lands in this State, and until they have sold and received the price stipulated to be paid for any particular tract of land belonging to them, the recording acts of this State have no application. A contrary doctrine would lead to great injustice. Until the United States have parted with their title to the public lands, no purchaser would think of seeking for equities or encumbrances, affecting the title, in any other place than those offices where the lands were subject to entry or sale. When Dunnegan executed the deed to Bates, only part of the consideration for the land had been paid, and whether the land might not revert to the United States was altogether uncertain. To record the deed of Dunnegan was a useless act, not required by law, and the record, consequently, was not notice to any one." See, also, Keech v. Enriquez, 28 Fla. 597; McCroskey v. Ladd (Cal.) 28 Vt. 216. That a deed not legally entitled to record does not constitute notice, see White v. Magarahan, 87 Ga. 217.

[6] People v. Burns, 161 Mich. 169, 125 N. W. 740.

[7] Monroe v. Hamilton, 60 Ala. 227. If a deed is not sufficiently acknowledged its record does not give constructive notice: Woods v. Banks, 34 Iowa, 599; Sherod v. Ewell, 104 Iowa, 253, 73 N. W. 493; Ligon v. Barton, 88 Miss. 135, 40 So. 555; Stevens v. Hampton, 46 Mo. 404; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Ryan v. Carr, 46 Mo. 483; Bunton v. Scull, 55 N. J. Eq. 747, 35 Atl. 843; Hunton v. Wood, 101 Va. 54, 43 S. E. 186; Abney v. Ohio Lumber etc. Co. 45 W. Va. 446, 32 S. E. 256; Williams v. Butterfield, 182 Mo. 181, 81 S. W. 615; Salvage v. Haydock, 68 N. H. 484, 44 Atl.

registration is confined to instruments which the statute authorizes to be registered. It cannot be extended to any and every instrument which parties may think proper to register. There must be a statute authorizing the registration, or mere registration will not operate as notice.[8] Nor will registration operate as constructive notice of any and every provision which may be introduced into an instrument, of which it is required. A conveyance of personal property may include a transfer of choses in action, and while operating as constructive notice of the transfer of the particular personal property described, it would not operate as a notice of the transfer of the choses in action.[9] The reason is obvious: the law does not authorize the registration of transfers of choses in action, and, therefore, does not cast on those dealing with him who has the possession and the apparent legal title, the duty to ascertain whether there has been an assignment of them. We have no statute (except as to limited partnerships) which authorizes the registration of articles of partnership, or of limitations or restraints which by agreement may be placed on the power and authority of a partner. While, so far as the mortgage is a conveyance of Hamilton's undivided share of the joint crops, its registration is constructive notice thereof; so far as it is a restraint or limitation of his authority as partner, the registration is not constructive notice." [1] Where both real and personal estate are conveyed by the same deed, the registry of the deed is not of itself constructive notice of the assignment of the personal estate.[2] A recital in a deed is evidence that the purchaser had notice of the fact recited. But

696; German-American v. Carondelet Real Estate Co. 150 Mo. 570, 51 S. W. 690.

[8] Citing Mitchell v. Mitchell, 3 Stewt. & P. 81; Dufphey v. Freenaye, 5 Stewt. & P. 215; Baker v. Washington, 5 Stewt. & P. 142; Tatum v. Young, 1 Port. 298.

[9] Citing McCain v. Wood, 4 Ala. 258; Stewart v. Kirkland, 19 Ala. 162.

[1] Per Brickell, C. J., in Monroe v. Hamilton, 60 Ala. 227.

[2] Pitcher v. Barrows, 17 Pick. 361, 28 Am. Dec. 306. Said Shaw, C. J.: "But we think this is not

this is true only so far as it concerns the title to the land purchased. The recital will not affect him with notice in regard to the title of any other land than that conveyed by the deed.[3] A deed of assignment when not authorized to be recorded does not impart notice because it is recorded.[4] Subsequent purchasers are not charged with constructive notice of the facts appearing from the entry of lands sold by the United States, upon the land-book in the county clerk's office, as such entry is required only for the purposes of taxation.[5] The registration of executory agreements for the sale of real property, if not authorized by statute, does not impart notice.[6] If the statute does not authorize the registration of a certified copy of a record of a deed, such registration is a nullity.[7]

§ 658. **Want of delivery.**—If a conveyance has not been delivered, the fact that it is registered does not cause it to prevail over a conveyance subsequently made, or a lien subsequently acquired. Thus, a judgment against a mortgagor was given the preference over a mortgage which was, in the absence and without the knowledge of the mortgagee, delivered by the mortgagor to the recorder of the proper county

constructive notice, any further than the statute has made it so, to wit, of the transfer of real estate. The fact that the assignment of the personal estate was in the same deed with the real, was merely accidental. If the plaintiff had had occasion to take a deed of Walcott, of real estate, the registry would have been conclusive evidence of constructive notice, whether in fact he examined the registry or not. But if he had no occasion to take a conveyance of real estate, he had no occasion to examine the registry, and the law does not presume that he did do it. As to that part of its contents relating to personal estate, there is no legal presumption that its contents were known to the plaintiff."

[3] Boggs v. Varner, 6 Watts & S. 469.

[4] Burnham v. Chandler, 15 Tex. 441.

[5] Betser v. Rankin, 77 Ill. 289.

[6] Mesick v. Sunderland, 6 Cal. 297.

[7] Lund v. Rice, 9 Minn. 230; Stevens v. Brown, 3 Vt. 420, 23 Am. Dec. 215; Pollard v. Lively, 2 Gratt. 216; Lewis v. Baird, 3 McLean, 56; Oatman v. Fowler, 43 Vt. 462.

to be recorded, where the judgment was obtained before the mortgagee had assented to the mortgage.[8] Where a deed has been unconditionally delivered to the grantee, irrespective of the question whether the consideration has been paid or secured, the deed may be recorded without the grantor's consent.[9] This principle relates more to the validity of the instrument than it does to the effect of the record. The instrument is not operative until delivery. "A deed takes effect by delivery. An execution and registration of a deed, and a delivery of it to the register for that purpose, do not vest the title in the grantee. Nothing passes by it." [1] This topic has been fully discussed in the chapter on delivery.[2]

§ 658a. **Showing deed forgery against decedent.**—In the majority of States, perhaps in all, there are statutes prohibiting a person having a pecuniary interest in the result of a suit from testifying as to any transaction with or statement made by a decedent to the detriment of the estate. There was placed on record an instrument purporting to be on its face a deed, property acknowledged. The original deed was lost, and the grantee being dead, an action was brought by the person described as the grantor in the deed and against the heirs and representatives of the grantee to cancel the deed as a cloud on the grantor's title. The question was presented whether the grantor was a competent witness to testify that the deed, which

[8] Goodsell v. Stinson, 7 Blackf. 437. See, also, Fitzgerald v. Goff, 99 Ind. 28; Weber v. Christen, 121 Ill. 91, 2 Am. St. Rep. 68; Parker v. Hill, 8 Met. 447; Owings v. Tucker, 90 Ky. 297; Hoadley v. Hadley, 48 Ind. 452; Goodwin v. Owen, 55 Ind. 243; Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146; Woodbury v. Fisher, 20 Ind. 387, 83 Am. Dec. 325; Henry v. Carson, 96 Ind. 412; Fitzgerald v. Goff, 99 Ind. 28; Freeman v. Pety, 23 Ark. 449; Ward v. Small, 90 Ky. 198.

[9] Ronan v. Meyer, 84 Ind. 390.

[1] Samson v. Thornton, 3 Met. 275, 281, 27 Am. Dec. 135.

[2] See §§ 290–293. See, also, Woodbury v. Fisher, 20 Ind. 387, 83 Am. Dec. 325; Hedge v. Drew, 12 Pick. 141, 22 Am. Dec. 416.

purported to have been signed by him, was not in fact so signed, but was a forgery. The court decided that the denial by the grantor of the execution of the deed did not necessarily involve a transaction with the grantee so as to render the grantor incompetent as a witness. It might or it might not, the court held, depending upon the particular circumstances of the case. Mr. Justice Mayfield, who delivered the opinion of the court said: "The grantor may make a deed to the grantee without the knowledge or consent of the grantee, and against his will. The grantor to a deed is a necessary party to its execution, but the grantee is not. The grantee, therefore, cannot, without the aid or consent of the grantor, make him a party to a transaction involving the execution of a deed. If the grantee should forge the name of the grantor to the deed, and forge the attestation and acknowledgment thereto, he cannot make it a transaction with the grantor by filing it for record and having it recorded without the knowledge and consent of the grantor. Nor would the fact that such a deed was thus executed and recorded by third parties, with or without the consent of the grantee, make it a transaction with the purported grantor. A transaction between two parties necessarily implies action, consent, knowledge, or acquiescence on the part of both. Hence, if a grantor never, in truth and in fact, executed or attempted to execute an alleged deed to a given grantee, he is not and cannot be a party to the transaction, which on its face purports to be the execution by him of a deed to the named grantee.

The grantee, third parties, nor all combined, cannot, without his act, word, deed, knowledge, consent, or acquiescence, make such purported grantor a party to a transaction as to which he had nothing to do and to which he was not a party. He is the only party or individual who can make himself a party thereto; and to deny to him the right to testify that he was not a party to the transaction would be to put it within the power of a grantee or third parties to absolutely acquire all

his property without his knowledge or consent. We do not believe that this is the law." [3]

[3] Blount v. Blount, 158 Ala. 242, 21 L.R.A.(N.S.) 755, 48 So. 581. In the same strain, the learned justice continued: "Of course, if he did, in fact and in truth, execute the deed, and the grantee dies, and in fact there had been a transaction between them, then, under the statute, he is incompetent to testify as to the transaction involved in the execution of the deed; but if he in fact made no deed at all, and had no knowledge of it, he was not, and could not be made, a party to a transaction which mercly on its face imports a transaction between him and a deceased person. It therefore follows that if it be conceded, or conclusively proven, that a grantor did in fact execute a deed to the grantee, and that it constituted a transaction between the two, and the grantee is dead, the grantor is incompetent to testify as to such transaction.

The grantor in this case does not concede that he executed the deed, but denies it, if the court would let him do so; and the evidence does not conclusively prove it. His testimony is therefore competent to determine the question *vel non* as to the transaction between the grantor and grantee. If the court or jury should, from all the evidence, find that the grantor was a party to the deed or transaction, then he is an incompetent witness; but he is competent until this is conclusively shown, or it is conceded that he was a party to the transaction in question. The other party to the suit cannot render him incompetent, by testifying that he was a party to a transaction with a deceased person through whom they claim, or by showing a chain of circumstances, which tend to prove he was a party to such transaction.

Filing for record a paper purporting on its face to be a deed, and recording it, makes such record, or a certified copy thereof, presumptive evidence of the execution of the alleged or purported deed, and is prima facie proof, in such case, as between the alleged parties thereto, of the recitals in such deed. This is a mere prima facie presumption, which the statute and the law indulge, and is not a conclusive presumption. It is open and proper for either party to dispute it, or to show that it is a forgery or a fraud, or that it is void for any sufficient reason. It is not like a judgment in a suit between the parties as to that matter. For example, if the purported deed in question here, which was filed for record and recorded, was, as a matter of fact, a forgery by the grantee or any other party, filing and recording it could not make it valid. It may in certain cases make the record, or a certified copy thereof, presumptive evidence of the recitals therein; but it is not conclusive, and does not make a forgery a valid conveyance, though it might aid the court or jury in finding the instrument in

§ 659. Equitable mortgages.—At one time it was considered that a mortgage of an equity was not within the purview of the registry acts, and hence that the registration of such a mortgage was not constructive notice.[4] But it is now established that the policy of these statutes requires all liens and encumbrances, whether legal or equitable, affecting the title to real estate, to be recorded, and therefore, as a general proposition, a mortgage of an equitable interest in land, taken without notice, is, if first recorded, preferred to any conveyance of, or encumbrances upon, such land.[5] It is held that a person in possession of land under a parol contract of sale may mortgage his interest, and although the mortgagor

question to have been a valid conveyance. However, it is not conclusive on judge or jury,—at least, not more so than the purported deed itself would be, if its execution was proven.

We are not now writing as to the probative force of such proof of execution, filing, and recording of the deed, but as to the conclusiveness of such matters to show a transaction between the grantor and grantee. We hold that the grantor in such document, no matter what its nature, character, or recitals, is not precluded, by such proof, such filing, and such recording, from showing that his alleged signature thereto and his acknowledgment thereto are forgeries and frauds, perpetrated without his knowledge or consent. If this be not true, one man can acquire, for his estate after his death, all the property of another, without the knowledge or consent of such other, and yet do it by due process of law. We say the law is not, and ought not to be, such as to allow such proceedings or results." Blount v. Blount, *supra*. A dissenting opinion was filed by Mr. Justice McClellan and also a dissenting opinion by Mr. Justice Simpson. The latter said: There cannot be any doubt of the proposition that a deed from one person to another is a transaction between them. The statute does not prohibit the interested party only from testifying that there was a transaction between them, but from testifying 'as to any transaction' or, as one court has interpreted it 'in relation to any transaction,' whether his testimony be to uphold the transaction, or to strike it down, it is testimony as to, or in relation to, a transaction."

[4] Boswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 280.

[5] Parkist v. Alexander, 1 Johns. Ch. 394; Jarvis v. Dutcher, 16 Wis. 307; General Ins. Co. v. United States Ins. Co., 10 Md. 517, 69 Am. Dec. 174; Crane v. Turner, 7 Hun, 357; Boyce v. Shiver, 3 S. C. 515.

may not have acquired the absolute fee, such mortgage is entitled to registration, and if recorded, is notice to subsequent purchasers and encumbrancers.[6] But it is held in Illinois, where one has only an equitable title derived from a bond for a deed which is not recorded, that the record of a mortgage given by him is not notice to a subsequent purchaser of the legal title from one in possession of the land. The title of a purchaser of this description is not derived through the title of the mortgagor. Hence, he will not take, it is held, subject to the mortgage, notwithstanding the fact that it is recorded.[7]

§ 660. **Assignment of mortgage.**—Under some of the early statutes, it was held that an assignment of a mortgage was not entitled to registration. Thus, in Indiana, before the passage of the statute allowing the registration of the assignments of mortgages, it was held that recording them did not give notice.[8] But in that State, a statute now exists which permits the registration of such assignments.[9] And, generally, at the present day, either by the express provision of a statute, or by judicial construction of the registry acts, assignments of mortgages are considered as instruments entitled to registration.[1] But the mortgagor himself is not bound by

[6] Crane v. Turner, 7 Hun, 357.

[7] Irish v. Sharp, 89 Ill. 261. See Halsteads v. Bank of Kentucky, 4 Marsh. J. J. 554; Bank of Greensboro v. Clapp, 76 N. Y. 482.

[8] Hasleman v. McKernan, 50 Ind. 441; Dixon v. Hunter, 57 Ind. 278.

[9] Acts of 1877, Ind. c. 58, § 1.

[1] Bank of Indiana v. Anderson, 14 Iowa, 544, 83 Am. Dec. 390; Bowling v. Cook, 39 Iowa, 200; Tradesman's etc. Assn. v. Thompson, 31 N. J. Eq. 536; Stein v. Sullivan, 31 N. J. Eq. 409; Fort v. Burch, 5 Denio, 187; James v. Morey, 2 Cow. 246, 14 Am. Dec. 475; Belden v. Meeker, 47 N. Y. 307; Turpin v. Ogle, 4 Bradw. (Ill.) 611; Smith v. Keohane, 6 Bradw. (Ill.) 585; Cornog v. Fuller, 30 Iowa, 212; McClure v. Burris, 16 Iowa, 591; Vanderkemp v. Shelton, 11 Paige, 28; Campbell v. Vedder, 1 Abb. N. Y. 295; James v. Johnson, 6 Johns. Ch. 417; St. Johns v. Spalding, 1 Thomp. & C. 483; Pepper's Appeal, 77 Pa. St. 373; Leech v. Bonsall, 9 Phil. 204; Neide v. Pennypacker, 9 Phil. 86; Maryland R. Code, 1878, art. xliv,

the registration of the assignment of the mortgage. He should have actual notice to prevent him from claiming the benefit of payments made to the mortgagee.[2] This principle has been expressly declared by statutes in several States. Thus, selecting California as an instance, it is provided by the code: "When the mortgage is executed as security for money due, or to become due, on a promissory note, bond, or other instrument, designated in the mortgage, the record of the assignment of the mortgage is not, of itself, notice to a mortgagor, his heirs, or personal representatives, so as to invalidate any payment made by them, or either of them, to the person holding such note, bond, or other instrument."[3] But the mortgagor is entitled to this protection only when he makes a payment. If the mortgagee release the mortgage without the pay-

§§ 37, 38; Cal. Civil Code, § 2934. In Belden v. Meeker, the earlier case of Hoyt v. Hoyt, 8 Bosw. 511, was overruled. See, also, Larned v. Donovan, 84 Hun (N. Y.) 533, 32 N. Y. Supp. 731, affd. in 155 N. Y. 341, 49 N. E. 942; Breed v. Nat'l Bank, 68 N. Y. S. 68, 57 App. Div. 468, aff'd in 171 N. Y. 648, 63 N. E. 1115; Merrill v. Luce, 6 S. D. 354, 61 N. W. 43; Livermore v. Maxwell, 87 Ia. 705, 55 N. W. 37; Nashua Trust Co. v. Edwards etc. Co. 99 Ia. 109, 68 N. W. 587; Swasey v. Emerson, 168 Mass. 118, 46 N. E. 426; Ames v. Miller, 65 Neb. 204, 91 N. W. 250; Weideman v. Zielinska, 92 N. Y. S. 493, 102 App. Div. 163; Butler v. Mazeppa Bank, 94 Wis. 351, 68 N. W. 998.

[2] New York Life Ins. etc. Co. v. Smith, 2 Barb. Ch. 82; Ely v. Scofield, 35 Barb. 330; Jones v. Gibbons, 9 Ves. 407, 410; Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483; Eggert v. Beyer, 43 Neb. 711, 62 N. W. 57; Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323; Larned v. Donovan, 155 N. Y. 341, 49 N. E. 942.

[3] Cal. Civil Code, § 2935. Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483. That these statutes do not apply ordinarily where the instrument secured by mortgage is negotiable, see: Wilder v. Campbell, 110 Mich. 580, 35 L.R.A. 544, 68 N. W. 278; Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4; Eggert v. Beyer, 43 Neb. 711, 62 N. W. 57. For other States in which similar provisions exist, see New York, Fay's Dig. of Laws, 1874, vol. 1, p. 585; Minnesota, Gen. Stats. 1878, c. 40, § 24; Kansas, Dassler's Stats. 1876, c. 68, § 3; Nebraska, Gen. Stats. 1873, c. 61, § 39; Comp. Stats. 1881, p. 392; Wisconsin, Rev. Stats. 1878, p. 641, § 2244; Oregon, Gen. Laws, 1872, p. 519; Michigan, Comp. Laws, 1871, p. 1847; Wyoming Ty., Comp. Laws, 1876, c. 3, § 17.

ment of any consideration, the release is inoperative against the assignee of the mortgage, who has his assignment recorded.[4] The mortgagor is not entitled to this protection of making a payment to the mortgagee, when the mortgage is given as security for the payment of a negotiable note, and this has been transferred before maturity.[5] A conveyance of the premises to the mortgagee, after the assignment of the mortgage, will not cause a merger of the mortgage title.[6] But, of course, as against all other persons than the mortgagor, who claim title other than through the mortgagee, the registration of the assignment of the mortgage is unnecessary. The original mortgage still stands, and is not, so far as priority of record is concerned, affected by the assignment.[7] In New York, it has been held that a power of attorney to assign a mortgage is not an instrument whose registration is provided for by the recording acts. The record of such an instrument is not notice.[8] And in the same State a similar decision was made with reference to a power of attorney to collect the amount due on a mortgage and to release it.[9] An unrecorded agreement between the mortgagor and the mortgagee, that the latter should release from the operation of the mortgage a

[4] Belden v. Meeker, 47 N. Y. 307; Viele v. Judson, 82 N. Y. 32. But in Massachusetts it is held otherwise: Wolcott v. Winchester, 15 Gray, 461; Welch v. Priest, 8 Allen, 165; Blunt v. Norris, 123 Mass. 55, 25 Am. Rep. 14.

[5] Jones v. Smith, 22 Mich. 360.

[6] Campbell v. Vedder, 3 Keyes, 174; s. c. 1 Abb. N. Y. App. Dec. 295; Purdy v. Huntington, 42 N. Y. 334, 1 Am. Rep. 532.

[7] Sprague v. Rockwell, 51 Vt. 401; Campbell v. Vedder, 3 Keyes, 174; Viele v. Judson, 82 N. Y. 32. A person who afterward purchases from the mortgagee is required to ascertain whether the mortgage has not been previously assigned. If he does not make this search, he cannot claim protection as a *bona fide* purchaser. See on this subject, Gillig v. Maass, 28 N. Y. 191; Oregon Trust Co. v. Shaw, 5 Saw. 336; Warner v. Winslow, 1 Sand. Ch. 430; Purdy v. Huntington, 42 N. Y. 334; Burhans v. Hutcheson, 25 Kan. 625, 37 Am. Rep. 274; Van Keuren v. Corkins, 6 Thomp. & C. 355.

[8] Williams v. Birbeck, Hoffm. 359.

[9] Jackson v. Richards, 6 Cowen, 617.

part of the land, upon receiving the payment of a specified sum, does not bind the assignee of the mortgage.[1]

§ 661. **In some States defective deeds if recorded impart notice.**—In a few of the States, the rule seems to prevail that a deed defectively executed or unacknowledged is, if actually recorded, sufficient notice of the equities created thereby. In Illinois, where this rule obtains, Scates, C. J., cites a number of authorities in opposition to the rule he proceeds to lay down, and observes: "I have referred to these decisions to show that they were made upon statutes differing from ours; some excluding from registration and record, deeds, etc., which were too defective to pass the estate; others, for want of compliance with the law in relation to acknowledgments. Our statute has introduced a very different policy, both as to the kinds and character of the instruments and the acknowledgments. In its language it comprehends everything that may relate to or affect the title, and requires all such to be recorded without any qualification as to whether they be sufficient in law or not, to effectuate the object purported on their face. It would seem to us to be the intention of the legislature, in general, to make the registry and recording books, and the filing of levies, etc., as complete a depository as possible of the State, of land titles, as they may be presented and affected by conveyances, contracts, encumbrances, and liens."[2] In that State, in accordance with this construction of the statute, it is held that though a deed of trust executed by a married woman to secure the purchase money due on the premises, may be void as a conveyance because her husband does not unite with her in it, yet, nevertheless, it is an instrument in writing relating to real estate, and after registration is constructive notice to all subsequent purchasers of the lien of the vendor for the unpaid price.[3] "It is,

[1] Warner v. Winslow, 1 Sand. Ch. 430; St. John v. Spalding, 1 Thomp. & C. 483.

[2] Reed v. Kemp, 16 Ill. 445, 451.

[3] Morrison v. Brown, 83 Ill. 562.

undoubtedly," said Mr. Justice Dickey, "the policy of our recording laws that every instrument in writing relating to land, when once recorded, shall be notice to the world of everything stated in such instrument, and of everything which is necessarily implied from the words of the recorded instrument. Those appellants claiming as subsequent *bona fide* purchasers or encumbrancers occupy the same position in this case as they would have done had this instrument (not having been recorded) been read aloud to them by the appellee, before they became in any way interested in this question. As against her grantee, there can be no doubt of her right to assert a vendor's lien. As to the others, they have constructive notice of her equities. This deed of trust by a *feme covert* (her husband not joining with her in its execution) has no validity as a conveyance. It has no force or power to *create* a lien. A married woman can, however, without the aid of her husband, accept a deed and hold title to land. She can also tell the truth, and there is no law to render its utterance ineffectual. Under our statute, as to the effect, as notice of recording instruments in writing relating to land, the execution and recording of this instrument becomes equivalent to a personal declaration of her equitable rights to each of appellants claiming as *bona fide* purchasers." [4]

§ 662. **In Kansas,** under a statute providing that "no instrument affecting real estate is of any validity against subsequent purchasers without notice unless recorded," the court decided that any instrument affecting real estate would be good against subsequent purchasers if recorded. It said: "The statute nowhere makes an acknowledgment necessary to the validity of a deed. If it be sufficient to affect real estate without acknowledgment, then it may be recorded, and if it be recorded, then subsequent purchasers are charged with notice. The statute only goes to the extent of providing that if a deed

[4] Morrison v. Brown, *supra*.

be acknowledged and certified in the manner prescribed, the original may be read in evidence, without proof of the execution; or, if recorded, a certified copy of the record, upon proper proof of inability to produce the original, may be read." The court accordingly held that a deed having been in fact recorded in the proper office, although not acknowledged, was constructive notice.[5]

§ 663. **Registration in wrong county.**—The various statutes require that a deed shall be recorded in the county in which the land conveyed by it is situated. A person desirous of ascertaining the condition of the title to a particular piece of land, is not compelled to search the records of every county in the State to accomplish this result. If he examines the records of the county in which the land lies, he does all that the law demands, and he may safely act upon the information thus disclosed. If a deed is recorded in a different county from that in which the land is suitated, the record cannot operate as constructive notice.[6] And, of course, it is immaterial that the deed is recorded in the wrong county under a mistake as to the true locality of the land.[7]

§ 664. **Land in two counties.**—Where the land embraced in a deed is situated in more counties than one, the deed should be recorded in every county in which any part of the land lies.[8] "The object of the registry acts was to enable

[5] Simpson v. Brown, 3 Kan. 172; Brown v. Simpson, 4 Kan. 76.

[6] King v. Portis, 77 N. C. 25; Harper v. Tapley, 35 Miss. 506, 510; Adams v. Hayden, 60 Tex. 223; Perrin v. Reed, 35 Vt. 2; Stewart v. McSweeney, 14 Wis. 468, 471; Harris v. Monro Cattle Co., 84 Tex. 674; Hawley v. Bullock, 29 Tex. 216.

[7] Adams v. Hayden, 60 Tex. 223. See Jones v. Powers, 65 Tex. 207.

[8] Perrin v. Reed, 35 Vt. 2; Stevens v. Brown, 3 Vt. 420, 23 Am. Dec. 215; Horsley v. Garth, 2 Gratt. 471, 44 Am. Dec. 393; Astor v. Wells, 4 Wheat. 466; Stewart v. McSweeney, 14 Wis. 468; Crosby v. Huston, 1 Tex. 203; Hundley v. Mount, 8 Smedes & M. 387. See Hill v. Wilson, 4 Rich. 521, 55 Am. Dec. 696; Bagley v. Kennedy, 94 Ga. 651. That the record of a deed

a person about to purchase lands, to ascertain whether they had been conveyed. In order to do this, the place where he must reasonably be led to make the inquiry is the probate clerk's office of the county where the land lies. That is the place intended by law for recording the deed of conveyance; and if, upon examination, he finds no conveyance there, he is justified in acting upon the belief that none has been made. If this were not true, a person could not safely purchase land lying in any particular county, without an examination of the probate clerk's office of every county in the State; for the land which he is about to purchase might be embraced in a deed, conveying, also, land in some other county, and recorded in that county." [9] The deed is properly recorded in any county in which a part of the land is situated.[1] A deed so recorded in one county is considered as admissible in evidence, under the Michigan statute, in any other county as to any of the lands described in it that lie within the State.[2]

§ 665. **Registration of copy of deed in proper county.** —If a deed has been recorded in the wrong county, and a copy of such record has been recorded in the proper county, the record of the copy cannot avail as notice to subsequent purchasers. This rule rests upon the ground that such copy is not entitled to be recorded, and hence conveys no notice.[3] In a case where it was insisted that a record in one county of a copy of a deed from another county was sufficient to put subsequent purchasers upon inquiry, the court said: "To hold

in but one of the two counties in which the land lies, is notice of the grantee's title to the part of the land lying in the other county: see Mattfeld v. Huntington, 17 Tex. Civ. App. 716, 43 S. W. 53; Perry v. Clift (Tenn.) 54 S. W. 121.

[9] Harper v. Tapley, 35 Miss. 506, 509, per Handy, J.

[1] Brown v. Lazarus, 25 S. W. Rep. 71, 5 Tex. Civ. App. 81.

[2] Wilt v. Cutler, 38 Mich. 189.

[3] Lewis v. Baird, 3 McLean, 56; Pollard v. Lively, 2 Gratt. 216.

that parties ought to have been put upon inquiry by this record would be precisely the same thing as holding them affected with notice. This would be giving to the record of an instrument not entitled to be recorded the same force, as to notice, that we give to one legally reduced to record. We do not think any authority can be found in support of this proposition. On the contrary, the familiar rule, and one laid down by this court, is, that the record of an instrument not entitled by law to be recorded is of no avail as notice.[4] It is said that a purchaser, as a matter of fact, receives the same information from the record of a copy as from the record of an original instrument. That may be true. But the broad difference is this: The statute only authorizes the record of original instruments, and it makes that record conclusive evidence of notice. It matters not that a subsequent purchaser has not, as a matter of fact, seen the record. If the instrument has been legally recorded, the law presumes him to have seen it, and holds him to the consequences of such knowledge. Not so as to the registry of a copy. It may be that, if a party can be clearly proven to have read the record, he should be held to have derived from it the same degree of actual knowledge that he would have derived from seeing a copy of an instrument in the hands of a private individual. He might be considered as put upon inquiry. But the law does not presume him to have read the record of an instrument not authorized to be recorded." [5]

§ 666. **Certified copy of deed recorded in wrong county as evidence.**—Related to the subject we are now considering is the question whether a certified copy of a deed recorded in a county other than that in which the land is situated, can be received in evidence in the proper county to af-

[4] Citing Moore v. Hunter, 1 Gilm. 317.

[5] St. John v. Conger, 40 Ill. 535, 536, per Lawrence, J., delivering the opinion of the court.

fect the title to the premises described in the deed. It is held that where deeds embrace lands lying in two counties, and are recorded in only one of them, exemplifications of the records are competent evidence upon the proof of the loss of original deeds to prove their contents in an action of ejectment for the recovery of the premises which lie in that county where the deeds were not recorded.[6] But it is also held that an authenticated copy of a deed recorded in a county in which the land does not lie, is not competent evidence of the original, for the reason that "where the law gives no authority for the reception of such acknowledgment or proof and admission to recordation, the record of those acts, and the certificate of the public custodian of the record, are entitled to no more respect than if the same had been performed by a private individual." [7]

§ 667. **Presumption of actual notice from examination of records.**—In a case in Pennsylvania, the land conveyed by a deed was situated in two counties, but the deed was recorded in one of them only. Attached to the deed, written under the certificate of acknowledgment, was a memorandum stating that part of the land had been sold. It was not satisfactorily shown that the memorandum referred to was written before the execution of the deed, but the deed

[6] Jackson v. Rice, 3 Wend. 180, 20 Am. Dec. 683; Scott v. Leather, 3 Yeates, 184. And see Lessee of Delancey v. McKeen, 1 Wash. C. C. 354; Conn v. Manifee, 2 Marsh. A. K. 396, 12 Am. Dec. 417; Simms v. Read, Cooke, 345.

[7] Pollard v. Lively, 2 Gratt. 216, 218. In Lewis v. Baird, 3 McLean, 56, 63, it is said: "But if the deed were a conveyance in fee of these military lands, a record of it in Kentucky, though duly certified, would not make the copy evidence in this State. The deed is required to be recorded in this State, after it has been duly acknowledged, and a certified copy of the record thus made is evidence under the statute. The recording of the deed, therefore, in Kentucky, if clearly shown, would not make either a certified or sworn copy from the record evidence. The original being lost, a sworn copy of it is the next best proof." See Kennedy v. Harden, 82 Ga. 230, 18 S. E. Rep. 542.

with the memorandum was recorded. The lower court instructed the jury that the memorandum on the original deed, if it was there at the time of the execution of the deed, constituted a part of the deed and was legally recorded; and as part of the land conveyed by the deed was situated in the county in which the deed was recorded, and in which the plaintiff resided, that such record was notice to him of the contents of the memorandum, and bound him also as to the part situated in the other county in which the deed was not recorded. The supreme court held that it was a reasonable presumption that the plaintiff inspected the registry in the proper county, and thus acquired actual notice of the conveyance, but reversed the case because the registry was defective in the fact that the memorandum was not acknowledged, and hence was not entitled to be recorded.[8] Chief Justice Gibson on the first point, after adverting to previous decisions that the registry of a deed defectively acknowledged is not constructive notice as to land in the proper county, and is deemed no evidence of notice whatever, said: "These authorities are not controverted; but it has been intimated that a presumption may arise of actual inspection of the defective registry, which is said to amount to actual notice of the contents of the original paper. The ground of the supposed presumption is the fact that the plaintiff purchased along with the tracts in dispute, certain other tracts included in the conveyance to the bank, which are situate in Huntingdon county, where the conveyance and what purports to be the memorandum containing a recital of the material facts were registered together; and as the original was lost, it is supposed to be a reasonable presumption that the plaintiff purchased on the faith of the registry in that county, and actually inspected it. Nothing is more reasonable." [9] In New Hampshire, under the statute in

[8] Kern v. Swope, 2 Watts, 75.

[9] Kerns v. Swope, 2 Watts, 75. The learned justice, said, however, that the registry was defective. The memorandum of the recital, thought to be material, purports,

force at the time the decision was rendered, it was necessary that a deed should be attested by two witnesses. A deed, however, with one witness, or none at all, was good between the

according to the registry, to have been indorsed on the conveyance, but underneath the certificate of the acknowledgment, which contains neither reference nor allusion to it; and the original was therefore destitute of the evidence of authentication required by the law to entitle it to be registered. The registration, therefore, being without the authority of the law, was the unofficial act of the officer, which could give the copy no greater validity than the original, deprived of legal evidence of execution; nor even so much, for an original deed exhibited to a purchaser would affect him though it were unaccompanied with the evidence of its execution. But here the registry was no better than a copy made by a private person in a memorandum-book, from which a purchaser would be unable to determine whether there was, in fact, an indorsement on the deed, or whether it had been truly copied, especially when neither the copy nor an exemplification of it would be legal evidence of the fact in a court of justice. Unquestionably a purchaser would not be affected by having seen the copy of a conveyance among the papers of another, or an abstract of it in a private book. The whole effect of a registry, whether as evidence of the original or as raising a legal presumption, that the copy thus made equipollent to the original had been actually inspected by the party to be affected, is derived from the positive provisions of the law; and when unsustained by these, a registry can have no operation whatever. Stripped of artificial effect, it is but the written declaration of the person who was officer at the time, that he had seen a paper in the words of the copy which purported to be an original. But to say nothing in this place of the incompetency of such a declaration as evidence of the fact, on what principle would a purchaser be bound to attend the hearsay information of one who is not qualified to give it. Since the decision in Cornwallis' case, Toth. 254, and Wildgoose v. Wayland, Goulds, 147, pl. 67, it has been considered a settled principle that the vague reports of strangers, or information given by a person not interested in the property, are insufficient. It has been held even that a general claim may be disregarded. There certainly are cases which seem to cast a doubt on the principle. But as is properly remarked by Mr. Sugden in his treatise on Vendors, the point of notice to which the remark of Chief Baron Hale was directed, in Fry v. Porter, 1 Mod. 300, did not relate to a purchaser. In Butcher v. Stapely, 1 Vern. 364, the purchaser was affected with notice, of which it is said, there was no other *direct* evidence than what might have been gleaned from the conversation of some neighbors, who said that they

parties. A deed witnessed by one witness only was recorded. The court held that the grantee in such a deed is entitled to the land against a subsequent attachment and extent, if the creditor, at the time of his attachment, had notice of the deed, and that actual notice of the record will be regarded as actual notice of the prior deed.[1] "As the deed in this case," said Perley, J., "was not executed according to the statute, the registration as such is inoperative; that is to say, the registration is not constructive notice of the conveyance. But, if by means of that registration of the defective deed, the defendants had actual notice of the plaintiff's title, they are charged with the notice as in other cases. The defendants, when they found the copy of the plaintiff's deed on record, must have understood that the intended record was to give information that such a deed had been made, and that the plaintiff claimed the land under it. This must be regarded as actual notice, such as every reasonable and honest man would feel bound to act upon."[2]

§ 668. **Comments.**—The case of Kerns v. Swope[3] can scarcely be regarded as an authority for the proposition that a presumption of fact exists that a purchaser inspects the records, and thus obtains notice of the contents of conveyances spread upon the records, affecting the title not only to lands situated in the county in which the records are, but also of lands situated in that and other counties. The court declares, it is true, that this is a reasonable presumption, but the case

had heard that the vendor had sold the estate to the plaintiff. It is obvious that to decree on parol evidence of loose conversation in the presence of the party, which may not have been heard or understood by him, would be attended with extreme danger of injustice; and, notwithstanding this decision, the rule seems to be established as I have stated it, having been recognized by this court in Peebles v. Reading, 8 Serg. & R. 480, and Ripple v. Ripple, 1 Rawle, 386."

[1] Hastings v. Cutler, 4 Fost. (24 N. H.) 481.

[2] Hastings v. Cutler, *supra*.

[3] 2 Watts, 75.

was decided on the point that the portion of the deed in question was not acknowledged, and hence not entitled to registration. The remarks of the court, therefore, upon the question of presumption may be treated as *obiter dicta.* The rule indicated by the court in that case can rest upon no sound reason. Whether a purchaser inspects or does not inspect the records of the county in which the land he is about to purchase is situated, cannot be made a matter of presumption. It is a matter of fact, of evidence. To adopt the rule that actual notice should in such a case be presumed is, in the opinion of the author, to establish a doctrine in direct conflict with the spirit and intent of the whole system of registration laws. Constructive notice can seldom be equivalent to actual notice. Yet, if the statutes relative to registration are complied with, a subsequent purchaser is bound by the information contained in the records, whether he has actual knowledge of the facts or not. But the whole current of decision is to the effect that, to give the record this character of affording constructive notice, every requirement of the statute must be observed. A failure in any essential respect renders the record ineffectual as constructive notice. In Hastings v. Cutler,[4] a more reasonable rule is laid down, yet one to which objection may be raised. It is not, however, unreasonable to require a person who has actual knowledge that there is a deed, valid between the parties in existence, to make inquiry to ascertain the rights of the grantee. But it is presumed that, under this decision, it would first be necessary to show such actual knowledge by competent evidence. No presumption can result that a purchaser had such knowledge.

§ 669. **Change of boundaries of county.**—If a deed has been registered in the county in which the land lies, it is not necessary to record it again in a new or other county into which the former county may be divided, or to which it

[4] 4 Fost. 481.

may be annexed. "We are not apprised of any statute which would require an owner of land, having his deed properly registered in the county where the land lies, to have his conveyance again recorded as often as, by subdivisions and changes, the land may fall into a new or different county. Very prudent men may use such precautions. But it is not necessary for the protection of their rights, the first registry being amply sufficient." [5] If the land, at the date of the deed, lies in one county, but if, at the time it is presented for registration, a new county has been carved out of the old one, which includes the land described in the deed, the conveyance must be recorded in the new county, and not in the old.[6]

[5] McKissick v. Colquhoun, 18 Tex. 148. When a deed is recorded in the county in which the land lies, the fact that the land is afterwards included in a newly made county does not require the deed to be recorded in the new county: Whiddon v. Lumber Co. 98 Ga. 700, 25 S. E. 770; Bivings v. Gosnell, 133 N. C. 574, 45 S. E. 942 (citing text). If a deed is properly recorded in the county in which the land was situated at the time of recording, a subsequent change of county does not, under most statutes, require a new recordation: Green v. Green, 103 Cal. 108, 37 Pac. 188. See, also, Koerpe v. R. Co. 40 Minn. 132, 41 N. W. 656.

[6] Garrison v. Hayden, 1 Marsh. J. J. 222, 19 Am. Dec. 70. This case was an action of ejectment, and the plaintiff, in deraigning title, offered a deed certified by the clerk of the county court of Fayette for the land, acknowledged and recorded in that county. The land, at the date of the deed, was in Fayette county, but, at the time it was acknowledged, was in Jessamine, which county had, in the interval between the date and acknowledgment, been established. The *nisi prius* court rejected the certified copy of the deed, and this was claimed to be error. The court said: "A proper construction of either the letter or object of the act of assembly, which requires deeds for land to be recorded in the county in which the land lies, must sustain the opinion of the circuit court. The deed must be recorded in the county in which the land lies at the time the deed is deposited for registration. When a party is about to deposit his deed to be recorded, the act of assembly addresses him in this language: 'Have it recorded in the county in which the land lies; that is, the county in which the land lies now when you make the deposit.' The object of this requisition is to give notice in the county of the transference of the title to the land. As, therefore, the clerk of Fayette had no legal right to receive the ac-

§ 669a. **Purchaser for nominal consideration as purchaser for value.**—The question as to the right of a purchaser for a purely nominal consideration to invoke the benefit of the recording statutes has been decided differently in different jurisdictions. In a case recently decided in Wisconsin, it was held that a person taking a quitclaim deed to property from the devisee of a former owner for a nominal consideration, acquires no rights as against one who purchased from such owner, but whose deed, by mistake, had been omitted from the record, and who had paid taxes on the property for a number of years.[7] The court says: "Unquestionably the defendant knew that he was purchasing a suspicious and speculative title for a sum hardly more than sufficient to defray the cost of executing the deed. The statute was not enacted to protect one whose ignorance of the title is deliberate and intentional, nor does a mere nominal consideration satisfy the requirement that a valuable consideration must be paid. Its purpose is to protect the man who honestly believes he is acquiring a good title, and who invests some substantial sum in reliance on that belief. The fact that the supposed title could be, and was, purchased for a mere nominal consideration, is certainly constructive notice of the invalidity of the title, and sufficient of itself to put the purchaser upon inquiry."[8] A similar decision was made in New York where

knowledgment, his certificate of the fact of acknowledgment is no authentication of the deed. The recording of a deed not being necessary to pass the title, as between the parties to it, proof of the original by the subscribing witnesses would have been sufficient for the plaintiff in this case. But, as he chose not to offer such proof, and relied on the certificate of the Fayette clerk, he must abide the consequence of his error." See, also, Bell v. Fry, 5 Dana, 344. Where there has been a change in the boundaries of a county, a deed is properly recorded in the county in which the land was situated at the time of recording: Green v. Green, 103 Cal. 108. See Kennedy v. Harden, 92 Ga. 230.

[7] Wis. etc. Co. v. Selover, 135 Wis. 594, 16 L.R.A.(N.S.) 1073, 116 N. W. 265.

[8] DeWitt v. Perkins, 22 Wis. 473; Hoppin v. Doty, 25 Wis. 573.

a farm worth twenty thousand dollars was conveyed by a father to his daughter in consideration of ten dollars and an undertaking to pay the net proceeds of the place to the father for life and after his death to pay a certain portion thereof to his wife and another daughter.[3] The court observes that the good faith of a purchaser may be seriously impaired, if not destroyed, by the inadequacy of the price at which the property is offered. "If the sum which the seller is willing to take is grossly disproportionate to the value of the thing which is the subject of the negotiation, it is strong proof of a defective title, and sufficient to put a prudent man upon inquiry; and, if the buyer neglects to prosecute diligently such inquiry, he may not be awarded the standing of a *bona fide* purchaser." [1] However, in some jurisdictions the rule as just stated is not recognized, and it is held that the payment of a consideration, though nominal is sufficient to give the purchaser precedence over a prior unrecorded deed.[2]

§ 670. Purchaser under quitclaim deed—Comments.—The law is not uniform on the question whether a grantee under a quitclaim deed is to be considered a *bona fide* purchaser, entitled to the protection of the registry laws. By a conveyance of this character he succeeds to such title only as the grantor possesses at the time the deed is executed.[3] He

[3] Ten Eyck v. Witbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809, disapproving Hendy v. Smith, 49 Hun, 510, 2 N. Y. Supp. 535; Webster v. Van Steenbergh, 46 Barb. 211.

[1] And see Dunn v. Barnum, 51 Fed. 355, 2 C. C. A. 265, 10 U. S. App. 86; Huff v. Maroney, 23 Tex. Civ. App. 451, 56 S. W. 754; Green v. Robertson, 30 Tex. Civ. App. 236, 70 S. W. 345; Lunn v. Scarborough (Tex. Civ. App.) 35 S. W. 508; Gress v. Evans, 1 Dak. 387, 46 N. W. 1132. And see Atty. Gen. v. Abbott, 154 Mass. 323, 13 L.R.A. 251, 28 N. E. 346; Smith v. Phillips, 9 Okl. 297, 60 Pac. 117.

[2] Strong v. Whybark, 204 Mo. 341, 12 L.R.A.(N.S.) 240, 102 S. W. 968; Ennis v. Tucker, 78 Kan. 55, 96 Pac. 140. And see Booker v. Booker, 208 Ill. 529, 70 N. E. 709, 100 Am. St. Rep. 250; Hart v. Gardner, 81 Miss. 650, 33 So. 442.

[3] See McInerney v. Beck, 10 Wash. 515; Spaulding v. Bradley, 79 Cal. 449.

cannot claim the benefit of any title subsequently acquired by his grantor. It has in some States been held that as he obtains the grantor's title only, he acquires nothing at all, if the grantor has previously transferred this title to another, and that it is immaterial whether he has notice of this fact or not. On the other hand, it is considered in other States, that this conveyance is effectual to convey such title as the grantor possesses, and such title as, under the registry laws, the grantee has a right to assume, is vested in the grantor.

§ 671. **View that such purchaser is not entitled to the protection of the registry acts.**—The doctrine that a purchaser under a quitclaim deed is not a *bona fide* purchaser without notice, prevails in many courts, and is supported by eminent authority. It was held in some of the earlier decisions of the United States, that "a purchaser by a deed of quitclaim, without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration without notice; and he takes only what the vendor could lawfully convey."[4] But in more recent cases this rule seems no longer to be recognized, and it is said by Mr.

[4] Oliver v. Piatt, 3 How. 333. See, also, May v. Le Claire, 11 Wall. 217, 232, 20 L. ed. 50, 53; Villa v. Rodriguez, 12 Wall. 323, 20 L. ed. 406; Van Rensselaer v. Kearney, 11 How. 297, 13 L. ed. 703; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396; Gest v. Packwood, 34 Fed. Rep. 368; Hastings v. Nissen, 31 Fed. Rep. 597; Woodward v. Jewell, 25 Fed. Rep. 6; Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618. And see, also, White v. McGarry, 2 Flip. 572. A duly recorded quitclaim deed is not entitled to precedence over another conveyance prior to the quitclaim in point of time but not recorded: Fowler v. Will, 19 S. D. 131, 102 N. W. 598, 117 Am. St. Rep. 938, 8 A. & E. Ann. Cas. 1093; Beakley v. Robert, 120 Mich. 209, 79 N. W. 193; Messenger v. Peter, 129 Mich. 93, 88 N. W. 209; Rosenbaum v. Foss, 7 S. D. 83, 63 N. W. 538; Citizens' Bank v. Shaw, 14 S. D. 197, 84 N. W. 779; Va. etc. Coal Co. v. Fields, 94 Va. 102, 26 S. E. 426. See, also, Wickham v. Henthorn, 91 Ia. 242, 59 N. W. 276; Woody v. Strong (Tex.) 100 S. W. 801; Minn. etc. R. Co. 116 Ia. 681, 88 N. W. 1082.

Justice Field: "The character of a *bona fide* purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise, as often, though we think, inadvertently said, either from the form of the conveyance or the presence or the absence of any accompanying warranty. Whether the grantee is to be treated as taking a mere speculative chance in the property, or a clear title, must depend upon the character of the title of the grantor when he made the conveyance; and the opportunities afforded the grantee of ascertaining this fact and the diligence with which he has prosecuted them, will, besides the payment of a reasonable consideration, determine the *bona fide* nature of the transaction on his part.[5] In a still later Federal case it is said: "The riper con-

[5] Moelle v. Sherwood, 148 U. S. 21, 30, 37 L. ed. 350, 354. In United States v. California and Oregon Land Co. 148 U. S. 31, 45, 37 L. ed. 354, 361, Mr. Justice Brewer said: "As against these evidences and conclusions of good faith, but a single proposition is raised, one upon which the dissenting judge in the circuit court of appeals rested his opinion, and that is the proposition that the conveyances from the road company were only quitclaim deeds, and that a purchaser holding under such a deed cannot be a *bona fide* purchaser; and in support of this proposition reference is made to the following cases in this court: Oliver v. Piatt, 3 How. 333, 410, 11 L. ed. 622, 657; Van Rensselaer v. Kearney, 11 How. 297, 13 L. ed. 703; May v. Le Claire, 11 Wall. 217, 232, 20 L. ed. 50, 53; Villa v. Rodrigue, 12 Wall. 323, 20 L. ed. 406; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396. The argument briefly stated is that he who will give only a quitclaim deed in effect notifies his vendee that there is some defect in his title, and the latter taking with such notice, takes at his peril. It must be confessed that there are expressions in the opinions in the cases referred to which go to the full length of this proposition. Thus, in Baker v. Humphrey, 101 U. S. 494, 499, 25 L. ed. 1065, 1067, Mr. Justice Swayne, in delivering the opinion of the court, uses this language: 'Neither of them was in any sense a *bona fide* purchaser. No one taking a quitclaim deed can stand in that relation.' Yet it may be remarked that in none of these cases was it necessary to go to the full extent of denying absolutely that a party taking a quitclaim deed could be a *bona fide* purchaser; and in the later case of McDonald v. Belding, 145 U. S. 492, 36 L. ed. 788, it was held, in a case coming from Arkansas, and in harmony

sideration and more thoughtful consideration of later years have exploded the fallacy upon which the earlier decisions of the Supreme Court rested, and have led the court to adopt the rule, which has now become firmly established, both upon reason and authority, that the innocent purchaser under a quitclaim deed may acquire the title under the registry statutes as against the holder of a prior unrecorded deed from the same grantor notwithstanding the fact that the latter had no title, and had nothing to convey, when he executed his second deed." [6] In Iowa the rule stated by the court is: "One holding title under such a deed is not to be regarded as a *bona fide* purchaser without notice of equities held by others." [7] But language to a contrary effect is found in a previous decision in that State. The court, however, subsequently claimed that in that case the question was not presented, and that the only point decided was that, under the recording laws, a purchaser under a quitclaim deed acquired a prior right to one claiming under an unrecorded bond for a deed of which he had no notice, because the quitclaim deed conveyed the legal title.[8] In

with the rulings of the supreme court of that State, that while ordinarily a person holding under a quitclaim deed may be presumed to have had knowledge of imperfections in his vendor's title, yet that the rule was not universal, and that one might become a *bona fide* purchaser for value although holding under a deed of that kind; and in that case the grantee so holding was protected as a *bona fide* purchaser; while in the case of Moelle v. Sherwood, just decided, *ante,* 21, the general question was examined, and it was held that the receipt of a quitclaim deed does not of itself prevent a party from becoming a *bona fide* holder, and the expressions to the contrary, in previous opinions, were distinctly affirmed."

[6] Boynton v. Haggart, 120 Fed. 819, 57 C. C. A. 301.

[7] Watson v. Phelps, 40 Iowa, 482, 483; Raymond v. Morrison, 59 Iowa, 371; Smith v. Dunton, 42 Iowa, 48; Springer v. Bartle, 46 Iowa, 688; Besore v. Dosh, 43 Iowa, 211, 212; Pastel v. Palmer, 71 Iowa, 157, 32 N. W. Rep. 257; Butler v. Barkley, 61 Iowa, 491, 25 N. W. Rep. 747; Steele v. Sioux Valley Bank, 79 Iowa, 339, 18 Am. St. Rep. 370; Light v. West, 42 Iowa, 138; Pleasants v. Blodgett, 39 Neb. 741, 42 Am. St. Rep. 624; Wickham v. Henthorn, 91 Ia. 242, 59 N. W. 276.

[8] Springer v. Bartle, 46 Iowa, 690.

Minnesota, the statute declared that: "A deed of quitclaim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by deed of bargain and sale." Commenting upon this language, the court said: "If the legislature intended by the use of the term 'lawfully convey,' to limit the estate conveyed to such as the grantor had a legal right to convey, then, as he may not lawfully convey land which he has already conveyed to another, but may release any real or fancied interest remaining in him, nothing passes beyond his actual interest at the time of the conveyance, whatever that may be. When, therefore, a person relies on a mere quitclaim of the interest which a party may have in property, he does so at his peril, and must see to it, that there is an interest to convey. He is presumed to know what he is purchasing, and takes his own risk." [9] And hence in that State, a purchaser under a quitclaim deed is not regarded as a purchaser entitled to the benefits of the registration acts.[1] But the statute in that State has been changed, and a purchaser under a quitclaim deed is regarded as a *bona fide* purchaser.[2] This is also the rule in other States [3] and South Dakota.[4]

And see, also, Steele v. Sioux Valley Bank, 79 Iowa, 339, 7 L.R.A. 524, 18 Am. St. Rep. 370.

[9] Martin v. Brown, 4 Minn. 282, 292, per Emmett, C. J.

[1] Marshall v. Roberts, 18 Minn. 405, 10 Am. Rep. 201; Everest v. Ferris, 16 Minn. 26. See, also, Hope v. Stone, 10 Minn. 152.

[2] Strong v. Lynn, 38 Minn. 315, 37 N. W. Rep. 448; Prentice v. Duluth Storage Co. 58 Fed. Rep. 437; Dunn v. Barnum, 51 Fed. 355, 2 C. C. A. 265.

[3] Rodgers v. Burchard, 34 Tex. 441, 7 Am. Rep. 283; Graham v. Hawkins, 38 Tex. 628; Richardson v. Levi, 67 Tex. 359, 3 S. W. Rep. 444; Harrison v. Boring, 44 Tex. 255; Fletcher v. Ellison, 1 Tex. Civ. Cas. 661; Thoon v. Newsom, 64 Tex. 161, 53 Am. Rep. 747; Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304; Woody v. Strong, 45 Tex. Civ. App. 256, 100 S. W. 801; Smith's Heirs v. Bank of Mobile, 21 Ala. 125; Walker v. Miller, 11 Ala. 1067, 1082, 1084; Barclift v. Lillie, 82 Ala. 319, 2 So. Rep. 120; Derrick v. Brown, 66 Ala. 162; O'Neal v. Seixas, 85 Ala. 80, 4 So. Rep. 745. See, also, Bragg v. Paulk, 42 Me. 502; Boon v. Chiles, 10 Peters, 177, 9 L. ed. 388; Vat-

§ 672. **View that such purchaser is entitled to the full protection of the recording laws.**—But in other States, and more reasonably, as it seems to us, it is held that a purchaser under a quitclaim deed who becomes such in good faith and for a valuable consideration, may claim the benefit of the recording laws, and that his conveyance, if first recorded, will prevail over a prior deed of bargain and sale. This is the rule adopted in California. In that State, Mr. Justice Belcher said: "There can be no doubt upon the question presented, if real estate, or an interest in real estate, can be aliened or assigned by a quitclaim deed. To alien or alienate means simply to convey or transfer title to another. In this State, from the earliest times, quitclaim deeds have been in every-day use for the purpose of transferring title to land, and have been considered as effectual for that purpose as deeds of bargain and sale. It is true, they transfer only such interest as the seller then has, and do not purport to convey the property in fee simple absolute, so as to pass an after-acquired title, but to the extent the seller has an interest, they divest him of it and vest it in the purchaser. We consider, therefore ,that a quitclaim deed received in good faith and for a valuable consideration, which is first recorded, will prevail over a deed of older execution which is subsequently recorded."[5] This view

tier v. Hinde, 7 Peters, 252, 8 L. ed. 675; Nash v. Bean, 74 Me. 340. See, also, Peters v. Cartier, 80 Mich. 124, 20 Am. St. Rep. 508; Eaton v. Trowbridge, 38 Mich. 454; Johnson v. Williams, 37 Kan. 179, 1 Am. St. Rep. 243; Utley v. Fee, 33 Kan. 683; Merrill v. Hutchinson, 45 Kan. 59, 23 Am. St. Rep. 713; Hutchinson v. Hartman, 15 Kan. 133; Young v. Clippinger, 14 Kan. 148; Goddard v. Donaha, 42 Kan. 754; Hoyt v. Schuyler, 19 Neb. 652; Gress v. Evans, 1 Dak. 387, 46 N. W. Rep. 1132; Snow v. Lake, 20 Fla. 656, 51 Am. Rep. 625; McAdow v. Black, 6 Mont. 601, 13 Pac. Rep. 377; American Mortgage Co. v. Hutchinson, 19 Or. 334; Baker v. Woodward, 12 Or. 3; Bragg v. Paulk, 42 Me. 502; Meikel v. Borders, 129 Ind. 529; Leland v. Isenbeck, 1 Idaho, 469; Parker v. Randolph, 5 S. D. 549, 29 L.R.A. 33, 59 N. W. Rep. 722.

[4] Fowler v. Will, 19 S. D. 131, 102 N. W. 598, 117 Am. St. Rep. 938; 8 A. & E. Ann. Cas. 1093.

[5] In Graff v. Middleton, 43 Cal. 341. This case was subsequently

was also at an early day adopted in Illinois. "Prior to the passage of the statutes made for the purpose of facilitating the manner of transferring lands, it was essential to the operation of a deed of release that the grantee should have some estate or interest in the land released; but many of the subtle distinctions and ceremonious forms peculiar to the ancient modes of transferring titles are abolished, and the policy of the law now requires that we should look rather to the intention of the parties than to the form in which it is expressed. A deed of release and quitclaim is as effectual for the purpose of transferring title to land as a deed of bargain and sale; and the prior recording of such deed will give it a preference over one previously executed, but which was subsequently recorded. In this respect there is no distinction between different forms of conveyance. As a general rule, the one first recorded must prevail over one of older execution, when made in good faith, and when it appears to have been the intention of the parties to convey again the same lands which had been previously conveyed." [6] In a case in Mississippi, the cases are reviewed by

approved in Frey v. Clifford, 44 Cal. 335, 343. See, also, Willingham v. Hardin, 75 Mo. 429; Boogher v. Neece, 75 Mo. 383. In the case of Allison v. Thomas, 72 Cal. 562, 1 Am. St. Rep. 89, the court while recognizing the rule stated as the correct principle in view of the language of the recording act in force when the cases were decided, says: "Unless these cases are justified by the peculiar wording of the statute, they seem to be against the decisions elsewhere upon the subject. It has been uniformly held that a conveyance of the right, title, and interest of the grantor vests in the purchaser only what the grantor himself could claim, and the covenants in such deed, if there were any, were limited to the estate described." In that case the court held that a quitclaim deed conveyed to the purchaser only what the grantor could himself claim, and that the only exceptions to the rule were based upon the registry laws, or were sales made under execution. See, also, Spaulding v. Bradley, 79 Cal. 449; Thompson v. Spencer, 50 Cal. 532; Rego v. Van Pelt, 65 Cal. 254.

[6] McConnel v. Reed, 4 Scam. (5 Ill.) 117, 121, 38 Am. Dec. 124, per Chief Justice Wilson. And to the same effect see Brown v. Banner Coal and Oil Co. 97 Ill. 214, 37 Am. Rep. 105; Kennedy v. Northup, 15 Ill. 148; Morgan v. Clayton, 61 Ill. 35; Hamilton v. Doolittle, 37 Ill.

Mr. Justice Campbell at considerable length, and as the result of his examination, he says: "We conclude that there is no *authority* for the proposition that a quitclaim deed in the chain of title deprives him who claims under it of the character of a *bona fide* purchaser. There are *dicta* and suggestions and inferences to that effect. But we deny and repudiate the proposition as unsound and insupportable on authority, principle, or policy. We concede that under some circumstances a quitclaim deed may be a 'significant circumstance,' in the consideration of a combination of circumstances of which it may be a part, but this is the greatest force it can possibly have in any case." [7] The rule that a purchaser under a quit-

473; Harpham v. Little, 59 Ill. 509; Butterfield v. Smith, 11 Ill. 485; Brady v. Spurck, 27 Ill. 478; Grant v. Bennett, 96 Ill. 513; Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316; White v. McGarry, 2 Flipp. C. C. 572. The title of a purchaser under a quitclaim deed without notice will prevail over that given by an unrecorded deed: Merrill v. Hutchinson, 45 Kan. 59, 23 Am. St. Rep. 713.

[7] Chapman v. Sims, 53 Miss. 163. The court, in that case, in discussing that question, said: "The deed from McPherson to Sims is a mere quitclaim deed, and it is said that, as there is such a deed in the chain of Anderson's title, he cannot be held to occupy the position of a *bona fide* purchaser. The cases cited in support of this legal proposition are: Smith v. Winston, 2 How. (Miss.) 601; Kerr v. Freeman, 33 Miss. 292; Learned v. Corley, 43 Miss. 687; Oliver v. Piatt, 3 How. 333, 410, 11 L. ed. 622, 657; May v. Le Claire, 11 Wall. 217, 232, 20 L. ed. 50, 53; Woodfolk v. Blount, 3 Hayw. (Tenn.) 147. In Smith v. Winston, the point under consideration was, whether the failure of consideration could be set up by a vendee under deed without covenants of warranty, as a defense to the recovery of the purchase money he had promised. It would seem that to suggest the question was to indicate the proper answer to it; but the learned judge delivering the opinion, discussed the question at length, and among many other things said: 'In a quitclaim deed, the party does nothing more than to acquit the grantee from any title or right of action which he may have; and the fact of taking nothing more than a quitclaim would, in general, imply a knowledge of doubtful title.' Again, he remarked: 'The law seems to be well settled that a purchaser without covenants takes all the risk of title.' The remark last quoted was pertinent, and all that was necessary to dispose of the point. It is indisputable that a purchaser with-

claim deed is entitled under the registry laws, to the character

out covenants takes all the risk of title, so far as any right to call on his vendor to indemnify him for a failure of title is involved. We are not able to perceive the appropriateness of the above-quoted statement, that 'the fact of taking nothing more than a quitclaim would, in general, imply a knowledge of doubtful title.' Knowledge, or want of it, could in no way affect the question being discussed. It was not the case of one claiming as a *bona fide* purchaser. That case is not an authority in support of the proposition for which it has been invoked. The case of Kerr v. Freeman is that of a complainant claiming land under a quitclaim deed, seeking the cancellation of certain deeds operating as clouds on his title. The judge delivering the opinion, speaking of the complainant's quitclaim deed, said: 'His deed merely shows a doubtful title;' but it was not said that because the complainant held under a quitclaim, he could not maintain his bill. On the contrary the question, 'whether the decree is sustained by the evidence in the cause,' was minutely discussed, and the conclusion announced that it was insufficient to warrant the decree. If it be true, as a legal proposition, that a title evidenced only by a quitclaim deed is not sufficient to support a claim to have clouds removed from it, the announcement of that proposition was enough to dispose of the case, and render an examination of the evidence unnecessary. This case is not an authority for the proposition that a vendee by quitclaim cannot be regarded as a *bona fide* purchaser. Learned v. Corley contains this expression: 'A quitclaim deed implies a doubtful title.' But that was not pronounced sufficient, of itself, to deprive the grantee of his claim to be a *bona fide* purchaser. It seems, rather, to have been treated as a significant circumstance in the history of the case fit to be considered, with other circumstances all of which combined were held to deprive the holder of his claim as a purchaser in good faith. In Oliver v. Piatt, this language is found: 'Another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quitclaim deed only for the tracts; and the subsequent deeds given by Oliver to him, accordingly, were drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title, and interest in the property; and under such circumstances it is difficult to conceive how he can claim protection as a *bona fide* purchaser,' etc. It is observable that the quitclaim deed, in pursuance of a previous stipulation for such a one, was declared to be a 'significant circumstance,' in connection with others, in themselves sufficient, to deprive the grantee of his claim to be treated

of a *bona fide* purchaser and to the protection that such a character gives, prevails in many States.[8]

as a *bona fide* purchaser. The quitclaim deed is not pronounced to be *per se* enough to rob its holder of the character of a *bona fide* purchaser. In May v. Le Claire this language is used: 'The evidence satisfies us that Cook had full notice of the frauds of Powers, and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quitclaim deed, he cannot be regarded as a *bona fide* purchaser without notice. In such cases, the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey.' And Oliver v. Piatt, 3 How. 333, 11 L. ed. 622, is referred to in support of the proposition. No other authority is cited. After declaring 'that Cook had full notice of the frauds of Powers, and of the infirmities of Dessaint's title,' it was surely unnecessary to say more, and the remark about the quitclaim deed is as perfect a specimen of an *obiter dictum* as the books afford. We have above shown that the single case cited in support of this *dictum* merely treated the quitclaim in that case as a 'significant circumstance,' and did not announce that it alone was in itself a bar to the claim to be a *bona fide* purchaser. In Woodfolk v. Blount, the court hesitatingly and doubtfully suggested that, perhaps 'the vendee in all cases, when he receives but a special warranty or quitclaim conveyance, takes the estate subject to all the disadvantages that it was liable to in the hands of the vendor, and the law will presume notice of all encumbrances, either legal or equitable. The circumstance of a vendor refusing to make a full and ordinary assurance is sufficient to excite suspicion, and put the party upon inquiry.' Not a single authority is referred to, except cases on the subject of 'indorsement of a bill without recourse after it is due,' which hold that the indorsee takes subject to all equities. The language immediately afterward used in the opinion is: 'The principles in relation to conveyances of real property with special warranty, perhaps will be found equally applicable. However, it is not necessary to give a positive opinion on this subject.' It is just to assume that the judge delivering that opinion would have cited some textbook or adjudication, if he could have found one to sustain the view he expressed. His citation of cases of indorsements of bills after maturity shows his anxiety on the subject, and suggests his inability to find any authority in point."

[8] Woodward v. Sartwell 129 Mass. 210; Dow v. Whitney, 147 Mass. 1; Mansfield v. Dyer, 131 Mass. 200; Kyle v. Kavanagh, 103 Mass. 356, 4 Am. Rep. 560; Cutler v. James, 64 Wis. 173, 54 Am. Rep. 603; Faryason v. Edrington, 49 Ark. 207; Munson v. Ensor, 94 Mo. 504; Hope v. Blair, 105 Mo. 85, 24 Am. St. Rep. 366; Craig v. Zimmerman, 87 Mo. 475, 56 Am. Rep.

§ 673. **Comments.**—We think that it is unreasonable to deprive a purchaser under a quitclaim deed of the benefits of the registration laws. A conveyance of this character is sufficient to convey all the title the grantor possesses at the time of its execution. If he has already executed a prior conveyance, a subsequent grantee, whether by a quitclaim deed, or a deed containing every covenant, can acquire no title unless it be by virtue of some principle of estoppel, or by force of some positive provision of the statute, relative to registration. There is, to our mind, no force in the argument that a purchaser by a quitclaim deed can succeed to no rights save those possessed by his grantor. The same is true of a purchaser under any other kind of a deed. The latter succeeds by the conveyance only to the title of the grantor, although he may be entitled to the benefit of the subsequent title of his grantor by operation of the doctrine of estoppel, and may have a right to resort to his grantor on the covenants contained in the deed for any breach of or defect in the title he has purchased. Nor should the fact that a purchaser accepts a quitclaim be regarded, in our judgment, as a "significant circumstance," in charging him with notice of a prior or para-

466; Ebersole v. Rankin, 102 Mo. 488; Eoff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609; Ely v. Stannard, 44 Conn. 528; Potter v. Tuttle, 22 Conn. 512; Bradbury v. Davis, 5 Colo. 265. A recorded quitclaim will prevail over prior unrecorded deed: Williams v. White etc. Co. 114 La. 448, 38 So. 414; Stark v. Boynton, 167 Mass. 443, 45 N. E. 764; Livingston v. Murphy, 187 Mass. 315, 72 N. E. 1012; Elliott v. Buffington, 149 Mo. 663, 51 S. W. 403; Strong v. Whybark, 204 Mo. 341, 12 L.R.A.(N.S.) 240, 102 S. W. 968; Schott v. Dosh, 49 Neb. 187, 68 N. W. 346, 59 Am. St. Rep. 531; Bannard v. Duncan, 79 Neb. 189, 112 N. W. 353. See, also, Ellison v. Torpin, 44 W. Va. 414, 30 S. E. 183; Dunfee v. Childs, 59 W. Va. 225, 53 S. E. 209; Wilhelm v. Wilken, 149 N. Y. 447, 44 N. E. 82, 32 L.R.A. 370, 52 Am. St. Rep. 743; Baecht v. Hevesy, 101 N. Y. S. 413, 115 App. Div. 509; Boyton v. Haggart, 120 Fed. 819, 57 C. C. A. 301. In some cases the fact that a purchaser has taken a quitclaim deed has been considered a circumstance tending to show notice on his part: Gaines v. Summers, 50 Ark. 322; Bagley v. Fletcher, 44 Ark. 153; Miller v. Fraley, 23 Ark. 735.

mount title. Mr. Rawle very properly says with reference to this suggestion: "But there would appear to be equal reason for the opposite argument, that a deed with general warranty was as significant a circumstance—that unless there had been something wrong about the title, the purchaser would not have demanded a general covenant, and that he intended to run the risk of the defect, and rely upon the covenant for his protection. In the absence of local usage it would seem that no presumption of notice can properly arise, either from the absence or presence of unlimited covenants, and where it is, as some of the cases say, the invariable usage in a State to insert general covenants, the presence in the deed of limited covenants is only a ground of presumption of mutual knowledge, or at least, of suspicion, of some defect of title." [9] The theory of the registry laws is that the records truly disclose the state of every title. If an intending purchaser, after a careful examination of the records, finds the legal title lodged in his grantor, and has no actual notice of any outstanding claim, and obtains all of his grantor's interest, why should his right to precedence over a prior unrecorded conveyance of which he had no notice depend upon the form of his deed? Quitclaim deeds in many States are not unusual forms of conveyance. The grantor may have the best of reasons for not desiring to execute a deed with covenants, or even to agree, impliedly, that the grantee shall succeed to any title the former may subsequently acquire. The grantee may be thoroughly satisfied with the validity of the grantor's title, and may, in his confidence, consider himself fully protected by acquiring that title without the exaction of covenants for his reparation in case of its failure. The fact that his deed contains no

[9] Rawle on Covenants (4th ed.) 35, 36, citing Miller v. Fraley, 23 Ark. 743; Lowry v. Brown, 1 Cold. 459. That the taking of a quitclaim deed may be a circumstance bearing on the question of notice, see Knapp v. Bailey, 79 Me. 195, 1 Am. St. Rep. 295; Mansfield v. Dyer, 131 Mass. 200.

covenants, and that the grantor conveys to him nothing but his title, should not, in our opinion, be entitled to consideration in the determination of the question whether he is to be regarded as a *bona fide* purchaser or not. This question should be decided with reference to other considerations, as want of consideration or purchase with notice. It might, perhaps, as a question of evidence, on the issue of notice, be conceded that a party should be permitted to show, that one of the *reasons* why the grantee took a quitclaim deed was because both he and the grantor were aware of a prior conveyance, or a defect in the title. But, as we have stated, we can see no reason for the doctrine that a quitclaim deed should, of itself, aside from any other suspicious circumstance, be sufficient to deprive its holder of occupying the character of a *bona fide* purchaser.

§ 674. **Intention in quitclaim to pass grantor's interest only.**—But even in the States where a quitclaim deed is recognized as an effectual mode of transferring the title of the grantor, and is accorded the same privileges under the registry law as a deed of bargain and sale, yet if it appears by the deed of quitclaim that the grantor intended to convey only such land as he owned at the time of its execution, the lands embraced in a prior operative conveyance are reserved from the operation of the quitclaim deed, and title to such previously conveyed lands will not pass by the deed of quitclaim, notwithstanding that the prior deed remains unrecorded. As an illustration of this principle a case may be cited where the description of the property intended to be conveyed by the quitclaim deed was: "All lots, blocks, lands, and fractional blocks, or any interest therein, in the town of Pekin, county of Tazewell, State of Illinois, that I have; also, all my right and interest, or in anywise appertaining, together with the right of ways. This deed is intended to convey all the interest the said Peter Menard has in the town of Pekin, now city, in said

county." The court held that this language embraced only such land as the grantor owned at the time of the execution of the deed.[1] The court said: "The language used clearly manifests the intention of the grantor to limit the operation of the conveyance to such lands as he then owned, and the title to which was still in him. Whilst a quitclaim deed is as effectual to pass title as a deed of bargain and sale, still it, like all other contracts and agreements, must be expounded and enforced according to the intention of the parties. In this deed the intention of Menard appears to have been to sell such lands only as had not been conveyed by him to other parties previous to that time."[2] A grantor conveyed land, specifically describing himself as the devisee of Alexander Skinner, by whom the land was owned in his lifetime. By a subsequent deed, which was first recorded, he conveyed to another "all the right, title, and claim which he, the said Alexander Skinner, *had,* and all the right, title and interest which the said Lee [grantor] holds as legatee and representative to said Alexander Skinner, deceased, of all lands lying and being the the State of Kentucky, which cannot at this time be particularly described, whether they be by deed, patent, mortgage, survey, location, contract or otherwise." The deed also contained a covenant against all persons claiming under the grantor, his heirs and assigns. The court held that the latter conveyance operated only upon the lands and the interest which he possessed at its execution, and therefore could not, by a prior registration, obtain precedence over or defeat the operation of the first deed, by which the same land was specifically conveyed.[3]

[1] Hamilton v. Doolittle, 37 Ill. 473. See, also, Pleasants v. Blodgett, 39 Neb. 741, 42 Am. St. Rep. 624, 58 N. W. 423; Va. etc. Co. v. Fields, 94 Va. 102, 26 S. E. 426 (citing text).

[2] Chief Justice Walker, in Hamilton v. Doolittle, *supra.*

[3] Brown v. Jackson, 3 Wheat. 449, 4 L. ed. 432. Mr. Justice Todd delivered the opinion of the court, and said: "A conveyance of the *right,*

§ 675. **Another illustration.**—The same construction was given to another deed, which was in the usual form of a quitclaim deed, conveying all the right, title, and interest of the grantor in certain lands, but after the description contained the clause: "Intending to convey such only as are now owned by said Walker, and not any that may have been conveyed to anyone else." "Such a deed," said Mr. Justice Trumbull, "is just as effectual for the purpose of transferring real estate as a deed of bargain and sale; and had there been no words in the deed under consideration, showing an intention on the part of the grantor not to convey the land in question, there can be no doubt that the plaintiff would have been entitled to recover. The deed, however, contains a clause showing that the grantor did not transfer by it any interest in lands which he had previously conveyed. It was competent for the grantor to insert such a limitation in the deed;

title, and interest in land is certainly sufficient to pass the land itself, if the party conveying has an estate therein at the time of the conveyance; but it passes no estate which was not then possessed by the party. If the deed to Banks had stopped after the words 'all the right, title, and claim which Alexander Skinner had,' there might be strong ground to contend that it embraced all the lands to which Alexander Skinner had any right, title, or claim, at the time of his death, and thus have included the lands in controversy. But the court is of the opinion that those words are qualified by the succeeding clause, which limits the conveyance to the *right, title, and claim* which Alexander Skinner had at the time of his decease, and which Lee also *held at the time of his conveyance,* and coupling both clauses together, the conveyance operated only upon lands, the right, title, and interest of which was then in Lee, and which he derived from Skinner. This construction is, in the opinion of the court, a reasonable one, founded on the apparent intent of the parties, and corroborated by the terms of the covenant of warranty. Upon any other construction, the deed must be deemed a fraud upon the prior purchaser; but in this way both deeds may well stand together consistent with the innocence of all parties." A general covenant of warranty is limited by words conveying only the right, title, and interest of the grantor: Reynolds v. Shaver, 59 Ark. 299, 43 Am. St. Rep. 36; Hull v. Hull, 35 W. Va. 155, 29 Am. St. Rep. 800. See, also, § 27, *ante,* and § 931, *post.*

and the grantee, by accepting such a deed, is bound by all the limitations it contains. The intention of the parties is the polar star by which courts are always to be guided in the construction of contracts; and can there be any question that Walker did not intend by his quitclaim deed to convey any land which he did not then own, or which might have been conveyed to anyone else, when he has expressed that intention in the deed itself, as clearly as language could make it? It is clear, therefore, that no interest in the land in question passed by the quitclaim deed, because Walker had previously conveyed the same land to Taylor and others. He says that it was his intention to convey only such lands described in the quitclaim deed as he then owned, and his ownership over the land in controversy was as effectually parted with, as to him, as it would have been if Taylor and others had immediately placed their deed upon record. To construe the clause under consideration as extending only to such lands as Walker had previously conveyed to persons who had put their deeds upon record, would be to give it no meaning whatever. His second conveyance could in no way affect their rights. It is probable that Walker, being at the time a large operator in lands, did not precisely recollect what tracts he had sold, and hence inserted a clause in his quitclaim deed that would protect all who had purchased from him, whether their deeds were recorded or not, even though he should make a second conveyance of the same land." [4]

§ 676. **Reservation in quitclaim deed as affecting a prior void or voidable deed.**—But although a quitclaim deed may show by proper words of reservation that the grantor did not intend to convey lands previously transferred by him, yet it is held that a prior void deed is not within such a

[4] Butterfield v. Smith, 11 Ill. 485, 486. See Harpham v. Little, 59 Ill. 509; Allison v. Thomas, 72 Cal. 562; Coe v. Persons Unknown, 43 Me. 432; Nash v. Bean, 74 Me. 340; Walker v. Lincoln, 45 Me. 67.

reservation, and that a subsequent quitclaim deed, with a reservation of this nature, will pass the title as against the prior conveyance.[5] "By fair construction, the language must be restricted to previous conveyances, legally executed, and operative as such. A conveyance void under the law, or even voidable, at the time of executing the subsequent conveyance, could not be held to be embraced within the reservation. It not unfrequently happens, that the subsequent deed is designed to avoid a prior deed which the grantor has the legal right to avoid, and such conveyances are upheld as binding, and sufficient to pass the title. Again, the language should be restricted so as not to embrace any conveyance which is so imperfectly executed that the law will refuse to give it effect as a conveyance of title. If it has been so executed that it cannot be proved so as to be admitted in evidence as a conveyance, it cannot have effect, and cannot be held to constitute a conveyance. If, from want of proof, or from other defect, it cannot be used in the assertion of the right to hold the title, it cannot be said to be a conveyance of the title to the land. In such a case, the legal title does not pass from the vendor, but remains in him at the time the subsequent conveyance is made, and falls fully within the operation of the language of such a deed." [6]

§ 676a. **Quitclaim deed as color of title.**—Where a claim under a deed is one of the elements constituting adverse possession or where the extent of the possession alleged to be adverse is dependent upon a deed as affording color of title, a quitclaim deed is sufficient to give such color of title.[7] But

[5] Hamilton v. Doolittle, 37 Ill. 473.

[6] Hamilton v. Doolittle, *supra*. A quitclaim deed will not cut off equities arising from transactions not required to be in writing or recorded: Hope v. Blair, 105 Mo. 85, 24 Am. St. Rep. 366; Mann v. Best, 62 Mo. 497; Ridgeway v. Holliday, 59 Mo. 444; Stoffel v. Schroeder, 62 Mo. 147; Munson v. Ensor, 94 Mo. 506.

[7] Castleberry v. Black, 58 Ga. 386; Johnson v. Girtman, 115 Ga.

a quitclaim deed which limits the interest conveyed to that of the grantor, will operate as color of title only to the extent of his interest.[8] Nor under a quitclaim deed, is there color of title to land not described in the deed.[9] A quitclaim deed may deprive the owner of his right to claim the benefit of a statute requiring the purchaser at a tax sale to commence an action to recover possession of the property sold within a specified time,[1] and adverse possession may be secured against the cotenants of a testator by one who enters into possession under a will and deed from the executors of a testator purporting to convey the whole property. If possession is acquired by virtue of a deed from a person who claims adversely to the creator of a trust, it may be the foundation of an adverse title.[2]

§ 677. **Record partly printed.**—The law is satisfied if the record contains a true copy of the instrument to be recorded. The record of a conveyance is not defective, because, instead of being entirely written, a portion of it is printed. The statute of Wisconsin requires that instruments shall be recorded "in a plain and distinct handwriting."[3] A book in which a mortgage was recorded was composed of printed blanks in the form of farm mortgages. When a mortgage of this kind was recorded, the blanks were filled in, and this was the only handwriting shown by the record. It was declared by

794, 42 S. E. 96; McDonough v. Jefferson County, 79 Tex. 535, 15 S. W. 490; Parker v. Newberry, 83 Tex. 428, 18 S. W. 815; McConnel v. Street, 17 Ill. 253; Holloway v. Clark, 27 Ill. 483; Winslow v. Cooper, 104 Ill. 235; Safford v. Stubbs, 117 Ill. 389, 7 N. E. 653; Hall v. Waterman, 220 Ill. 569, 4 L.R.A.(N.S.) 776, 77 N. E. 142; Swift v. Mulkey, 14 Or. 59, 12 Pac. 76; Minot v. Brooks, 16 N. H. 374.

[8] Busch v. Huston, 75 Ill. 343. See McDonough v. Jefferson County, 79 Tex. 535, 15 S. W. 490.

[9] Woods v. Banks, 14 N. H. 101; Archer v. Beihl, 60 C. C. A. 101, 136 Fed. 113.

[1] Knight v. Campbell, 76 Iowa, 730, 39 N. W. 829.

[2] Hall v. Waterman, 220 Ill. 569, 4 L.R.A.(N.S.) 776, 77 N. E. 142.

[3] Rev. Stats. § 758, subd. 2.

statute in that State that "the words 'written' and 'in writing,' may be construed to include printing, lithographing, and any other mode of representing words and letters." [4] The court held that the objection that a part of the record was printed was invalid.[5] "There is no claim that this copy of the record was not complete and perfect. We cannot hold that this record is defective because a portion of it is printed. Certainly a printed record is as effective to protect *bona fide* purchasers as one wholly in writing. It is also just as beneficial to parties and those in privity with them. The objects of the recording acts are as fully complied with by a printed as by a written record. There is no question but that the book in which the record was made was a part of the public records in the register's office of Ozankee county." [6]

§ 678. **Interest of recording officer.**—The registration of a deed is purely a ministerial act. The record is not vitiated by the fact that the clerk by whom it is recorded is a party to the instrument.[7]

§ 679. **Time at which deed is held to be recorded.**—The statute may prescribe that the depositing of a deed within a specified period shall have a retroactive effect, so that its registration may, when it is filed within this limited time, relate back to the time of its execution. In many States it is expressly provided that a deed is considered as recorded at the time it is filed for record. In the absence of legislation on the subject, it is generally conceded, so far as the question of priority and kindred questions are concerned, that a deed is considered in law to be recorded at the time at which it is deposited with the proper officer for registration.[8] "When a

[4] Rev. Stats. § 4971, subd. 19.

[5] Maxwell v. Hartmann, 50 Wis. 660.

[6] Mr. Justice Cassoday, in Maxwell v. Hartmann, *supra*.

[7] Brockenborough v. Melton, 55 Tex. 493; Tessier v. Hall, 7 Mart. (La.) 411.

[8] Cal. Civil Code, § 1170; Kesler v. State, 24 Ind. 315; Harrold v.

deed," said the Supreme Court of Rhode Island, "which has never been recorded, is lodged with a town clerk, the act of lodging it, unaccompanied with any counter declarations, is itself an implied direction to record, and, other things equal, the title is complete upon its being lodged with such implied directions; for, by the terms of our statute, the lodging of a deed to be recorded is equivalent to an actual entry of it upon the record, so far forth as is necessary to perfect the title. The title being made complete by such lodgment, the subsequent neglect of the town clerk cannot affect the grantee's rights under the deed. The deed remaining on file in the clerk's office and open to inspection, is notice to all the world

Simonds, 9 Mo. 326; Mallory v. Stodder, 6 Ala. 801; Poplin v. Mundell, 27 Kan. 138; Dubose v. Young, 10 Ala. 365; Horsley v. Garth, 2 Gratt. 471, 44 Am. Dec. 393; Deming v. Miles, 35 Neb. 739, 37 Am. St. Rep. 464; Perkins v. Strong, 22 Neb. 725; Sinclair v. Slawson, 44 Mich. 123, 38 Am. Rep. 235; Leslie v. Hinson, 83 Ala. 266; Bloom v. Noggle, 4 Ohio St. 45; Brown v. Kirkman, 1 Ohio St. 116; Tousley v. Tousley, 5 Ohio St. 78; Fosdick v. Barr, 3 Ohio St. 471; Mayham v. Coombs, 14 Ohio, 428; Magee v. Beatty, 8 Ohio, 396; Bercaw v. Cockerill, 20 Ohio St. 163; Throckmorton v. Price, 28 Tex. 605; Belbaze v. Ratto, 69 Tex. 36; Harrison v. McMurray, 71 Tex. 122; Gladding v. Frick, 88 Pa. St. 460; Brooke's Appeal, 64 Pa. St. 127; Clader v. Thomas, 89 Pa. St. 343; Watkins v. Wilhoit, 104 Cal. 395; Parker v. Scott, 64 N. C. 118; Metts v. Bright, 4 Dev. & B. 173, 32 Am. Dec. 683; Davis v. Whitaker, 114 N. C. 279, 41 Am. St. Rep. 793; Oaks v. Walls, 28 Ark. 244; Lee v. Bermingham, 30 Kan. 312; Kiser v. Heuston, 38 Ill. 252; Brown v. Banner Coal & Oil Co., 97 Ill. 214, 37 Am. Rep. 105; Merrick v. Wallace, 19 Ill. 486; Naltinger v. Ware, 41 Ill. 245; Haworth v. Taylor, 108 Ill. 275; Bedford v. Tupper, 30 Hun, 174; Simonson v. Falihee, 25 Hun, 570; Mutual Life Ins. Co. v. Dake, 87 N. Y. 257; Lewis v. Hinman, 56 Conn. 55; Franklin v. Cannon, 1 Root, 500; Bishop v. Schneider, 46 Mo. 472, 2 Am. Dec. 533; Heidson v. Randolph, 66 Fed. Rep. 216, 13 C. C. A. 402; Mangold v. Barrow, 61 Miss. 593, 48 Am. Rep. 84; Jacobs v. Denison, 141 Mass. 117; Gillespie v. Rogers, 146 Mass. 610; Parrish v. Mahany, 10 S. D. 276, 66 Am. St. Rep. 715. When a deed has been deposited with the proper custodian, at the right time and place, a party's duty to file a paper has been performed: Hook v. Fender, 18 Col. 283, 36 Am. St. Rep. 277; Beebe v. Morrell, 76 Mich. 114, 15 Am. St. Rep. 288.

of a conveyance of the land, either absolute or conditional." [9] A deed that has been so filed for record, is sufficient to charge subsequent purchasers with constructive notice from that time of its existence and execution, and is, of course, entitled to priority over any other deed subsequently filed for record.[1]

[9] Nichols v. Reynolds, 1 R. I. 30, 35, 36 Am. Dec. 238. See, also, Gide v. Fauntleroy, 8 Mon. B. 177; Horsley v. Garth, 2 Gratt. 471, 44 Am. Dec. 393. A paper is filed when delivered to the proper officer for that purpose: Edwards v. Grand, 121 Cal. 254; Tregambo v. Comanche Mill Co., 57 Cal. 501; Mann v. Carson, 120 Mich. 631, 79 N. W. 941; Masterson v. Southern R. Co., (Ind.) 82 N. E. 1021; Franklin County Commissioners v. State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183; In re Conant, 43 Or. 530, 73 Pac. 1018; Bade v. Hibberd, 50 Or. 501, 93 Pac. 364; Barber Asphalt Paving Co. v. O'Brien, 128 Mo. App. 267, 107 S. W. 25. A filing of a document for record is not vitiated on account of the failure of the officer to indorse on it a statement of its filing and the time. McDonald v. Crusen, 2 Or. 258; Moore v. Williamette Transp. Co. 7 Or. 359; Hilts v. Hilts, 43 Or. 162, 72 Pac. 697; In re Conant, 43 Or. 530, 73 Pac. 1018; Bade v. Hibberd, 50 Or. 501, 93 Pac. 364; Mann v. Carson, 120 Mich. 631, 79 N. W. 941; Day etc. Lumber Co. v. Mack, 24 Ky. L. Rep. 640, 69 S. W 712; Holman v. Chevaillier. 14 Tex. 337. It is presumed to be recorded when filed for record. Eufaula Nat. Bank v. Prewett, 128 Ala. 470, 30 So. 731; Farabee v. McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734; Shebel v. Bryden, 114 Pa. St. 147, 6 Atl. 905.

[1] Bigelow v. Topliff, 25 Vt. 274, 60 Am. Dec. 264. In that case, Isham, J., in delivering the opinion of the court, said: "What will be a sufficient record for that purpose, depends upon the object and general provisions of the act. In some cases, the instrument must be recorded at length upon the book of records, and it will have no effect until it is so recorded. This is true in all cases where the enrollment is necessary to the investing of the title. In such case, it is made a condition precedent, and no right or title passes until the statute is strictly complied with. This rule prevails where recording is required of the proceedings of the collector in sales of land for taxes: Clark v. Tucker, 6 Vt. 181; Giddings v. Smith, 15 Vt. 344. So, in the levy of executions upon real estate, the record of the execution and levy is necessary to pass the title: Morton v. Edwin, 19 Vt. 81. In these cases, the object of the record is not simply notice, but it is an essential link in the chain of evidence in the proof of title to the estate. Where the object of the record is notice, merely the statute is complied with when the party has left the instrument with the recording officer for that purpose,

§ 680. **Mistake of copying deed in record—Conflicting views.**—A deed may be executed in every particular as required by law, may be properly acknowledged, deposited with the proper officer for registration, yet may not be correctly copied by the recording officer into the record-books. In such a case, a searcher of the records is compelled to as-

with directions for its immediate record. This construction is not to be considered as an open question, but as settled by the decisions of this court, as well as by that practical construction which it has received since the passage of the act. This principle was recognized by this court in the case of Ferris v. Smith, 24 Vt. 27. In that case, the act required 'the deputation and certificate of the oath of office of a deputy sheriff to be recorded in the county clerk's office, and, until recorded, the official acts of such deputy were not valid.' The object of the act was notice, and lodging that deputation and certificate with the county clerk for record, was held a sufficient compliance with the act to invest him with the prerogatives of the office, and render valid his official acts, though the deputation and certificate had not been recorded *in extenso* upon the records. In Connecticut, the same rule prevails, and leaving the deed for record with the certificate of the clerk thereon, that it was so left is sufficient to protect the title as against the grantor, as well as subsequent purchasers and creditors: Hine v. Roberts, 8 Conn. 347. The difference in phraseology between our statute and theirs is not such as to justify a different construction, particularly where the practical construction of the act has been uniformly the same." Chancellor Kent, in a note to his Commentaries, says: "The statute of New York gives priority to the conveyance which 'shall be first duly recorded'; but it adds that it shall be 'considered as recorded from the time of the delivery to the clerk for that purpose.' A provision to the same effect is in the Massachusetts Revised Statutes for 1836, though no doubt the previously existing rule of law was the same. This prevents the question which Mr. Bell says has arisen in Scotland, between a sasine first transcribed, though last presented, and a sasine, which, by the minute-book, is proved to have been first presented, though last transcribed. He admits, however, the better construction of the statute to be that the minute-book of the time of the presentation of the instrument was intended to be the regulator of the order of preference by priority: 1 Bell's Com. 679"; 4 Kent's Com. (12th ed.), star page 459. In Ferris v. Smith, 24 Vt. 27, 32, the court said, with reference to conveyances, where the title is passed or the right acquired by act of the parties, as in the conveyance of real estate by deed, that "though a record is necessary in order to give full effect to the transaction for

sume that the information they contain is true. He rarely has an opportunity to inspect the original deed, and even if he has such an opportunity, deems an inspection of the original unnecessary. At the same time, the person who has recorded his conveyance has done all in his power to secure a proper registration. If a mistake is made in the copying of the deeds, the fault is not his. A very interesting question arises when a mistake has been made by the officer in spreading the deed on the record. Shall the purchaser who acted in good faith and acquired his rights in the honest belief that the records correctly showed the various claims upon the property, suffer because the officer failed to do his duty, or shall the person who presented his conveyance for registration bear the consequences of the officer's negligence? The decisions are contradictory on this question. On one side it is asserted that the person who files a deed for record is not responsible for the officer's neglect, and on the other, it is declared with equal confidence that the records do not give notice of what they do not contain.

§ 681. **View that the grantee is not affected by mistake in copying the deed.**—On one hand, on the ground that a deed is considered as recorded, when it is left with the

collateral purposes, it is made so as the medium of general notice. And, as a public recording office is a place where all persons have the right to apply for information, as well in regard to instruments lodged there for record as to the records already made, the act of the party in lodging the evidence of his title in such an office, for the *bona fide* purpose of having it recorded without delay, and the reception of it by the recording officer for the same purpose, are held to operate like the record itself as notice to third persons. In other words, the deed or instrument thus deposited and received is deemed to be of record or recorded: Marbury v. Madison, 1 U. S. Cond. R. 273, 274. This is on condition, to be sure, that a full and proper record be ultimately made, and that the party shall in no way interfere to prevent or delay the making it: Sawyer v. Rogers v. Adams, 8 Vt. 172, 30 Am. Dec. 459." See, also, Davis v. Ownsby, 14 Mo. 170, 55 Am. Dec. 105.

officer for the purpose of registration, it is held that by depositing the deed with the proper officer, the grantee has done all that is required of him, and although the officer records only a portion of the instrument, or omits to record it at all, the rights of the grantee cannot thereby be injuriously affected.[2]

[2] Riggs v. Boylan, 4 Biss. 445; Polk v. Cosgrove, 4 Biss. 437; Marigold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84; Kiser v. Heuston, 38 Ill. 252; Bedford v. Tupper, 30 Hun, 174; Merrick v. Wallace, 19 Ill. 486; Wood's Appeal, 82 Pa. St. 116; s. c. 13 Am. Law Reg. 255; Flowers v. Wilkes, 1 Swan, 408; Lee v. Bermingham, 30 Kan. 312; Bank of Kentucky v. Haggin, 1 Marsh. A. K. 306; Brooke's Appeal, 64 Pa. St. 127; Nichols v. Reynolds, 1 R. I. 30, 36 Am. Dec. 238; Musser v. Hyde, 2 Watts & S. 314; Oats v. Walls, 28 Ark. 244; Mims v. Mims, 35 Ala. 23; Throckmorton v. Price, 28 Tex. 605, 91 Am. Dec. 334; Beverly v. Ellis, 1 Rand. 202; Board of Commrs. v. Babcock, 5 Or. 472; Case v. Hargadine, 43 Ark. 144; Nichols v. Reynolds, 1 R. I. 30, 36 Am. Dec. 238; Marlet v. Hinman, 77 Wis. 136, 20 Am. St. Rep. 102; Gillespie v. Rogers, 146 Mass. 610; Farnsworth v. Jordain, 15 Gray, 517; Tracy v. Jenks, 15 Pick. 465; Ames v. Phelps, 18 Pick. 314; Fuller v. Cunningham, 105 Mass. 442; Wood v. Simons, 110 Mass. 116. See, also, Poplin v. Mundell, 27 Kan. 138; Glading v. Frick, 88 Pa. St. 460; Lignoski v. Crooker, 86 Tex. 324, 24 S. W. Rep. 278; Freiberg v. Magale, 70 Tex. 116, 7 S. W. Rep. 684; Woodson v. Allen, 54 Tex. 551; Converse v. Potter, 45 N. H. 385; Tousley v. Tousley, 5 Ohio St. 78; Brown v. Kirkman, 1 Ohio St. 116; Green v. Carrington, 16 Ohio St. 548, 91 Am. Dec. 103; Lewis v. Hinman, 56 Conn. 55, 13 Atl. Rep. 143; Hine v. Robbins, 8 Conn. 342; Franklin v. Cannon, 1 Root, 500; Watkins v. Wilhoit, 104 Cal. 395; Fouche v. Swain, 80 Ala. 151; Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 692; Hiatt v. Calloway, 7 B. Mon. 178; Bank v. Haggin, 1 Marsh. A. K. 306; Mutual Insurance Co. v. Dake, 87 N. Y. 257; Taylor v. Hotchkiss, 2 La. Ann. 917; Falconer's Succession, 4 Rob. 5; Payne v. Pavey, 29 La. Ann. 116; Swan v. Vogle, 31 La. Ann. 38; Swepson v. Bank, 9 Lea, 713; Woodward v. Boro, 16 Lea, 678; Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84. When a deed is filed for record it operates as constructive notice, though the officer may fail to observe the requirements of the statute in relation to its recordation: Deming v. Miles, 35 Neb. 739, 37 Am. St. Rep. 464. See, also, Perkins v. Strong, 22 Neb. 725. See, also, Franklin v. Cannon, 1 Root, 500; Hartmyer v. Gates, 1 Root, 61; Judd v. Woodruff, 2 Root, 298; McDonald v. Leach, Kirby, 72; McGregor v. Hill, 3 Stewt. & P. 397. And see Clader v. Thomas, 89 Pa. St. 343; Gaskill v. Badge, 3 Lea (Tenn.), 144. Where a statute provides that

A statute in Illinois provided that after a specified date "all deeds and other title papers which are required to be recorded shall take effect and be in force from and after the time of filing the same for record, and not before, as to all subsequent creditors and purchasers without notice, and all such deeds and title papers shall be adjudged void, as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record in the county where the said lands may lie." The recorder in recording a deed misdescribed the premises in his record. The court held that the grantee performed his duty by leaving his deed for record with the proper officer; and the mistake in the record did not affect the question of notice given by filing the deed for record.[3] Commenting on the statute above quoted, Mr. Justice Breese said: "This was the law in force at the time of the execution of the deed to Hugunin, and under it, all the duty he had to perform to make it available against the world, was to place it with the recorder to be filed for record. Before that time it had effect only as against the grantors—after that time, it took effect and was in force against all persons. It is only by virtue of this law that the plaintiff can claim to postpone defendant's deed, and destroy its effect as against his purchase at the sheriff's sale. He is, in effect, claiming to enforce a statute penalty imposed

an instrument shall be operative as a record from the time of its delivery to the proper office the instrument is constructive notice even though improperly recorded or not record at all by the recording officer: Chapman & Co. v. Johnson, 142 Ala. 633, 4 Am. & Eng. Ann. Cas. 559; Scaling v. Wichita etc. Bank, 39 Tex. Civ. App. 154, 87 S. W. 715; Roberson v. Downing Co., 120 Ga. 836, 1 Am. & Eng. Ann. Cas. 757; Hayden v. Pierce, 165 Mass. 359. The admission of a deed in evidence as a "registered deed" is not affected by failure of the clerk to record it or by his recording it in a wrong book: Durrence v. Northern etc. Bank of Philadelphia, 117 Ga. 385, 43 S. E. 726. The record title to real estate may be relied upon by one dealing therewith in the absence of actual knowledge of the title in fact or of facts sufficient to put him on inquiry: Friend v. Yahr, 126 Wis. 291, 1 L.R.A.(N.S.) 891, 109 N. W. 997, 110 Am. St. Rep. 924.

[3] Merrick v. Wallace, 19 Ill. 486.

upon the grantee in the deed, by reason of his having omitted to do something the law required him to do to protect himself and preserve his rights. The law never intended a grantee should suffer this forfeiture, if he has conformed to its provisions. The plaintiff claiming the benefit of this statute, being, as it is, in derogation of the common law, and conferring a right before unknown, he must find in the provisions of the statute itself, the letter which gives him that right. To the statute alone must we look for a purely statutory right. All that this law required of the grantee in the deed was that he should file his deed for record in the recorder's office, in order to secure his rights under the deed. When he does that, the requirements of the law are satisfied, and no right to claim this forfeiture can be set up by a subsequent purchaser. The statute does not give to the subsequent purchaser the right to have the first deed postponed to his, if the deed is not actually recorded, but only if it is not filed for record. If it was not properly recorded after the grantee had left it to be filed for record, and by reason thereof a subsequent purchaser is misled, he surely has no right to say that the first purchaser shall suffer by this omission of the recorder to perform his duty, rather than himself. The statute leaves such a loss to fall where the common law left it. In such a case the subsequent purchaser cannot call in aid the statute, because his case does not come within its provisions. In such a case the statute is silent, and the common law must take its course. He must seek his remedy against the recorder." [4]

§ 682. **Reasonable precaution.**—Where, under the registration laws, the filing of a deed is equivalent to its actual registration, the fact that a subsequent *bona fide* purchaser for value and without notice took every reasonable precaution to ascertain the condition of the title, and bought and

[4] Merrick v. Wallace, 19 Ill. 486, 497.

paid for the land only on the assurance of the recording officer that there was in his office no evidence of a conflicting right to the property, cannot give his deed precedence over such prior deed filed for record, but not actually recorded.[5] In

[5] Throckmorton v. Price, 28 Tex. 606, 91 Am. Dec. 334. Said the court: "In whatever manner the question presented in this case is decided, it must operate to the injury of innocent parties; there is, therefore, no equitable consideration favoring a preference of the parties on one side over those on the other. The point in issue between them must be determined by an application of the provisions of the registration laws to the facts of the case. When this is done, there cannot be the slightest doubt as to a correct decision of the question before us, and that the instruction given to the jury was erroneous. But for the registration law, the older title would obviously convey the better right. And it is the uniform provisions of these laws that such instruments as must be recorded shall be valid as to all subsequent purchasers for a valuable consideration without notice, and as to creditors from the date when such instrument shall be properly acknowledged, proved, or certified and delivered to the clerk for record, and from that time only. (O. & W., arts. 1726, 1727, 1730, 1731.) And lest there should be any doubt in the matter, it is further enacted that any instrument required to be recorded shall be considered as recorded from the time it was deposited for record with the clerk. (O. & W., art. 1709.) And to enable all persons who may wish to examine the office to ascertain what instruments have been deposited for record, it is also made the duty of the clerk (O. & W., art. 1707), when any instrument has been deposited for record to enter in alphabetical order, in a book to be provided for that purpose, the names of the parties to such instrument, the date and nature thereof, and the time of its delivery for record. And as a further facility and security for persons wishing to make an examination in the office of the recorder for instruments required by law to be recorded, the clerk, after recording any such instrument, is directed to enter the same in the index-books which he is required to keep of recorded instruments. (O. & W., arts. 1710, 1711, 1712.) If the clerk has neglected to comply with these plain and simple requirements of the statute, and appellees have been thereby misled to their injury, they cannot claim redress for such injury from appellants, who have been in no default. The law did not impose upon them the responsibility of seeing that the duties prescribed by the statute for the protection and security of other parties, were, in fact, faithfully discharged by the clerk. Registration laws of a general similarity to ours have been enacted in most of the other States, yet we have been able to find no case in which the first deed has

Virginia, it is held that although the deed may be lost by the negligence of the recorder, or may be stolen from his office, it must be considered as recorded, if it has been left with him for record.[6] Where this rule prevails, it is possible that a

been postponed in favor of the second, from the failure of the clerk to record the prior deed as directed by the statute, while the contrary has been frequently decided." And see Woodson v. Allen, 54 Tex. 551.

In Oats v. Walls, 28 Ark. 244, 247, the court said: "Our own court, through Justice Bennett, in the case of Harrison & Stewart v. Lewis, Commissioner, 26 Ark. 154, said: 'The certificate of entry now before us was issued in strict conformity to the above enactment, with the exception of making a note of such entry on his township maps, and in his books, to be kept for that purpose. It is a well-established principle that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him': Lytle v. The State, 9 How. 333, 13 L. ed. 160. In the United States v. Castillero, 2 Black, 97, 17 L. ed. 360, the Supreme Court of the United States say: 'Besides, it is a universal rule that omissions by a public officer, in the mode of complying with forms prescribed to him as his duty, are not permitted to affect the party': Nichols v. Reynolds, 1 R. I. 36, 36 Am. Dec. 238. In 5 Marsh. J. J. 558, it is said the mistake of the officer ought not to prejudice the rights of the parties. To the same effect, see Merrick v. Wallace, 19 Ill. 486, 3 Peters, 338, 7 L. ed. 699. That the grantee was only bound to properly file his deed for record, and thereafter it was the duty of the clerk (for the performance of which the clerk alone is responsible) to note the filing and enter it upon the record, is, in effect, held by the above and other cases."

The record is not vitiated by the fact that it contains no copy of the seal, or any mark to indicate a seal. It is sufficient if the deed which is recorded purports to be under seal: Smith v. Dall, 13 Cal. 510. And see Jones v. Martin, 16 Cal. 165.

[6] Beverly v. Ellis, 1 Rand. 102. The court said that the construction of the words of a section which gave a deed priority if filed for record, "and recorded according to the directions of this act," would not be tolerated, "which would make it depend on the acts or omissions of the clerk, over whom he has no control, and with whom the law compels him to deposit his deed. A different construction would be attended with great mischief. The act having prescribed no time to the clerk to record a deed by spreading it on the record, its validity would be fluctuating and uncertain, and the object of the act defeated. If there is any defect in the notice when searched for, the subsequent purchaser, perhaps, has his remedy

party, in the registration of whose deed a mistake was made, might be estopped, if, after knowledge of the defect in the record, he is guilty of laches in failing to give notice of his title.[7]

§ 683. **Contrary view that purchaser is bound by only what appears upon the record, and grantee must suffer for mistake in record.**—On the other hand, the doctrine announced by many courts is, that the records are only notice of what they contain, and that if a deed has been filed for record, but incorrectly copied, the grantee filing the deed must suffer for any error contained in the record, rather than an innocent purchaser who has parted with value in the belief that the records truly disclosed all the rights of others.[8] The

against the clerk, if it was his duty to make it perfect."

[7] See Lee v. Bermingham, 30 Kan. 312.

[8] Potter v. Dooley, 55 Vt. 512; Jennings v. Wood, 20 Ohio, 261; State v. Davis, 96 Ind. 539; Barnard v. Campau, 29 Mich. 162; White v. McGarry, 2 Flipp. C. C. 572; Terrell v. Andrew County, 44 Mo. 309; Brydon v. Campbell, 40 Md. 331; Payne v. Pavey, 29 La. Ann. 116; Miller v. Bradford, 12 Iowa, 14; Sanger v. Craigue, 10 Vt. 555; New York Life Ins. Co. v. White, 17 N. Y. 469; Heistner v. Fortner, 2 Binn. 40, 4 Am. Dec. 417; Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; s. c. 19 Alb. L. J. 276; Disque v. Wright, 49 Iowa, 538; s. c. 13 West. Jur. 34, 158; Taylor v. Hotchkiss, 2 La. Ann. 917. See, also, Beekman v. Frost, 18 Johns. 544, 9 Am. Dec. 246; Frost v. Beekman, 1 Johns. Ch. 299; Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260; Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304; Sinclair v. Slawson, 44 Mich. 123, 38 Am. Rep. 235; Donald v. Beales, 57 Cal. 399; Page v. Rogers, 31 Cal. 293; Smith v. Lowry, 113 Ind. 37, 15 N. E. Rep. 17; McLarren v. Thompson, 40 Me. 284; Hill v. McNichol, 76 Me. 314; Stedman v. Perkins, 42 Me. 130; Ritchie v. Griffiths, 1 Wash. St. 429, 22 Am. St. Rep. 155, 25 Pac. Rep. 341; Cady v. Purser, 131 Cal. 552; Quackenbush v. Reed, 102 Cal. 493; Watkins v. Wilhoit, 104 Cal. 395. In Cady v. Purser, *supra,* the court says: "The principle upon which the rule rests is, that as under the provisions of the recording act, if the grantee of an interest in lands would protect himself against subsequent purchasers or encumbrancers, he must give notice of his interest, and as the statute provides for constructive notice in the place of actual notice, it is incumbent upon him to comply with all the requirements prescribed for such

courts that declare this rule, while admitting for the most part that the record of a deed becomes effective from the time that a deed is filed with the recording officer for registration, draw a distinction in cases where after filing the deed its contents are not correctly spread upon record. They hold that the purchaser is not bound to enter into a long and laborious search into the original papers to ascertain whether the recorder has faithfully performed his duty or not. They consider that the obligation of giving notice is placed upon the person who holds the title, and that he, and not an innocent purchaser, must suffer the consequences of an imperfect performance of this duty. The risk of a failure properly to place a document on record must be borne by the person who seeks the benefit of the registration laws, whether the failure is his own fault or the fault of the officer.[9] Under this view it is considered that the recording officer, is, for the purpose of correct transcription of an instrument into the proper book of record, the agent of the party recording the instrument, and that in the eye of the law, errors and omissions in the record are his errors and omissions,[1] so that where there is a conflict between the actual record as shown by the book of record, and the constructive record by the indorsement made upon the instrument at the

constructive notice, one of which is the correct transcription of the instrument into the appropriate book: Neslin v. Wells, 104 U. S. 428, 26 L. ed. 802; Terrell v. Andrew County, 44 Mo. 309. For this purpose the recorder is the agent of the grantee and the errors, or omissions of the recorder in making such transcriptions are his errors or omissions in the same manner as are the errors of a sheriff in executing a writ, or of a clerk in recording an order or a judgment." Where a deed appears to have been recorded twice, and there is a dissimilarity between them as they are recorded, the court will take into consideration the evidence afforded by the records themselves as to which has been more carefully registered, the situation of the property as described in each, and the conduct of the parties as it relates to the property in dispute: Stinson v. Doolittle, 50 Fed. Rep. 12.

[9] People v. Burns, 161 Mich. 169, 125 N. W. 740.

[1] Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391.

time it was filed for record, the actual record as shown by the book must prevail.[2] Speaking of a provision of the code that "an instrument is deemed to be recorded, when being duly acknowledged or proved, and certified, it is deposited in the recorder's office with the proper officer for record," the court said it must be read in connection with the section that "every conveyance of real property acknowledged or proved and certified and received as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees," and that each provision quoted must be construed with reference to the purposes for which it was enacted.[3] "For the purpose of complying with a statutory requirement," says the court, "as in the case of official bonds or certificates of marriage, where the evident purpose of the statute is to make the instrument a matter of public record, or when the recording of an instrument is an essential step in perfecting some right or completing some act of the party, as in the case of a declaration of homestead, or an assignment for the benefit of creditors, the depositing of the instrument in the recorder's office is sufficient; but when merely making a record of the instrument is not the ultimate purpose of the party, but the recording of the instrument is the means by which his ultimate purpose is to be carried into effect, as when his purpose is to give notice of his interest in real estate, section 1213 requires not only that the instrument shall be filed with the recorder for record, but that it shall also be 'recorded as prescribed by law.'"[4] The obligation to give notice, it is said, rests on the person who holds the title, and he will be the sufferer if this duty is not properly performed.[5]

[2] Donald v. Beals, 57 Cal. 399. See, also, Watkins v. Wilhoit, 104 Cal. 395; Meherin v. Oaks, 67 Cal. 57.

[3] Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391.

[4] Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391.

[5] Terrell v. Andrew County, 44 Mo. 309.

§ 684. **Fuller presentation of this view.**—For a fuller presentation of the view taken by the courts adopting this rule, we may refer to a case in Missouri, where Mr. Justice Wagner, in delivering the opinion of the court, said: "It is contended here on behalf of the county, that according to our statute, when a person files with the recorder an instrument, it imparts notice of its real contents to all subsequent purchasers, regardless of any mistakes that the recorder may commit in placing it on record; that the statute provides that every instrument in writing certified and recorded in the manner prescribed shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice. According to the literal interpretation of the section, no notice is imparted till the instrument is actually placed on record, and then it relates back to the time of filing. It was, no doubt, the intention of the legislature to give a person filing an instrument or conveyance all the benefit of his diligence; and when he deposits the same with the recorder, and has it placed on file, he has done all that he can do, and has complied with the requirement of the law. From that time it will give full notice to all subsequent purchasers and encumbrancers. A person in the examination of titles, first searches the records; and if he finds nothing there, he looks to see if any instruments are filed and not recorded. If nothing is found and he has no actual notice, so far as he is concerned, the land is unencumbered. If he finds a conveyance he goes no further; he never institutes an inquiry to find whether the deed is correctly recorded or the contents literally transcribed. Indeed, to attempt to prosecute such a search would be idle and nugatory. Grantees do not usually leave their deeds lying in the recorder's office for the inspection of the public. After they are recorded, they take them out and keep them in their possession. In a large majority of cases, it would not only en-

tail expense and trouble, but it would be useless to attempt to get access to the original papers. Hard and uncertain would be the fate of subsequent purchasers if they could not rely upon the records, but it must be under the necessity, before they act, of tracing up the original deed to see that it is correctly recorded. The statute says that when the deed is certified and recorded it shall impart notice of the contents from the time of filing. Certainly; but this is to be understood in the sense that the deed is rightly recorded, and the contents correctly spread upon the record. It never was intended to impose upon the purchaser the burden of entering into a long and laborious search to find out whether the recorder had faithfully performed his duty. The obligation of giving the notice rests on the party holding the title. If he fails in his duty, he must suffer the consequences. If his duty is but imperfectly performed, he cannot claim all the advantages and lay the fault at the door of an innocent purchaser."[6] In

[6] Terrell v. Andrew County, 44 Mo. 309, 311. In Sawyer v. Adams, 8 Vt. 172, 176, 30 Am. Dec. 459, the court, per Williams, C. J., say: "In such cases, the purchaser may be wholly free from fault or negligence. He may deliver his deed to the proper officer, and it may be returned to him as recorded, but through accident or design it is not truly recorded. Subsequent purchasers or creditors having no other means of knowledge of the contents of the deed than by resorting to the records, cannot be considered as having notice of any other conveyance than such as appeared on record. The object of recording, as has already been noticed, is for the purpose of notice to after-purchasers and creditors. In considering what is necessary to complete a record, it will not answer to say that the record may be so made as entirely to defeat the object for which it was designed. The purchaser may fairly deliver his deed to the town clerk. The clerk may return it to him with a regular certificate that it has been recorded; and if he does nothing more, if he does not record it in fact, there is no actual or constructive notice to purchasers of the existence of such deed. The clerk is guilty of fraud, and the person who left the deed for record is deceived; still his deed is not recorded and no title passes thereby, except as against the grantor and his heirs. In such a case there can be no doubt that the purchaser will lose his title through the fault or fraud of the town clerk." See, also, Huntington v. Cobleigh, 5 Vt. 49; Skinner v. McDaniel, 5 Vt. 539.

Iowa, the language of the statute of 1839, was that an instrument in writing, properly certified and acknowledged, "shall from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees shall be deemed in law and equity to purchase with notice." [7] The supreme court of that State placed an entirely different construction upon this statute from that given in Illinois to one of similar import.[8] Wright, J., delivered the opinion of the court, and, referring to this statute, said: "This statute in our opinion was only intended to fix the *time* from which notice to subsequent purchasers was to commence, and not to make such filing or depositing notice of the contents *after* the same was recorded. After the record of the deed, the record itself is the constructive notice of its contents, and it never was the intention of the legislature to hold a subsequent purchaser, buying after the recording, bound by the contents of a deed, ever so improperly and incorrectly recorded, because at some time a deed correct in the description of the property was filed with the recorder." [9]

In Jenning's Lessee v. Wood, 20 Ohio, 261, 266, it is said by Caldwell, J., delivering the opinion of the court: "The obligation rests on the party holding the title to give the notice. He controls the deed; he can put it on record or not at his pleasure. If from any cause he falls short of giving the legal notice, the consequences must fall on himself. It is his own business, and he must suffer the consequences of its being imperfectly performed." See Curtis v. Root, 28 Ill. 367.

[7] Miller v. Bradford, 12 Iowa, 14.

[8] For case in Illinois, see Merrick v. Wallace, 19 Ill. 486, § 681.

[9] Miller v. Bradford, 12 Iowa, 19. See, also, Miller v. Ware, 31 Iowa, 524; Disque v. Wright, 49 Iowa, 538. In Frost v. Beekman, 1 Johns. Ch. 288, the Chancellor said: "The true construction of the act appears to be that the registry is notice of the contents of it and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage, any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. The act in providing that all persons might have recourse to the registry,

§ 685. Views of Mr. Pomeroy.—Mr. Pomeroy, in his treatise on Equity Jurisprudence, takes the view that a record is constructive notice only to the extent that it is a true copy of the original instrument, and that a subsequent purchaser may act upon the information disclosed by the records, irrespective of the question whether they set out the original deed correctly or not. He says: "A record is a constructive notice, only when, and so far as, it is a true copy, substantially, even if not absolutely, correct, of the instrument which purports to be registered, and of all its provisions. Any material omission or alteration will certainly prevent the record from being a constructive notice *of the original instrument,* although it may appear on the registry books to be *an* instrument perfect and operative in all its parts. The test is a plain and simple one. It is, whether the record, if examined and read by the party dealing with the premises, would be an *actual* notice to him of the original instrument, and of all its parts and provisions. By the policy of the recording acts such a party is called upon to search the records, and he has a right to rely upon what he finds there entered as a true and complete transcript of any and every instrument affecting the title

intended *that* as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them, when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am satisfied that was not the intention, as it certainly is not the sound policy of the statute; nor is it repugnant to the doctrine contained in the books, that notice to a purchaser of the existence of a lease is notice of its contents." See, also, Peck v. Mallams, 10 N. Y. 518; Ford v. James, 4 Keyes, 300. But it was held in Simonson v. Falihee, 25 Hun, 570, that a release of mortgaged land is complete when it is left with the clerk for record, and that where there is no fraud or collusion, the party is not responsible for an error of the clerk in recording it, and the erroneous record in such a case does not bind the party executing the release.

to the lands with respect to which he is dealing. A record can only be a constructive notice, at most, of whatever is contained within itself."[1] And again: "Furthermore, the record of an instrument which is itself duly executed and entitled to be registered, does not operate as a constructive notice, unless it is made in the proper form and manner, in the proper book, as required by the statute. The policy of the recording acts is that those persons who are affected with constructive notice should be able to obtain an actual notice and even full knowledge by means of a search. A search could not, *ordinarily,* be successful and lead the party to the knowledge which he seeks, if the instrument were recorded in a wrong book. This rule, therefore, instead of being arbitrary and technical, is absolutely essential to any effective working of the statutory system."[2]

§ 686. **Comments.**—The author is compelled to dissent from the views expressed by Mr. Pomeroy, and from the doctrine which prevails in several of the States, that a grantee is held responsible for defects in the record not caused by his act or through his procurance, but by an officer over whom he can exercise no control. The grantee, by depositing his deed with the recording officer, does all that he can do. He complies with every requirement of the statute. It is universally conceded, when his deed is correctly copied into the records, that notice is given from at least the time the conveyance is deposited with the proper officer. We can see no reason for the restriction that notice shall be thus given only on condition that the deed is subsequently correctly copied. If the grantee, by depositing the deed with the recorder, has given the notice required of him by the statute, and has, by this step, obtained all the priority and acquired all the rights of a purchaser whose deed is first recorded, why should his title afterward become, by the carelessness, or, perhaps, fraudulent de-

[1] 2 Pomeroy's Eq. Jur., § 654. [2] 2 Pomeroy's Eq. Jur., § 653.

sign of the recording officer, subordinate to that of another, who, on equitable grounds, aside from the arbitrary provisions of the statute, can be entitled to no more favorable consideration than he? It cannot be said that the permanent and continued existence of the record is essential to preserve the priority that a purchaser obtains by the due record of his instrument. For as we point out, in a following section, the subsequent destruction of the book in which the deed is recorded, by fire, the mad caprice of a mob, the mishaps of war, or the hand of some person who desires its destruction for selfish and fraudulent purposes, cannot deprive the record of the effect of giving constructive notice, acquired by the original registration. When the record is destroyed, as a matter of fact, it must cease to give notice. Still it is considered, on the soundest logic and reason, that when a person has filed his deed for record, he has complied with the law, and cannot be affected by the destruction afterward of the record. Why, then, should he be held responsible when the record is not totally destroyed, but rendered imperfect by the act of a public officer, whose acts he cannot supervise? Again, the recording acts are intended for the benefit of subsequent purchasers and encumbrancers. The first grantee requires no protection. By the principles of the common law, in the absence of statutory regulation, he succeeds by his deed to all the title of his grantor, and unless the law places upon him the obligation of doing some particular act, his deed, on common-law principles, is good against everybody. The second purchaser can succeed, so far as the question of title alone is concerned, only to the interest of his grantor, and if that has been antecedently conveyed, he, by a second conveyance, can acquire nothing. But for the protection of the *subsequent* purchaser, the law requires the first grantee to give notice of his deed by procuring its registration, or to suffer the consequences of its postponement to the conveyance of another, who deals with the same grantor in good faith and without notice of such prior deed. Now, it is

obvious that the registration laws are intended for the *benefit* of the *subsequent* purchaser, and it seems to us a reasonable rule, that if the first grantee does all that he has the power to do to secure to subsequent purchasers the benefit of this notice by the record, he should not be held responsible because a public officer failed to do his duty. It is true, that it may be hard to declare that a purchaser who has parted with his money, on the assurance given by the records that the grantor possessed title, acquires nothing because the records are incorrect, and do not show a prior conveyance. It may indeed, be said that to declare such a rule will cause purchasers to lose faith in the records, and will retard the sale of property. But it must be remembered that it is equally hard to say that the first purchaser must lose the property that he has purchased when he has complied strictly with every provision of the statute, and has not been guilty of the slightest negligence. One of two innocent persons must, of necessity, be damaged, and, in our judgment, the loss should fall upon the second purchaser rather than upon the first. And this loss is not so severe as at first glance it may seem. He can recover back the purchase money for a failure of consideration, and he has his remedy against the recording officer for his dereliction of duty, and in several of the States severe penalties are prescribed for the execution of a second deed of the same property by the same grantor with intent to defraud a prior purchaser. On the whole, while on this question the authorities are divided, and either view is supported by a number of well-considered cases, yet we think the most reasonable rule is the one we have stated. While this is our opinion, still it must be confessed that neither view can be said to be supported by the preponderance of authority.

§ 687. **Effect of mistake in copying deed when considered recorded as soon as filed.**—In those States in which the rule prevails that a deed is considered in law recorded the

moment it is deposited with a proper officer for registration, it follows, as a natural conclusion, that any error in transcribing the deed cannot injure the grantee. A married woman conveyed land by deed, and the deed was acknowledged and recorded. Twelve years after it was recorded it was supposed to have a defective acknowledgment, and a copy of the deed was obtained from the recorder's office, which the grantor acknowledged to be her act and deed for the purposes therein mentioned, she then being a widow. The copy of the deed was returned properly acknowledged and given to the recorder to be recorded. The recorder did not transcribe this copy and the certificate of acknowledgment in their entirety, but, acting under the impression that the original deed was already recorded, he deemed it unnecessary to re-record that, but simply added upon the record the certificates annexed to the deed, with a reference to the original deed. The court held that if a widow by reacknowledging a void deed executed by her while married gives it validity, that it is sufficient if she acknowledge it to be her deed, without re-signing it; and when the deed is left for record, the grantee's rights are protected though the officer records only a portion of it.[3] A mistake in transcribing a mortgage, by which it is made to appear as security for a smaller amount than that named in it, does not, as against subsequent purchasers and encumbrancers, impair its efficiency.[4] A mistake in recording a mortgage will not prejudice the rights of the mortgagee as against those of a sub-

[3] Riggs v. Boylan, 4 Biss. 445. Said the court: "The duty of the recorder was to re-record the deed that was handed to him in 1839, with the added certificates, and I think that the deed having been given to him to be recorded, and his duty being to record it, and he having recorded nothing but the certificates, with a reference to the original, that the rights of the purchaser must be considered as having the shield of the law thrown upon them, and the deed did transfer the title."

[4] Mims v. Mims, 35 Ala. 23; Dubose v. Young, 10 Ala. 365. See Musser v. Hyde, 2 Watts & S. 314; Wood's Appeal, 82 Pa. St. 116; s. c. 16 Am. Law Reg. 255; Brooke's Appeal, 64 Pa. St. 127, and cases cited.

sequent purchaser.[5] An instrument, under this view, gives notice of its contents as soon as it is filed for record, although the officer may have failed to record it, or may have recorded it in the wrong book.[6]

§ 688. Effect of mistake where opposite view prevails. —Where it is held to be the duty of a grantee to see that his deed is properly spread upon the records, subsequent purchasers are charged with such notice only as they actually have or obtain from an inspection of the records. If, for instance, the recorder, by mistake, writes in the record the name of another person as the grantor in the deed in the place of the true grantor, the deed in Ohio is not considered duly recorded, and will not charge a subsequent purchaser with notice.[7] In the case cited, the recorder's mistake in recording the deed consisted in recording the name of the grantor as *Samuel* Granger, when the name in the deed, and the true name, was *Lemuel* Granger.[8] Where a mortgage is given as security for the pay-

[5] Chapman & Co. v. Johnson, 142 Ala. 633, 38 So. 797.

[6] Durrence v. Northern Nat. Bank, 117 Ga. 385, 43 S. E. 726. But if instructions are given not to record the deed, the filing is not notice: Turberville v. Fowler, 101 Tenn. 88, 46 S. W. 577.

[7] Jennings v. Wood, 20 Ohio, 261.

[8] Jennings v. Wood, *supra*. The court on this point said: "Did Jennings have notice of his title placed on record? He did not. The deed put on record purported to be a deed from a different person. It is only by the names of the parties conveying that a claim of title can be traced. Take the title in controversy as an illustration. If a person had gone to the record to ascertain the situation of this title; if, commencing at the source of titles, he had traced it down from grantee to grantee, until he should have found that the title had passed to Lemuel Granger, then all that he would have to do to ascertain whether the record showed any conveyance from Lemuel Granger, would be to examine the index to ascertain whether any conveyance had been made by Lemuel Granger; if none such appeared, then the record would give notice of no such conveyance. It would give him notice, however, that the title was still in Lemuel Granger. The reason that a party is chargeable with constructive notice is, that by an examination of the record, he will have actual notice. The deed actually shown on record was by a

ment of three thousand dollars, but upon the record it appears by mistake to have been given for three hundred dollars, it is notice to subsequent purchasers only for the sum expressed in the registry.[9] Where a deed was executed for *four-tenths* of an interest in land, but by mistake in the registration it appeared on the records to be for a *fourteenth* interest only, it was held that constructive notice was given of the conveyance of the land to the extent of one-fourteenth part only.[1] It has also been decided that if a town clerk copies a deed delivered to him for registration in a book in which no deeds had been recorded for upward of twelve years, and for the purpose of concealment and fraud, does not insert the names of the parties to the deed in the index, such a deed is not recorded, and it is held that no notice is given thereby to subsequent purchasers and attaching creditors.[2]

§ 689. **Continued.**—And if a deed for the east half of a lot is recorded as a deed of the west half, a subsequent purchaser of the east half, who has no notice that an error has been committed in the registration of the deed, will under this view be fully protected.[3] So where a deed conveys one-half of the grantor's *individual* right, title, and interest, into and to a certain piece of land, but, by mistake of the recorder, it is registered as a conveyance of one-half of the grantor's *un-*

person who had nothing to do with the title, and was, to all intents and purposes, a different conveyance from the one by which Jennings claims. But it is said that Jennings had a good deed, and that he had done all that it was necessary for him to do; that the mistake was that of the recorder, and that he should not suffer for the default of the officer. It may be a hardship on Jennings, it no doubt is; but here one of two innocent persons must suffer; and whenever this is the case, the rule is, that the misfortune must lie where it has fallen, it must rest on the person in whose business and under whose control it happened."

[9] Frost v. Beekman, 1 Johns. Ch. 288.

[1] Brydon v. Campbell, 40 Md. 331.

[2] Sawyer v. Adams, 8 Vt. 172, 30 Am. Dec. 459.

[3] Sanger v. Craigue, 10 Vt. 555.

divided right, subsequent *bona fide* purchasers are charged with notice of the conveyance of only the estate shown by the records.[4] Under the Wisconsin statute, a deed must be attested by two witnesses to entitle it to be recorded. It is held in that State that if an error is made in recording a conveyance at length, by omitting to copy the attestation, subsequent purchasers and mortgagees are not charged with constructive notice.[5] Under this view, where a mortgage covering the northwest quarter of a tract of land was made to appear in the record as a mortgage of the northeast quarter, it was held that a grantee in a subsequent deed of the northwest quarter was not affected by the mortgage.[6] No one is obliged to take notice of an instrument improperly recorded.[7] But if a deed has been properly attested by a witness and a notary public, the fact that it appears of record as having been executed in the presence of such witness and of a notary public having other initials to his name does not cause the record of the deed to lose its character as constructive notice.[8] Where the pledgee of an assignment of a mortgage, taken as collateral security, intending to discharge the assignment only, wrote opposite the mortgage records, the words: "In consideration of the full payment of all moneys secured to be paid, I hereby discharge the same of record," a subsequent purchaser relying upon an abstract showing a discharge of the

[4] Miller v. Bradford, 12 Iowa, 14.

[5] Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772. It appeared in this case, however, in a suit upon a mortgage defectively recorded in this respect, that one of the defendants at the time he purchased a part of the morgtaged premises "had heard that there was a defective railroad mortgage upon them, but did not look for it, because his abstract did not show it." The court held that under such circumstances, he must be deemed to have had actual notice of the mortgage.

[6] White v. McGarry, 2 Flipp. C. C. 572.

[7] Etzler v. Evans, 61 Ind. 56.

[8] Roberson v. Downing Co., 120 Ga. 833, 48 S. E. 329, 102 Am. St. Rep. 128.

mortgage is entitled to protection against a foreclosure of the mortgage.[9]

§ 690. **Destruction of record.**—After a deed has been once properly recorded, the destruction of the book in which it is recorded does not affect the constructive notice afforded by the original record.[1] When a party has placed his deed

[9] Lowry v. Bennett, 119 Mich. 301, 77 N. W. 935. See, also, Day v. Brenton, 102 Iowa, 482, 71 N. W. 538, 63 Am. St. Rep. 460; Florence v. Morien, 98 Va. 26, 34 S. E. 890; Wilkins v. McCorkle, 112 Tenn. 688, 80 S. W. 834; Dean v. Gibson, 34 Tex. Civ. App. 508, 79 S. W. 363; Terrell v. Andrew Co., 44 Mo. 309; Nystrom v. Quinby, 68 Minn. 4, 70, N. W. 777.

[1] Steele v. Boone, 75 Ill. 457; Armentrout v. Gibbons, 30 Gratt. 632; Gammon v. Hodges, 73 Ill. 140; Heaton v. Prather, 84 Ill. 330; Curyea v. Berry, 84 Ill. 600; Myers v. Buchanan, 46 Miss. 397. And see Deming v. Miles, 35 Neb. 739, 37 Am. St. Rep. 464; Alvis v. Morrison, 63 Ill. 181, 14 Am. Rep. 117; Shannon v. Hall, 72 Ill. 354, 22 Am. Rep. 146; Taylor v. Franklin Sav. Bank, 50 Fed. Rep. 289; Paxson v. Brown, 61 Fed. Rep. 874; Hyatt v. Cochran, 69 Ind. 436; Addis v. Graham, 88 Mo. 197; Franklin Sav. Bank v. Taylor, 131 Ill. 376; Thomas v. Hanson, 59 Minn. 274, 61 N. W. Rep. 135. The fact that the deed has been recorded may be shown by the certificate of the recorder, or by the index-book or other secondary evidence: Smith v. Lindsay, 89 Mo. 76, 1 S. W. Rep. 88; Alvis v. Morrison, 63 Ill. 181, 14 Am. Rep. 117; Cowles v. Hardin, 91 N. C. 231; Paxson v. Brown, 61 Fed. Rep. 874; Stebbins v. Duncan, 108 U. S. 32. But see Weber v. Moss, 3 Tex. Civ. App. 13, 21 S. W. Rep. 609, where it is held that if the record of a deed is partially destroyed so as not to show that the deed was properly acknowledged for registration, such record does not charge subsequent purchasers with constructive notice of the deed. In Myers v. Buchanan, 46 Miss. 397, the court said: "We have, however, no hesitation in affirming the general proposition propounded by the complainant, and hold the deed of trust in favor of Myers, in 1861, constructive notice to all the world, notwithstanding the disordered condition of the records in 1865. It would be monstrous to declare a lien, acquired by a duly recorded mortgage lost by subsequent partial or total destruction of the records. Such a rule would subject every lien in the State to the hazards of accidental fire the caprice of incendiaries and the casualties of war." To the same effect see Ashburn v. Spivey, 112 Ga. 474, 37 S. E. 703; Tucker v. Shaw, 158 Ill. 326, 41 N. E. 914; Thomas v. Hanson, 59 Minn. 274, 61 N. W. 135; Weir v. Cordz-Fisher Lumber Co., 186 Mo. 388, 85 S. W. 341;

upon record, he has complied with all the requirements of the law. After the record has been destroyed by fire, he is not compelled to record his deed a second time, or to do any other act to notify subsequent purchasers, in order to be protected in his rights under his deed.[2] "It is true," said Mr. Justice Craig, "a party who owns real estate in Cook county may, if he thinks proper, in case the record of his title has been destroyed, again record his title papers; yet he is under no legal obligation to incur that expense. It is no doubt true that a large number of deeds and other instruments of writing, relating to land in Cook county, which were recorded previous to the fire, have been lost or destroyed, and could not be produced. To hold, therefore, that the owner of property was required to again record the title papers, or be liable at any moment to lose the title, would be establishing a precedent of the most dangerous character. The result of the doctrine contended for by appellant would compel, in numerous instances, parties who owned real estate in Cook county to take immediate possession, or otherwise their titles would be at the mercy of subsequent purchasers."[3] Furthermore, the weight of

Manwaring & Mo. etc., Co., 200 Mo. 718, 98 S. W. 762; Williams v. Butterfield, 214 Mo. 412, 114 S. W. 13; Cooper v. Flesner, (Okl.) 23 L.R.A.(N.S.) 1180, 103 Pac. 1016.

[2] Gammon v. Hodges, 73 Ill. 140. See Hyatt v. Cochran, 69 Ind. 436. Under the statute of Texas, where county records are destroyed, deeds which are preserved must be re-corded within four years, and unless so re-recorded, the first record does not constitute notice as against a *bona fide* purchaser: Magee v. Merriman, 85 Tex. 105, 19 S. W. 1002; O'Neal v. Pettus, 79 Tex. 255; Weber v. Mass, 3 Tex. App. 13, 21 S. W. Rep. 609; Barcus v. Bringham, 84 Tex. 538, 19 S. W. Rep. 703; Salmon v. Huff, 80 Tex. 133, 15 S. W. Rep. 257; Greer v. Willis, (Tex.) 81 S. W. 1185. But see in this connection: Curry v. Lehman, 55 Fla. 847, 47 So. 18.

[3] See Gammon v. Hodges, *supra*. See, also, Shannon v. Hall, 72 Ill. 354, 22 Am. Rep. 146; Alvis v. Morrison, 63 Ill. 181, 14 Am. Rep. 117. In Texas it was held that where one had recorded his deed, and the records were destroyed, his failure to take steps to have his conveyance again recorded, is not negligence, as against a subsequent purchaser from the original vendor, who, not having paid the price in full, could not claim the equity of

authority holds that the mere failure of a person to avail himself of statutory provisions for the restoration of records, does not, in the absence of statutory provisions, prevent him from relying on the original record.[4] Its character as a record is not taken away although it is not re-recorded in compliance with the terms of a permissive enabling act.[5] When once recorded, constructive notice is given, although the record may fail to give the information desired.[6]

§ 691. **Proof of deed where record destroyed.**—Where the record has been destroyed, and it becomes material to prove the execution of the deed, it may be proved in most instances, by the production of the deed itself, and hence little difficulty will generally be experienced. But when the record has been destroyed and the deed lost, its execution must be proven like that of any other lost paper, by secondary evidence. What evidence will suffice to prove this fact is a matter to be determined by the court or jury, and of course it is impossible to lay down a universal rule as to the amount of evidence that will be required to establish this fact. It has been decided, however, where a deed and its record had both been destroyed by fire, that its execution is sufficiently proven by the testimony of a clerk of an abstract firm, that the deed had been filed for record, and that the day after its execution he had made a minute of it, which he produced, and the testimony of a partner of the person claiming to be grantee that the deed was, in his opinion, executed in his office and was taken away for the purpose of acknowledgment. Such testimony will pre-

a *bona fide* purchaser: Evans v. Templeton, 69 Tex. 375, 5 Am. St. Rep. 71.

[4] Ashburn v. Spivey, 112 Ga. 474, 37 S. E. 703; Shannon v. Hall, 72 Ill. 354, 22 Am. Rep. 146; Gammon v. Hodges, 73 Ill. 140, Hyatt v. Cochran, 69 Ind. 436; Myers v. Buchanan, 46 Miss. 397. But see Holton v. Alley, 15 Ky. L. Rep. 529, 24 S. W. 113.

[5] Hyatt v. Cochran, 69 Ind. 436.

[6] Heim v. Ellis, 49 Mich. 241, 13 N. W. 582. See, also, Mattfield v. Huntington, 17 Tex. Civ. App. 716, 43 S. W. 53; Greer v. Willis, 81 S. W. 1185.

vail against the positive denials of the grantors that they at any time had executed such a deed.[7]

§ 692. **Index as part of the record—Comments.**—The index is a very important aid to searchers in enabling them to ascertain whether a particular individual has conveyed his title. Without the assistance furnished by the index, it would be practically impossible for an ordinary person, with no peculiar means of information, to learn from the inspection of the records the condition of a title. The index is generally required by the registry laws to be kept as one of the official records. In connection with the question we have just discussed, the inquiry arises, is an index placed on the same footing as the record-book itself, and what consequence, if any, results from a mistake in the index by which an innocent purchaser may be misled? On this question, we shall encounter, to some extent, the same conflict in the decisions, that we found existed on the question as to the person who should suffer for an error in the transcription of the original deed into the records.

§ 693. **View that deed improperly indexed does not give constructive notice.**—In Pennsylvania, in one case, the court held that a conveyance not correctly indexed was not constructive notice.[8] But as the case was decided on the ground that the subsequent purchaser had actual notice of the prior conveyance, it was unnecessary to pass upon this question. Mr. Chief Justice Woodward, however, remarked: "But it was not duly indexed, and not therefore, constructive notice to third parties. As a guide to inquirers, the index is an indispensable part of the recording, and without it, the record affects no party with notice."[9] In a later case in the same State this question incidentally arose, but the court did

[7] Heacock v. Lubuke, 107 Ill. 396.
[8] Speer v. Evans, 47 Pa. St. 141.
[9] Speer v. Evans, 47 Pa. St. 141.

not decide it. The deed had been properly indexed in the separate index, but not in a general index which the officer kept for convenience of searchers. The law did not require the recorder to keep a general index. The court held that as the deed was indexed in the particular index required by law to be kept, it was sufficient to give notice but observed: "Whether his title can be taken from him by the omission to enter his recorded and certified deed in the particular index, may admit of question, but we give no opinion on this point." [1]

[1] Schell v. Stein, 76 Pa. St. 398, 18 Am. Rep. 416. Mr. Chief Justice Agnew delivered the opinion of the court, and said: "The question presented by the record in this case is, whether a deed regularly acknowledged or proved, and recorded in the proper book, and indexed in the separate index appropriated to the book, but not in the general index of all the deed-books, is not defectively recorded. If it be, the conceded principle is that a deed defectively registered is a nullity as to subsequent purchasers or mortgagees. There is no law which requires the recorder to keep a general index to all the deed or mortgage-book in his office. That it is a great convenience, and, in the populous counties of the State, has become a necessity, is evident, but it is the province of the legislature, and not of this court, to make this convenience or the necessity the subject of law. The registration of deeds is purely a system of legal institution, and not of common right or abstract justice. At common law, in England, there was no system of registration, and the rule between claimants of the same title was found in the maxim, *prior in tempore potior est in jure.* In this State the system has been one of growth. The original act of 1715 did not even require the record to be a book. The recorder was to provide parchment *or* good large books, and his certificate was to give the number of the book *or* roll. No provision was made for indexing until the act of 1827, which was applicable to other offices as well as that of the recorder. But so early as 1775 the law required a bond of the recorder with sufficient sureties, which was to be held for the use of 'parties that shall be indemnified or aggrieved' in the same manner as sheriff's bonds. The duty of searches is that of the officer, not of parties, and he must see to it that no mistakes are made in searching. The act of 1827 imposed no duty as to indexes, except to have one for each and every book. If greater convenience induces the recorder to keep a general index, to save the handling of different books, and he omits to index a deed in it, and thereby overlooks a deed regularly recorded and duly indexed in the proper book, his certificate makes him liable to the party who

In later cases arising in Pennsylvania, however, the doctrine has been unequivocably announced that the index is not essential to the registration of a deed and the earlier cases so far as they state a different rule, are overruled.[2] The view that a deed incorrectly indexed does not give notice is to some extent sanctioned in some other States.[3]

§ 694. **Decisions in Iowa on this question.**—In Iowa several decisions have been rendered on this question, based

is injured by it. But surely the one who has had his deed duly acknowledged or proved, recorded in the proper book, and certified under the hand and seal of the office of the recorder in due form, has done all the law requires of him. On what principle of law or sound reason shall he be required to supervise the officer's gratuitous indexing of deeds in an index not required by law? He is not to be presumed to be familiar, and, as a fact, nine out of ten persons are not familiar, with the system of the office. All the citizens can be bound to know is the law, and he is warned by no law that there must be kept a general index."

[2] Stockwell v. McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Pyles v. Brown, 189 Pa. St. 164, 42 Atl. 11, 69 Am. St. Rep. 794; Wood's Appeal, 82 Pa. St. 116. The requirement of a statute as to the manner in which indexes shall be made must be observed: Smith v. Lamping, 27 Wash. 624, 68 Pac. 195; Dirks v. Collins, 37 Wash. 620, 79 Pac. 1112. But indexing is not essential unless the statute makes it so: Maxwell v. Stuart, 99 Tenn. 409, 42 S. W. 34; Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 692; Armstrong v. Austin, 45 S. C. 69, 29 L.R.A. 772, 22 S. E. 763; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 532.

[3] See Barney v. McCarty, 15 Iowa, 510, 83 Am. Dec. 427; Whalley v. Small, 25 Iowa, 188. See, also, Handley v. Howe, 22 Me. 560; McLaren v. Thompson, 40 Me. 284. Where the statute requires the recording officer to keep indexes in which the names of grantors must be placed alphabetically, a tax deed, until it is indexed, is held not to be recorded nor admissible in evidence: Hiles v. Atlee, 80 Wis. 219, 27 Am. St. Rep. 32; Howe v. Thayer, 49 Iowa, 154. In Wisconsin, the omission to enter a description of the land under the appropriate head in the general index is cured by transcribing at length the deed containing such description in the proper record: St. Croix etc. Co. v. Ritchie, 73 Wis. 409. See, also, Oconto Co. v. Gerrard, 46 Wis. 317. A purchaser is not bound to look beyond the proper index for information as to conveyances: Koch v. West, 118 Ia. 468, 92 N. W. 663, 96 Am. St. Rep. 394.

upon the statutes in force in that State. In one case[4] the court said that an analysis of the statute showed that the recorder was required to perform the following acts with respect to all instruments required to be recorded: "1. File all deeds, etc., presented to him for record, and note on the back of the same the hour and day they were presented for record." "2. Keep a fair book on which he shall *immediately* make an entry of every deed, giving date, parties, description of land, dating it on the day when it was filed in his office." "3. Record all instruments in regular succession." "4. Make and keep a complete alphabetical index to each record-book, showing page on which *each* instrument is recorded, with the names of the parties thereto." The opinion of the court was delivered by Mr. Justice Dillon, who said that reading this statute with the others on the same subject, the court was of the opinion that in order to constitue a compliance with their requirements, it was necessary that each of the following steps should be substantially observed: "1. The instrument must be deposited or filed with the recorder for record. He thereupon notes the fact, and 'the hour and day,' on the back thereof, and the day on 'the fair-book,' as it is styled, and retains the instrument in his office. The instrument itself thus remaining on file in his office with the indorsement upon it, and the entries in the 'fair-book,' which are required to be immediately made, constitute the notice until the instrument is actually extended upon the records. 2. The next step in the process is the recording, that is, the copying of the instrument at large into the 'record-book,' and noting in it the precise time when it was filed for record. The object of this noting is that the record may show on its face when the notice commences. 3. The third and final step is the indexing of the instrument so recorded. The statute prescribes the requisites of the index. It shall be a complete alphabetical index to each record-book, and shall give the names of the parties,

[4] Barney v. McCarty, 15 Iowa, 510, 83 Am. Dec. 427.

and show the page where each instrument is recorded. The paging cannot, of course, be given until the deed is actually transcribed into the record-book, and up to this time it remains on file. When recorded and indexed the deed may be withdrawn, and the record takes its place, and constructively imparts notice to the world of its existence and contents." The justice then remarked: "Keeping in view alike the well-known objects and the enlightened policy on which the registry acts are based, as well as the language and requirements of the several statutes above cited, the court are of the opinion that all three of these steps are essential, integral parts of a complete, valid registration." He then examined several cases cited by the counsel for the respective parties, and concluded the opinion by observing: "To hold that an index is not essentially part of a valid and complete registration in this State, would overlook the uniform practice of relying wholly upon it to find the names of the various owners in tracing titles, and would also ignore the fundamental design of the recording acts, which is to give certainty and security to titles, by requiring all deeds and liens to be made matters of public record, and thus discoverable by all persons who are interested in ascertaining their existence, and who will examine the records in the mode which the law has pointed out." It was accordingly held that the omission to index a conveyance deprived the record of imparting constructive notice of its contents.[5] But where a conveyance was filed in the proper office, and entered of record on page "546" of the proper book, but the index entry, while showing the names of the grantor and grantee, and substantially the "nature of the instrument," and the book in which the record was made, stated the page of the record as "596," it was held that the index was operative as constructive notice of the acts which would be disclosed by an examination of the record.[6] In another case a deed had

[5] Barney v. McCarty, 15 Iowa, 510, 83 Am. Dec. 427.

[6] Barney v. Little, 15 Iowa, 527. The court cited with approval the

been filed for record, and had remained in the recorder's office from the time it was filed, but it had never been actually recorded or indexed. The court held that the mere filing was not sufficient to impart constructive notice.[7] The court decided this case on the authority of Barney v. McCarthy and said: "The only point of difference between the facts in that case and the one at bar is, that while the instrument there was copied upon the record, and taken from the recorder's office, here it was not copied, and remained in the office. The doctrine of that case is clearly applicable to this. If the recording of an instrument duly filed is insufficient without an index thereof, certainly filing without either the index or the recording would, under that decision, fail to impart notice."[8] A purchaser of a piece of land executed a mortgage back as security for the payment of the purchase money. But by mistake the land that was described was an entirely different tract. It was held that a subsequent purchaser was not charged with constructive notice of the recitals in the deed, which might be sufficient to place him upon inquiry, when the index required by law to be kept did not contain such recitals.[9] But a description in the proper column in the index as "certain lots of land," the record being complete in other respects, was held

former case of Barney v. McCarty, 15 Iowa, 510, 83 Am. Dec. 427, and said: "It is a purchaser's duty to examine the records. The law places this means at his disposal. It requires all matters affecting titles to appear of record. If he omits to examine, he is to impute the loss, if any, to his own indolence or folly: Astor v. Wells, 4 Wheat. 466. Assuming the instrument to be one which may properly be registered, the law charges him with a knowledge of all facts which an ordinarily careful examination of the records would have made him cognizant of. Having thus settled the rule which is to be applied, the court cannot avoid the conclusion that if the appellants, in the case under consideration, had made an ordinary, diligent, skillful, and careful examination of the records, the mortgage in question would have been discovered to them."

[7] Whalley v. Small, 25 Iowa, 184. See, also, Oconto Co. v. Jerrard, 46 Wis. 317.

[8] Whalley v. Small, 25 Iowa, 184.

[9] Scoles v. Wilsey, 11 Iowa, 261.

sufficient to convey constructive notice to subsequent purchasers.[1] And it was also held that where the words "see record" were written in the column in which the description of the lands should have been placed, a subsequent purchaser was charged with notice.[2]

§ 695. **View that mistake in index has no effect upon record.**—In Missouri, although the rule prevails that a deed does not impart constructive notice if a mistake has been made in the record,[3] yet it is established that this result does not follow from a mistake or omission in the index.[4] Wagner, J., referring to the registry act of that State, said: "The general nature, object, and scope of the whole act, taken together, is to point out the duty of the clerk, not only in the making of a proper record of conveyances, but also in furnishing facilities for their discovery, examination, and use, by all persons interested in them; and to secure the due performance of these duties the clerk is made liable to the party injured for the neglect of them. The index, which it is the duty of the clerk to make out and preserve in a book for that purpose, seems to be one of the facilities to be used in making search for the record, but not a part of the record itself. It

[1] Bostwick v. Powers, 12 Iowa, 456.

[2] White v. Hampton, 13 Iowa, 259. For other cases in Iowa upon this question, see Calvin v. Bowman, 10 Iowa, 529; Noyes v. Horr, 13 Iowa, 570; Barney v. Little, 15 Iowa, 527; Gwynn v. Turner, 18 Iowa, 1; Howe v. Thayer, 49 Iowa, 154; Hiles v. Atlee, 80 Wis. 219, 27 Am. St. Rep. 82, 49 N. W. Rep. 816.

[3] Terrell v. Andrew County, 44 Mo. 309.

[4] Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Land & River Imp. Co. v. Bardou, 45 Fed. Rep. 706. Filing a deed, it is held in North Carolina, constitutes constructive notice, and the failure of the officer to index the deed as required by statute does not impair its efficacy: Davis v. Whitaker, 114 N. C. 279, 41 Am. St. Rep. 793. Where a deed is properly filed for record, the failure to record it does not affect the person's rights if the deed was properly indexed: Sawyer v. Vt. etc. Co., 41 Wash. 524, 84 Pac. 8.

is his duty to have an index, and to enter upon it a proper reference to every record of a conveyance, and for any neglect to do so, he is liable to the party aggrieved for double the amount of damages sustained. But it is not certain that any one will be injured by the neglect, and therefore the record itself should not be held void. The purchaser may take his deed, relying solely upon the representations or covenants of his grantor, without desiring to examine the records. An index or the want of it will obviously be of no importance to him. So, if without making any search, or causing any to be made, a person should rely alone upon the representations of the clerk, that the title was clear, and these representations should be knowingly false, could it with reasonable propriety and fairness be said that he was injured by want of an index? Yet in these cases, if the argument advanced be correct, though no one is injured by the failure of the clerk to perform his duty as to indexing, and though the purchaser has had his deed correctly transcribed and spread upon the record, still the recording should be held void. In my opinion, the proper office of the index is what its name imports—to point to the record—but that it forms and constitutes no part of the record. The statute states, without reserve or qualification, that when an instrument is filed with the recorder and transcribed on the record, it shall be considered as recorded from the time it was delivered. From that time forth it is constructive notice of what was actually copied. A subsequent section for the purpose of facilitating research, besides recording, devolves a separate, distinct, and independent duty upon the recorder, and in the event of a non-compliance with that duty, the party injured has his redress. The purchaser or grantee, when he has delivered his deed and seen that it was correctly copied, has done all the law requires of him for his protection; and if any other person is injured by the fault of the recorder in not making the proper index, he must pursue his remedy against that offi-

cer for his injury."[5] In Georgia, the court considered that the index was intended for the convenience of the searcher. "If the clerk fails to do his duty, he injures those who desire to search. The duty is, therefore, to the searcher and to the public, and not to the holder of the deed. And this has, as we think, always been the understanding of the law in this State."[6] The rule that generally prevails is, that the index is not a part of the record, and that a grantee cannot suffer for any mistake in it.[7]

[5] In Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533. Under the Kentucky statute the record of the deed is notice, even if the officer fails to index it, and the deed is withdrawn by the grantee without seeing that it has been properly indexed: Herndon v. Ogg, 119 Ky. 814, 84 S. W. 754.

[6] Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 692.

[7] Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; Musgrove v. Bonser, 5 Or. 313, 20 Am. Rep. 737; Board of Commrs. v. Babcock, 5 Or. 472; Green v. Carrington, 16 Ohio St. 548, 91 Am. Dec. 103; Lincoln Building & Sav. Assn. v. Hass, 10 Neb. 581; Curtis v. Lyman, 24 Vt. 338, 58 Am. Dec. 174; Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 692; Nichol v. Henry, 89 Ind. 54; Barrett v. Prentiss, 57 Vt. 297; Bedford v. Tupper, 30 Hun, 174; Stockwell v. McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Swan v. Vogel, 31 La. Ann. 38; Semon v. Terhune, 40 N. J. Eq. 364; Oconto Co. v. Jerrard, 46 Wis. 317; Ely v. Wilcox, 20 Wis. 523, 91 Am. Dec. 436; Fallas v. Pierce, 30 Wis. 443; Mutual Life Ins. Co. v. Dake, 1 Abb. N. C. 381. In Mutual Life Ins. Co. v. Dake, 1 Abb. N. C. 881, Mr. Justice Smith, after stating this rule, said: "In reaching this conclusion, I have not overlooked the practical inconveniences that may result from it in searching records. But the duty of the court is only to declare the law as the legislature has laid it down Arguments *ab inconvenienti* may sometimes throw light upon the construction of ambiguous or doubtful words; but where, as here, the language of the law makes it plain, they are out of place. Inconveniences in practice will result, whichever way the question shall be decided. The power to remedy them is in the legislature, and not in the courts. Even as the law now stands, the party injured by the omission of the clerk is not without remedy, for he has his action against the clerk." As to what an index of records should contain, see Smith v. Royalton, 53 Vt. 604. See, also, supporting text, Stockwell v. McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Barrett v. Prentiss, 57 Vt. 297; Swan v. Vogel, 31 La. Ann. 38. The validity of a deed as notice to subsequent purchasers is not affected by failure

§ 696. Comments.—In those States where a mistake in the record does not affect its power of imparting constructive notice, a mistake in the index cannot injure the grantee. In Iowa, the decisions are founded upon the express language of the statutes of that State. We think that whether the law requires an index to be kept or not, a grantee who has deposited his deed for record should not suffer for a mistake of the officer. As we have already said, we consider the true principle to be, unless the language of the statute necessarily leads to a different conclusion, that the obligation of the grantee as to giving notice ceases when he has filed his deed for record. For any mistake made in the index or record by the officer, the grantee should not be held responsible, but the loss should fall upon the subsequent purchaser, who may have his remedy against the recording officer for the negligent performance of an official duty.[8]

of the clerk to index it properly if it had been delivered to the clerk and duly admitted to record: Va. etc. Assn. v. Glenn, 99 Va. 460, 39 S. E. 136.

[8] In Ritchie v. Griffiths, 1 Wash. 429, 12 L.R.A. 384, 22 Am. St. Rep. 155, the court holds that under the statute of that State the index is an essential part of the record, and says: "While it is true that Devlin in his work on Deeds, section 696, seems to imply that an index is not necessary to give constructive notice, yet he evidently bases the idea, not so much on the theory that the index is not a part of the record, as from his general conclusion that the obligation of the grantee as to notice ceases when he has filed his deed for record. And he qualifies this general statement by saying: 'Unless the language of the statute necessarily leads to a different conclusion'—a qualification, it seems to us which renders meaningless the general statement; for as constructive notice is purely statutory, it must necessarily follow that it is 'the language of the statute' that leads to one or the other of the conclusions. He cites Barney v. Little, 15 Iowa, 527, but says that 'the decision in that case was founded upon the express language of the statute of that State,' intimating that in consideration of the statute the conclusion of the court was correct; and in as much as our statutes make the index a more important factor in the system of registration than does the Iowa statute, we may fairly conclude that under a statute like ours the learned author would consider the index an essential part of the record." It is impossible to lay down any general rule, as each State pro-

§ 697. **Liability of recording officer for error.**—As it is the duty of the recording officer to duly index and record the deed, he is liable in damages to the party injured for a breach of this duty. The only question that can arise is, who is the party aggrieved? It would probably be held in those States where it is considered that a deed is not duly recorded unless properly copied upon the record-book, that it would be the grantee, who, by this view, is the one sustaining the injury.[9] But generally the claim to damages would accrue to the party who purchased upon the assurance that the records were correct.[1] The statute of Missouri requires the recorder to keep an index, and declares that if he fails or refuses to provide and keep in his office an index of the character required, he shall pay to the aggrieved party double the damages caused thereby. But the court intimated that if a purchaser takes his deed, without attempting to examine the records, relying exclusively upon the representations or covenants of his grantor, or should rely solely upon the representations of the officer that the title was perfect and free from encumbrances, it could not with reasonable propriety and fairness be said that such purchaser was injured by the want of an index.[2] In Indiana, where the view

vides its own methods for registering instruments affecting title to land, and the courts of each State construe their own statutes.

[9] See Terrell v. Andrew County, 44 Mo. 309. The clerk's failure to copy the description correctly will not prejudice the grantee, as the deed is constructive notice from the time it is filed for record: Lewis v. Hinman, 56 Conn. 55.

[1] Board of Commissioners v. Babcock, 5 Or. 472; Mutual Life Ins. Co. v. Dake, 1 Abb. N. C. 381; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533.

[2] Bishop v. Schneider, 46 Mo. 472, 479, 2 Am. Rep. 533. See further as to the liability of the recording officer for damages for mistakes: Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; Hunter v. Windsor, 24 Vt. 327; Crews v. Taylor, 56 Tex. 461; Lee v. Bermingham, 30 Kan. 312; Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84; State v. Davis, 96 Ind. 539; Board of Commissioners v. Babcock, 5 Or. 472; Poplin v. Mundell, 27 Kan. 138; Fox v. Thibault, 33 La. Ann. 32; Walkins v. Wilhoit, 104 Cal. 395.

obtains that the record of a deed is notice of the existence and record of the deed, and not of the original instrument, a deed containing an agreement on the part of the grantee to assume and pay the sum of five hundred dollars as a part of the mortgage debt on the land conveyed, was, by the recorder's mistake, recorded in such a manner as to show the assumption on the part of the grantee of only two hundred dollars of such mortgage debt. The recorder and his sureties were held to be liable upon the officer's official bond for the damages which the grantor sustained by such mistake.[3] But where the deed is forged, unless the recording officer was aware of the forgery he is not liable for recording it.[4]

§ 697a. **Duty of recording officer.**—The duties of a register of deeds are generally specifically prescribed by the statute creating or regulating the office. If a statute makes it the duty of an officer to provide an alphabetical index and to keep the same for inspection, it is his duty to keep such index with the same care that he is required to use in keeping his books of record. If any one is injured by his neglect he is liable, or, if the statute provides that a town shall be liable, the latter may be held responsible, but before a cause of action can be sustained it must appear that the damages claimed were caused by the neglect.[5] Where the statute requires an officer to keep a general index of the record of conveyances, a failure to do so will give a cause of action to a party injured. If a purchaser searching the index, fails to learn of the existence of a mortgage because it was not indexed and buys the property believing it to be unencumbered and is dispossessed by foreclosure, he is entitled, in an action on the official bond of the officer, to recover nominal damages, and such actual damages as were proximately caused by the officer's neglect.[6]

[3] State v. Davis, 96 Ind. 539.
[4] Ramsey v. Riley, 13 Ohio, 157.
[5] Hunter v. Windsor, 24 Vt. 327.
[6] Norton v. Kumpe, 121 Ala. 446, 25 So. 841. Mr. Justice Sharpe delivering the opinion of the court

But if the intention of the statute is that the index shall serve merely as a guide to the record, and it is not a part of the record itself, then a failure to index a conveyance does not make the record defective in any essential respect so as to deprive the conveyance first recorded of its priority.[7] Where the statute declares that the conveyance shall be considered as recorded from the time of its delivery to the recording officer, nothing more is required to be done to render the record complete. But notwithstanding that priority may not be affected, the officer may be liable in a civil action to the party injured by his omission or neglect.[8] Although an index may not be necessary to render the record effective as constructive notice to a subsequent purchaser, still for misfeasance, or non-feasance, the recording officer is liable to the injured party, and where his official delinquency consists of his failure to index the record of an instrument the injured party is the party misled by the want of the index, and not the person whose deed has, in other respects, been duly recorded.[9]

said: "The direction to prepare and keep a general, direct, and reversed index of prior as well as subsequently recorded conveyances was as imperative and demanded the same measure of care and accuracy in its execution, as did the statutory direction to record and index in the first instance. The purpose of the enactment was to afford faculties for a search of the record, and such purpose would fail if no reliance could be had upon the general index. If it carried no presumption of verity, the searcher must resort to the records, as if there was no general index. The general index, if consulted at all, would become a snare, rather than a guide, if, when purporting to point to all incumbrances, it was silent as to some. The mere constructive notice which the registration statutes impute from the filing of a conveyance for record is for the protection of those claiming under the conveyance, and does not exist for the protection of the recording offices from liability for nonperformance of official duty."

[7] Mutual Life Ins. Co. of New York v. Dake, 87 N. Y. 257.

[8] Mutual Life Ins. Co. of New York v. Dake, 87 N. Y. 257.

[9] Green v. Carrington, 16 Ohio St. 548, 551, 91 Am. Dec. 103. See, also, Jennings Lessee v. Wood, 20 Ohio, 261; Matter of Holliday, 13 Ohio Cir. Ct. 672, 6 Ohio Civ. Dec. 751; People v. Nash, 62 N. Y. 484;

§ 697b. **Required to perform statutory duty only.**—Inasmuch as the duty of the recorder is fixed by statute he is not required, in the absence of a statutory provision, to search the records for the purpose of ascertaining whether persons whose names are attached to a petition for a liquor license, are freeholders or not.[1] If, however, pursuant to statute, he undertakes to give a certificate of all the instruments recorded in his office, he must mention all, and cannot decide as to their validity.[2] But he is not required to certify that a description covers part of a larger tract. The person who desires a search cannot carve out a description of land at his volition, and require the services of the officer to ascertain the condition of the title, nor is he required "upon a call for a search by such a description, to certify that he can find no deeds on record conveying the premises described, for the premises described may be embraced in the general description in some deed on record, and he is under no obligation to employ a surveyor, or to make inquiries or examinations outside of his office to ascertain facts which do not appear distinctly by his records. He may decline to make such a search until he is furnished with the information that will enable him to find and identify the premises by his records."[3] A recording officer may be prevented by statute from practicing law. Such a statute is not unconstitutional because a person who takes the benefit of an office also assumes its burdens.[4] It is not his province to decide upon the validity of conveyances offered to him for registration, but his duty is to receive, file and record such conveyances, as the statute permits to be received, filed and recorded.[5] Where the office is created by the legislature, that body, in the absence of a constitutional inhi-

Morton v. Smith, (Tex. Civ. App.) 44 S. W. 683.

[1] State v. Holm, 70 Neb. 606, 64 L.R.A. 131, 97 N. W. 821.

[2] Sacerdotte v. Duralde, 1 La. 482.

[3] Ballinger v Deacon, 44 N. J. L. 559, 563.

[4] McCracken v. State, 27 Ind. 491.

[5] People v. Fromme, 35 N. Y. App. Div. 459, 54 N. Y. Supp. 833. But it is said that he is not abso-

bition, can abolish it.[6] As a conveyance is deemed to be recorded when filed, no injury can be caused to any one by the failure of the officer actually to record it.[7] The recorder must record conveyance in the order in which they are presented to him.[8] Where a statute prescribes the method of indexing deeds and mortgages, a board of supervisors of a county has no power to alter it or to interfere with the custody of the records or to transfer the duty or power of making indexes to another person.[9] The failure of a recorder to keep his office at the county seat does not invalidate the records in his office.[1] Where the statute requires the recorder to keep indexes of the records, it will be presumed that he has complied with the statute, on the ground that all public officers are presumed to have performed their duty.[2] While a recording officer is a ministerial officer he is not entirely without discretion, although he cannot exercise a judicial discretion.[3] He is liable on his bond for his failure to register a deed correctly, notwithstanding his negligence is not willful, nor of such a gross character as to imply willfulness.[4] A county officer is liable on his bond for errors or omissions in searches of title where the statute makes it his duty to supply searches.[5] But if there is no statutory obligation he is not liable in his official capacity for lack of skill or care, but in such an event he is liable individually, as if he were engaged in the private business of searching records.[6]

lutely without discretion in deciding whether an instrument offered to him, is entitled to registration: Dancy v. Clark, 24 App. Cas. D. C. 487.

[6] State v. McDaniel, 19 S. C. 114.

[7] Kessler v. State, 24 Ind. 313.

[8] Florence v. Mercier, 2 La. 487.

[9] People v. Nash, 62 N. Y. 484, affirming 3 Hun, 535.

[1] Thomas v. Hanson, 59 Minn. 274, 61 N. W. 135.

[2] Fullerton Lumber Co. v. Tinker, 22 S. D. 427, 118 N. W. 700.

[3] Dancy v. Clarke, 24 App. D. C. 487.

[4] State v. McClellan, 113 Tenn. 616, 85 S. W. 267.

[5] Ziegeler v. Commonwealth, 12 Pa. St. 227; Philadelphia v. Anderson, 142 Pa. St. 357, 12 L.R.A. 751; Lusk v. Carlin, 5 Ill. 395.

[6] Mallory v. Ferguson, 50 Kan. 685, 22 L.R.A. 99, 32 Pac. 410;

§ 697c. **Liability of officer for negligence.**—An action for damages may be maintained by the party aggrieved against a register of deeds for injury caused by the failure to perform a duty placed on him by law or by the negligent performance of such duty.[7] The parties to the conveyance are the "parties aggrieved" within the meaning of a statute making the recorder liable for damages caused by his negligence.[8] A recording officer who receives a conveyance for record is liable if he returns it or delivers it, before it is recorded.[9] If the officer does not examine the record itself, but relies solely on a marginal entry, he is negligent.[1] But if a party does not examine the records, he cannot be said to be misled by the omission of an officer to index a mortgage.[2] If the statute does not obligate a recorder to certify abstracts of title his liability, in case of a false certificate is merely for a breach of his contract obligation. He is not, under these circumstances liable in his official capacity.[3]

Smith v. Holmes, 54 Mich. 104, 19 N. W. 767; Mechanics' Building Assn. v. Whitacre, 92 Ind. 547.

[7] Hartwell v. Rilcy, 47 N. Y. App. Div. 154, 62 N. Y. Supp. 317; Van Schaick v. Sigel, 58 How. Pr. 211, affirmed 9 Daly, 383, 60 How. Pr. 122, 11 N. Y. Wkly. Dig. 1177; Mechanics' Building Assn. v. Whitacre 92 Ind. 547; Reeder v. State, 98 Ind. 114; State v. Davis, 117 Ind. 307, 20 N. E. 159; State v. Green, 124 Mo. App. 80, 100 S. W. 1115; Welles v. Hutchinson, 2 Root (Conn.), 85; Sutherland First Nat. Bank v. Clements, 87 Iowa, 542, 54 N. W. 197; Luther v. Banks, 111 Ga. 374, 36 S. E. 826; Falconer's Succession, 4 Rob. (La.) 5; Sauvinet v. Landreaux, 1 La. Ann. 219; Chige v. Landreaux, 2 La. Ann. 606; Gordon v. Stanley, 108 La. 182, 32 South. 531; Schell v. Stein, 76 Pa. St. 398, 18 Am. Rep. 416; Houseman v. Girard Mut. Building Assn., 81 Pa. St. 256; Peabody Building Assn. v. Houseman, 89 Pa. St. 261, 33 Am. Rep. 757.

[8] Watkins v. Wilhoit, (Cal.) 35 Pac. 646; Duffy v. Wilhoit, (Cal.) 35 Pac. 651.

[9] Welles v. Hutchinson, 2 Root, 85.

[1] Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502.

[2] Lyman v. Edgerton, 29 Vt. (3 Williams), 305, 70 Am. Dec. 415.

[3] Mechanics' Building Assn. v. Whitacre, 92 Ind. 547. In this case the recorder was held liable for the damages caused, where he entered the record of payment on the margin of the wrong mortgage and as a consequence a party loaned

§ 697d. **Damages.**—Unless an actual loss is sustained, the recorder is liable only for nominal damage for a mistake.[4] A recorder is liable for the mistake of his deputy.[5] If the statute requires the recorder to index immediately an instrument filed with him for record, a delay in indexing is presumptive evidence of negligence.[6] The failure of a register of deeds to index a mortgage as required by statute, renders him liable in damages, under a statute declaring that public officers shall be liable for all acts "done" by virtue of their office.[7] The implication that each grantee holds an undivided moiety of the land does not arise from a certificate of the recorder that the title to the land is in the two grantees.[8] The question whether in a particular case an officer has been negligent so as to subject him to damages, may be a question for the jury.[9] If a register of deeds fails to notice a mortgage on the tract index when he is required to do so by statute, he is liable on his bond, to a purchaser, for such damages as have been caused by his neglect, where the purchaser, relying on the index had bought up the mortgage, and had enforced it to the extent that it embraced other property, and had exhausted his remedies against the vendor and the party executing the note secured by the mortgage.[9a] Where, under the statute of a state, a recorder is prohibited from entering satisfaction of record of a mortgage without the production of the note secured or of an affidavit of payment, the fact that it is presumed that an intending purchaser of land knows the

money and took as security a mortgage on the land which appeared to be free from the incumbrance.

[4] State v. Davis, 117 Ind. 307, 20 N. E. 159; Kimball v. Connolly, 2 Abb. Dec. 504, 33 How. Pr. 247.

[5] Van Schaick v. Sigel, 58 How. Pr. 211.

[6] First Nat. Bank v. Clements, 87 Iowa, 542, 54 N. W. 197.

[7] State v. Grizzard, 117 N. C. 105, 23 S. E. 93. A recorder of deeds is liable for a false certificate: Schell v. Stein, 76 Pa. (26 P. F. Smith), 398, 18 Am. Rep. 416.

[8] Tripp v. Hopkins, 13 R. I. 99.

[9] Morton v. Smith, (Tex. Civ. App.) 44 S. W. 683.

[9a] Johnson v. Brice, 102 Wis. 575, 78 N. W. 1086.

law, will not relieve the officer from liability for the injury resulting to the purchaser, if the former enters the satisfaction without the production of the evidence required by the statute.[1] If a loss is sustained by a mortgagee, caused by the failure of a deputy county clerk, properly to index a *lis pendens,* the principal is liable, although the act is a purely ministerial one, occurring in the ordinary course of business of the office.[2] But although injury may result, the officer may not be guilty of negligence. Thus, a mortgagor presented to the officer, the original of a mortgage duly recorded, together with an order directed to the officer, purporting to bear the signature of the mortgagee, to cancel the mortgage on the record. This order was forged, but the officer had no knowledge of its invalidity nor had he any reason for suspicion. On the question of his responsibility in damages, the court considered that his act in recording the forged order did not make him liable to a person injured by this act, for the reason that the possession of the original mortgage by the mortgagor relieved the officer from all imputation of neglect, in the absence of any other fact placing upon the officer the duty of prosecuting an inquiry into the genuineness of the order.[3]

§ 697e. **Damages must be caused by official default.**—A register of deeds in furnishing a certificate of title, does not become a guarantor of title, but he is liable for any damages that result from his failure to exercise proper care or skill in the preparation of the abstract.[4] Generally speaking, no one has a cause of action against another unless there has been some contractual relation between them or he has been damaged by fraud, collusion or falsehood. An attorney who examines an abstract is liable only to the person employing

[1] State ex rel. Phillips v. Green, 124 Mo. App. 80, 100 S. W. 1115.

[2] Hartwell v. Riley, 47 App. Div. N. Y. 154, 62 N. Y. Supp. 317.

[3] Luther v. Banks, 111 Ga. 374, 36 S. E. 826.

[4] Wacek v. Frank, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502.

him and not to a stranger who may have action upon his opinion.[5] But it was held in one case that a person who makes an abstract of title guaranteeing it to be correct must respond in damages to a purchaser who placed reliance upon the abstract and declined to purchase the land without it, if it omits to mention conveyances which are recorded, notwithstanding the fact that the owner of the property caused the abstract to be made at his own expense, received it from the maker, and delivered it for examination to the person intending to purchase.[6] This decision is based upon the ground that the acceptance or refusal of the other to sell made a privity of contract between the purchaser and the maker of the abstract. But, generally, an officer is liable in damages for negligence on making a search to the one only for whom it is prepared.[7] The damage sustained must be the direct effect of the mistake of the officer [7a] and not the result of the fault or laches of the party injured.[8] A subsequent purchaser of the party who ordered the search has no cause of action against a recorder for a false certificate of title.[9] If, through inexcusable neglect, a recorder fails to index a trust deed properly, it will be presumed that he acted wilfully, although it may be impossible to show a wilful purpose to injure.[1]

§ 697f. **When statute of limitations begins to run.**— The cause of action for damages for a false certificate of search where this is authorized by statute accrues at time

[5] National Savings Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Fish v. Kelly, 17 C. B., N. S. 194; Wharton on Negligence, §§ 339-341.

[6] Dickle v. Abstract Co., 89 Tenn. 431, 24 Am. St. Rep. 616.

[7] Day v. Reynolds, 23 Hun, 131.

[7a] Kimball v. Connolly, 33 How. Pr. 247.

[8] Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533.

[9] Houseman v. Girard Mut. Building & Loan Assn., *81 Pa. (32 P. F. Smith), 256.

[1] Maxwell v. Stuart, 99 Tenn. 402, 42 S. W. 34.

that the claimant parted with his money on the faith of the certificate, although at that time there may have been no special damages and the claimant, would at the time of the breach of duty be entitled to at least nominal damages.[2] Nor can a distinction as to the time when the cause of action accrues, be drawn between torts arising from contracts and those which arise from official misfeasance. "Such a distinction," said the court, "is not found in the statute, and it is clearly opposed to reason, for why should a duty imposed by the legislature be obligatory rather than one which is voluntarily assumed? Nay, a man might rather be excused from the performance of all obligation forced upon him, than from one which of his own will he took upon himself. Indeed, the two become equal and all distinction appears, only when we consider that the statutory duty is assumed as part of the office which the incumbent undertakes to fill. Moreover, the officer having thus assumed the duty and being paid therefor by the party who requires its performance, the transaction to all intents and purposes becomes a personal contract, as much so as though it were wholly voluntary and not statutory."[3] If the recorder negligently fails to copy correctly the description of the land contained in a mortgage, a cause of action arises against him, it is held in Indiana, from the time of the wrong registration.[4] The running of the statute of limitations, it is likewise held, is not prevented by the ignorance of the one entitled to bring an action nor the silence of the person liable.[5]

[2] Owen v. Western Savings Bank, 97 Pa. St. 47, 39 Am. Rep. 794.

[3] Owen v. Western Savings Bank, 97 Pa. St. 47, 39 Am. Rep. 794.

[4] State v. Walters, 31 Ind. App. 77, 66 N. E. 182, 99 Am. St. Rep. 244.

[5] State v. Walters, 31 Ind. App. 77, 66 N. E. 182, 99 Am. St. Rep. 244. On this point, the court, per Black, P. J., said: "The controlling question is whether or not the action was barred by the statute of limitations, and the determination of this matter depends upon the solution of the question as to when the cause of action accrued on the recorder's official bond for the breach alleged; that is, When could the recorder first have been sued for the official error charged? Our

A person holding himself out as an examiner of titles is required to exercise skill and care in his examination, and if

statute (Burns Rev. Stats. 1901, § 294) provides: 'All actions against a sheriff, or other public officer, or against such officer and his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty,' shall be commenced within five years after the cause of action has accrued, and not afterward. It was the statutory duty of the county recorder to record the mortgage for the relatrix in its order; and if not recorded in forty-five days from the execution thereof, the mortgage was liable to be defeated in favor of any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration: Burns' Rev. Stats. 1901, §§ 3350, 8007; United States Sav. etc. Co. v. Harris, 142 Ind. 226, 237, 40 N. E. 1072, 41 N. E. 451.

"The misdescription of the land in the record of the mortgage rendered the recording worthless from the first. The debtor continued personally liable, and this liability became of no avail to the relatrix —not through the error of the recorder, but by reason of the debtor's insolvency. The security of the land continued available, notwithstanding the fault in the recording, until the execution of the second mortgage which, because of the recorder's mistake, was a superior lien, and finally exhausted the security. The damage consisting of the loss of the security was a direct result of the incorrect copying of the description of the mortgaged land in recording the mortgage. If that damage had accrued and action therefor had been commenced within the period of the statute after the recording of the mortgage, there can be no doubt that damages for the loss thereby sustained might have been recovered.

"The right of the relatrix to have the recording of her mortgage done correctly, so that the record would constitute constructive notice of all her rights as mortgagee, was as absolute as the right to have the mortgage recorded. As between her and the recorder, she was under no obligation to inspect the record of her mortgage to see that it was safely correct. By presenting a mortgage in due form, proper for recording, and paying the recorder's fee, she did all that was incumbent upon her to impose the duty upon the recorder. When the mortgage was recorded so incorrectly that the record was worthless as notice, there was at once a violation of official duty on the part of the recorder, and the relatrix was at once thereby deprived of a material and valuable right. She then had a cause of action against the recorder. If she had discovered the error before any subsequent conveyance or encumbrance, and the original mortgage was then still in existence and in her possession, she might have had it recorded again, at the expense of the fee therefor, or, if in such case the or-

he fails to exercise such skill and care, he is liable in damages, for any loss that he may cause. The statute of limitations

iginal mortgage was lost, she perhaps might have procured a correction of the record; but in the meantime (at least, after the expiration of forty-five days from the execution of her mortgage) she would have been in the condition of a mortgagee whose mortgage, not being recorded, is liable to be cut off by intervening circumstances beyond her control. It might be difficult, in an action against the recorder, brought before the accruing of any rights of others in the land, to say what considerations, other than the loss of the fee for recording, should enter into the assessment of the amount of the damages; but it must, we think, be said that a right having been violated and she having suffered an individual wrong, some damage must be presumed, whether susceptible of proof or not: See Cooley on Torts, 2d ed., 383.

"It cannot be doubted, it would seem, that a cause of action involving the essential elements of an actionable tort arose in favor of the relatrix against the recorder immediately upon the commission of the wrong of recording her mortgage incorrectly, the amount of the damage being determinable by a jury, under instructions. Such an action would not be like an action for a continuing nuisance, for which damages may be recovered from time to time as they have accrued; but it would be one in which all damages, past and future, so far as ascertainable would be recoverable.

"The case before us is not governed by the principles of those wherein some act has been done, which, not being wrongful at the time, or not being wrongful then as to the plaintiff, furnishes an element of an action only after specific damage has resulted therefrom, and the right of action does not accrue until the special damage complained of has accrued. There, the damage being the gist of the action, the time runs only from the actual happening of the damage. Here, however, there was both wrong and injury as soon as the error had been committed. The mistake in the recording was not, as to the mortgagee, something which might rightfully be done, and which could not be regarded as a thing amiss until some damage should actually accrue therefrom; but it was in itself a thing amiss. Where damage has so accrued, further consequential damage will not give rise to a fresh cause of action. We are constrained to hold with the court below that the statute of limitations barred the action.

"There has been some discussion by counsel of the law relating to the concealment of the fact of liability to an action by one party, and the discovery of the cause of action by the other (Burns' Rev. Stats. 1901, § 301); but the case at bar affords no occasion for the postponement of

begins to run from the time at which he makes his report.[6] Under the Kansas statute, an action for damages caused by the negligence of a register of deeds in recording an instrument comes under the class enumerated in the statute as "an action for injury to the rights of another, not arising on contract," and it should be brought within the time limited by the statute for the commencement of that class of actions.[7] The cause of action in some states is considered as arising not when the mistake is made, but when the vendee is deprived of his property.[8]

§ 698. **Correction of mistake in record.**—The officer who has recorded the deed has the power to correct any mistake made in copying the deed into the record-book.[9] But where the view prevails that subsequent purchasers are charged with notice of such facts only as the records disclose, the corrections cannot affect the rights of a purchaser without no-

the running of the statute of limitations on the ground of concealment. The fact that a person entitled to an action has no knowledge of his right to sue, or of the facts out of which his right arises, does not prevent the running of the statute, or postpone the commencement of the period of limitation, until he discovers the facts or learns of his rights thereunder. Nor does the mere silence of the person liable to the action prevent the running of the statute. To have such effect, there must be something done to prevent discovery—something which can be said to amount to concealment: Ware v. State, 74 Ind. 181; Schultz v. Board etc., 95 Ind. 323; Pence v. Young, 22 Ind. App. 427, 53 N. E. 1060; Bower v. Thomas, 22 Ind. App. 505, 54 N. E. 142.

"To constitute the concealment which will postpone the operation of the statute of limitations, there must be more than mere silence or general declarations; there must be fraud in act or statement, intended to prevent knowledge of the existence of the cause of action, and operating to prevent discovery: Jackson v. Jackson, 149 Ind. 238, 47 N. E. 963."

[6] Lattin v. Gillette, 95 Cal. 317, 29 Am. St. Rep. 115.

[7] Hatfield v. Malin, 6 Kan. App. 355, 50 Pac. 108.

[8] State v. McClellan, 113 Tenn. 616, 85 S. W. 267.

[9] Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260; Baldwin v. Marshall, 2 Humph. 116; Sellers v. Sellers, 98 N. C. 13, 3 S. E. Rep. 917.

tice of the mistake, who became such before the correction was made. Thus, where a grantee had his deed recorded, but by mistake the number and description of the lots conveyed were omitted in the record, and another person afterward bought the same lots of the same grantor, and subsequently the record of the first grantee's deed was amended by interlineation of the description, it was held that the interlineation could impart notice only from the time it was made, and hence that the second grantee had no notice of the previous conveyance of the property.[1] But under the statute in California, providing for the filing in the office of the recorder a duplicate of a sheriff's certificate of sale, it was held where such duplicate was deposited by the sheriff with the recorder, and marked as filed by the latter, but was recorded in a book of deeds as a deed, and regularly indexed as such, and afterward placed in a file of recorded deeds, where it remained for a number of years, that it imparted notice to subsequent purchasers.[2]

§ 699. **Reformation of deed—Correcting record.**—A court has not power to order the erasure of words from a deed, or to order the recorder to alter his record when he has correctly copied the deed. This is not the proper mode of reforming a deed. If words are inserted in a deed which the parties did not intend to insert, or if words are omitted which the parties intended to insert, the court should find that there was a mistake, and in what it consisted.[3] The usual and most appropriate method of correcting a deed, is for the court

[1] Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260. See Barnard v. Campau, 29 Mich. 162; Harrison v. Wade, 3 Cold. 505. It has been held, however, that the recording officer cannot correct the record. See Jennings v. Dockham, 99 Mich. 253, 58 N. W. Rep. 66; Foster v. Dugan, 8 Ohio, 87, 31 Am. Dec. 432; Farmer's & Mechanic's Bank v. Bronson, 14 Mich. 361; Burton v. Martz, 38 Mich. 761.

[2] Page v. Rogers, 31 Cal. 293. Mr. Justice Shafter, however, dissented.

[3] Toops v. Snyder, 47 Ind. 91.

in its decree of reformation to require the grantor to make a new deed in accordance with the decree. If, however, this course is inconvenient, a commissioner should be appointed to carry out the decree. When the new deed is recorded, a note should be made on the margin of the record of the first deed, stating the reformation and showing in what place upon the record the new deed can be found.[4]

§ 700. **Copy of seal.**—A record is not vitiated by the omission to record the seal or to indicate in some manner that a seal was attached to the instrument.[5] "The object of registration of a deed is to give notice to the public of the fact that the title to the property has passed from the vendor, and thereby prevent others from dealing with him as the owner. The conveyance itself is required to be copied into the record, in order that parties may determine its sufficiency and the character of the estate conveyed. To accomplish this end it is not necessary that the seal should be copied upon the book; it is enough if it appear from the record that the instrument copied is under seal." [6] A certified copy of a deed from the recorder's office contained in the margin of the certificate of acknowledgment taken before a notary, and

[4] King v. Bales, 44 Ind. 219.

[5] Geary v. City of Kansas, 61 Mo. 378; Hadden v. Larned, 87 Ga. 634; Thorn v. Mayer, 33 N. Y. Supp. 664. This section is cited as authority in Summer v. Mitchell, 29 Fla. 179, 14 L.R.A. 815, 30 Am. St. Rep. 106. See, also, Griffin v. Sheffield, 38 Miss. 359, 77 Am. Dec. 646; Gale v. Shillock, 4 Dak. 182; 29 N. W. Rep. 666; Hammond v. Gordon, 93 Mo. 223; Ballard v. Perry, 28 Tex. 347; Witt v. Harlan, 66 Tex. 660; Coffee v. Hendricks, 66 Tex. 676. A seal may be presumed from the attestation clause; Macey v. Stark, 116 Mo. 481, 21 S. W. Rep. 1088; Reussens v. Staples, 52 Fed. Rep. 91; McCoy v. Cassidy, 96 Mo. 429; Carrington v. Potter, 37 Fed. Rep. 767; Todd v. Union Dime Sav. Inst., 118 N. Y. 337. See § 247, *ante*.

[6] Smith v. Dall, 13 Cal. 510, per Terry, C. J. See, also, Growning v. Behn, 10 B. Mon. 383; Beardsley v. Day, 52 Minn. 451, 55 N. W. Rep 46; Heath v. Big Falls Cotton Mills, 115 N. C. 202, 20 S. E. Rep. 369; Aycock v. Raleigh etc. R. R. Co., 89 N. C. 321.

in the place where a seal is usually affixed, the words "no seal," written in brackets in this manner: [No seal.] The concluding clause of the certificate was in the usual form: "In witness whereof I have hereunto set my hand and affixed my official seal, the day and year first above written." The lower court refused to receive the copy of the deed in evidence, on the ground that the certificate did not contain the seal of the notary. But on appeal the supreme court held that this ruling was error, and that the words "no seal" did not imply that no seal was affixed, but were a mere note by the recorder of the place of the notary's seal, which he was unable to copy.[7] Under the statute in Missouri, the registration of a mortgage, although no seal or scrawl is attached, nevertheless imparts notice. The registration law in that State is considered as intending to embrace, not only legal conveyances, but also every instrument in writing affecting the legal or equitable title to land.[8]

§ 701. Filing deed with person in charge of office.—A person who causes his deed to be placed on file for record in the office provided for the registration of deeds, by depositing it with the person in charge of the office, and paying the legal fee, does all that the law requires. It is not necessary that the deed should be delivered to the recorder or a regular deputy. It is sufficient that the deed was deposited

[7] Jones v. Martin, 16 Cal. 166. This case is cited in Geary v. City of Kansas, 61 Mo. 378, and the court say of it: "We think there was no error in this ruling." See, also, Hedden v. Overton, 4 Bibb. 406; Griffin v. Sheffield, 38 Miss. 359, 77 Am. Dec. 646; Sneed v. Ward, 5 Dana, 187; Ingoldsby v. Juan, 12 Cal. 564. But see Switzer v. Knapps, 10 Iowa, 72, 74 Am. Dec. 375, where it is held that "where the record of a deed does not show a copy of the seal, as such copies are usually made in records, the presumption is that there was no seal in the original." And see, also, holding substantially the same, Todd v. Union Dime Savings Institution, 118 N. Y. 337; Floyd v. Ricks, 14 Ark. 286, 58 Am. Dec. 374.

[8] McClurg v. Phillips, 57 Mo. 214.

with the person who has the actual control of the office, as the recording officer is responsible for the acts of one thus permitted to assume possession of the keys and papers of his office.[9] The agent of a grantee was directed to take the deed to the recorder's office for record. This was done, and the deed was delivered to a person who was acting as recorder. The latter made the proper indorsements upon the deed, three days before the entry of judgment against the grantor in the deed. It was held that the delivery to the person in charge of the office was sufficient, and the deed was entitled to precedence over the judgment.[1] Mr. Justice Treat said of this delivery that "this was all a prudent man would deem necessary or advisable. No laches can be imputed to the grantees. They were not required to ascertain who was the recorder *de jure*. It was sufficient to ascertain who was in possession of the records and discharging the duties of the office."[2]

§ 702. **Comments.**—The reason for this rule is manifest. A person is not compelled to enter into an examination of the appointment of one acting as a deputy. He is not required to ascertain whether such person has taken the oath of office, filed a bond, if necessary, or complied with other provisions of the statute. The officer by placing him in charge, becomes accountable for his acts. Even if the offi-

[9] Dodge v. Protter, 18 Barb. 193, 202; Cook v. Hall, 1 Gilm. (6 Ill.) 575; Oats v. Walls, 28 Ark. 244; Bishop v. Cook, 13 Barb. 326. See Bosley v. Forquar, 2 Blackf. 61, 63; Deming v. Miles, 35 Neb. 739, 37 Am. St. Rep. 464.

[1] Cook v. Hall, 1 Gilm. (6. Ill.) 575.

[2] Cook v. Hall, *supra*. In Bishop v. Cook, 13 Barb. 328, Welles, J., with reference to a chattel mortgage which the statute declared should be void as against creditors, unless it or a true copy of it should be filed in the office of the town clerk, said: "The filing consisted in presenting the mortgage at the office and leaving it there, and depositing it in the proper place with the papers in the office. This was done in the proper case, and was all the appellant under the circumstances could do, and all the law required of him. Although there was no town clerk *de jure*, there was a town clerk's office and a town clerk *de facto*."

cer is not allowed by law to appoint a deputy, the punishment for a neglect to attend personally to the duties of his position should be against him, and should not be placed upon a person doing business with the office. Practically, if the person in charge actually files the instrument, and it is subsequently correctly copied into the record, no inconvenience can arise, or damage be done. But a case may be imagined, though it does not seem to have arisen, or at least has not come within our observation, where the person in charge failed to record the instrument at all, and subsequent purchasers are thus misled. It would probably be held that in such an event the same rule should apply as would were such person the officer himself.

§ 703. **Registration of deeds when State is in rebellion.** —Where a person is acting under a *de facto* government, if it is of paramount force in the county within which he performs the duties of his office, his official acts, notwithstanding that such government is unlawful and revolutionary, are valid and binding, if not done for the purpose of assisting the war power of the unlawful government. Hence, the registration of a deed by an officer who continued to act as such after the State had passed an ordinance of secession, and while the county in which he exercised his functions was under the military power of the confederate government, is a valid recordation.[3] Chief Justice Waite, without attempting to give any exact definitions within which the acts of the government of a State in rebellion should be treated as valid or invalid, observed, upon the general subject: "It may be said, perhaps, with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic

[3] Henning v. Fisher, 6 W. Va. 238. But see the earlier cases in that State of Brown v. Wylie, 2 W. Va. 502, 98 Am. Dec. 781; Calfee v. Burgess, 3 W. Va. 274.

relations governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid, if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void."[4]

§ 704. **Payment of fees.**—An officer is not required to receive a deed, or to permit it to be filed in his office for registration, until all fees he is authorized to collect have been paid. But if he sees proper to permit a deed to be deposited with him without the payment of the tax upon it, he must record it, and must look for the payment of the tax to the person for whom he records the deed. By receiving the deed for record without objection, it is presumed that he dispenses with the previous payment of the tax, and the person depositing the instrument has a right to assume that it will be duly recorded.[5] A provision in a statute that "no deed shall be admitted to record until the tax is paid thereon," is merely directory. If the officer records the deed without the payment of the tax, the record is not invalidated, but he assumes the tax.[6]

[4] In Texas v. White, 7 Wall. 700, 733, 19 L. ed. 227, 240. See, also, Harrisons v. Farmers' Bank of Virginia, 6 W. Va. 1; Griffin v. Cunningham, 20 Gratt. 31; Sherfy v. Argenbright, 1 Heisk. 128, 2 Am. Rep. 690; Thorington v. Smith, 8 Wall. 1, 19 L. ed. 361.

[5] Bussing v. Crain, 8 Mon. 593; Ridley v. McGehoe, 2 Dev. 40; People v. Bristol, 35 Mich. 28.

[6] Lucas v. Clafflin, 76 Vt. 269. See, also, Hoffman v. Mackall, 5 Ohio St. 124, 64 Am. Dec. 637. Where the register refuses to record the deed until his fees are paid, the leaving of the deed with him is held not to be constructive notice: Cunningham v. Peterson, 109 N. C. 33.

§ 705. **Proof of time at which deed is recorded.**—The certificate of the recorder is generally regarded as conclusive proof of the time at which a deed is deposited for record. "It is the date of the reception and record, and not the order in which the entry is made, that is to be relied upon as giving notice of priority. The record is the instrument of notice to subsequent purchasers of the state of the title; and to permit it in any manner to be affected by parol or extraneous evidence would not only destroy its value for that purpose, but would convert it into an instrument for deception. It would be dangerous to the rights of all subsequent purchasers, and contrary to the established rules of evidence, to admit any of the testimony offered to explain or vary the record."[7] But the certificate is not conclusive of the fact that the instrument has been properly recorded, but only of the time of its receipt by the recording officer.[8] But when the register has failed to note the time at which it was received for record, such time may be proved by parol evidence.[9]

§ 706. **Withdrawing deed filed for record.**—If a deed is withdrawn from the office of the recorder before it is actu-

[7] Hatch v. Haskins, 17 Me. 391, 395, per Shepley, J. See, also, Fuller v. Cunningham, 105 Mass. 442; Bubose v. Young, 10 Ala. 365; Tracy v. Jenks, 15 Pick. 465; Ames v. Phelps, 18 Pick. 314; Wing v. Hall, 47 Vt. 182; Bullock v. Wallingford, 55 N. H. 619; Edwards v. Barwise, 69 Tex. 84; 6 S. W. Rep. 677. But see Horsely v. Garth, 2 Gratt. 471, 44 Am. Dec. 393, where it was held that parol evidence is admissible to show when a deed was recorded.

[8] Thorp v. Merrill, 21 Minn. 336; New York Life Ins. Co. v. White, 17 N. Y. 469; Dubose v. Young, 10 Ala. 365; Worcester Nat. Bank v. Cheeney, 87 Ill. 602. And see Jackson v. Phillips, 9 Cow. 94. Where the entry in the index-book in the recorder's office shows upon its face that it was not made at the time at which it was received, the presumption as to the correctness of the certificate is destroyed: Hay v. Hill, 24 Wis. 235.

[9] Metts v. Bright, 4 Dev. & B. 173, 32 Am. Dec. 683; Cunningham v. Peterson, 109 N. C. 33, 13 S. E. 714; Boyce v. Stanton, 15 Lea, 346.

ally recorded, its priority is lost.[1] A person executed a mortgage and filed it for record the same day. He afterward obtained possession of it before it was actually spread upon the records, and, while it was out of the recorder's possession, he sold the premises described in the mortgage. The purchaser had his deed recorded, and, subsequently, the mortgage was returned to the recorder's office. The court held that the deed was entitled to priority if the purchaser had paid a valuable consideration.[2]

§ 707. **Constructive notice.**—But the purchaser may have sufficient information to put him upon inquiry, and charge him with constructive notice. Thus, if a person, when about to purchase a piece of property, is informed by the recorder that the vendor has already executed a deed of the same property to another person, which was filed for record, but was withdrawn before being recorded, this information is sufficient to put such intending purchaser upon inquiry.[3] To constitute notice of an adverse title to the property, it is not

[1] Hickman v. Perrin, 6 Cold. 135; Turman v. Bell, 54 Ark. 273, 26 Am. St. Rep. 35; Johnson v. Borden, 40 Vt. 567, 94 Am. Dec. 436; Worcester Nat. Bank v. Cheeney, 87 Ill. 602; Clamorgan v. Lane, 9 Mo. 446. See, where liens of mortgage have not been lost, though instruments withdrawn, Swift v. Hall, 23 Wis. 532; Wilson v. Leslie, 20 Ohio, 161; Woodruff v. Phillips, 10 Mich. 500.

[2] Kiser v. Heuston, 38 Ill. 252. Where a deed of trust is presented to the recorder, and is indorsed, "filed for record," and immediately afterward, and before any entry concerning it is made, is withdrawn for the purpose of having a government stamp placed upon it, and is not returned for a month or more afterward, the first filing is not sufficient to give constructive notice of the existence of the deed: Worcester Nat. Bank v. Cheeney, 87 Ill. 602. See, also, Clamorgan v. Lane, 9 Mo. 446. While a mortgage may be properly filed for record, still if it is withdrawn by the grantee or his agent, and while it is out of the officer's possession, the property is purchased by another, who has no notice of the mortgage it will not be enforced against the innocent purchaser: Webb v. Austin, 22 Ky. L. Rep. 764, 58 S. W. 808.

[3] Lawton v. Gordon, 37 Cal. 202.

essential that such information should be given by a person interested in the property.[4]

§ 708. **Deposit subject to further order.**—If a conveyance is left with the recording officer with instructions not

[4] Lawton v. Gordon, *supra*. In that case Mr. Justice Rhodes, delivering the opinion of the court, said: "The purchaser received definite and certain information of the existence of Reed's deed, and this information was worthy of credit, for it came from one who had seen the deed and filed it for record. Would any reasonable man, who was contemplating the purchase of property, after having received that information, doubt as to his duty to pursue the inquiry, in order to ascertain the true condition of the title? He certainly would not hesitate unless he was laboring under the mistake of law, that a recorded deed always took precedence of an unrecorded deed. The information itself being sufficient in all respects to put the purchaser upon his inquiry, the only remaining question is, whether the information must come from a person interested in the property? Upon this question the plaintiff cites Leading Cases in Equity, notes to Le Neve v. Le Neve, in which the writer says: 'And this rule has been stated so positively, and in such unqualified terms, under the sanction of names of great authority, as to lead to the inference that notice cannot be binding unless it proceed from a person interested in the property and in the course of the treaty for its purchase.' The rule alluded to was, that the notice must be certain; and the rule, it was said, applied emphatically to all statements which do not proceed directly from parties in interest or their agents. 'But this doctrine,' he continues, 'must be understood as applying to notice in its limited sense, as distinguished from knowledge or such information as is substantially equivalent to knowledge. It is evident that, if it be shown that the purchaser knew of the existence of an adverse claim or title, it cannot be necessary to prove notice, and that it must be immaterial whether his knowledge was obtained from the parties interested or from third persons. The true rule, therefore, with regard to the statements of strangers and of parties in interest, would seem to be that the general statement of the existence of an adverse title, to which no weight would be due when proceeding from a stranger, will be notice when coming from the party interested; and not that *distinct and positive* information can be disregarded because the person who gives it has no interest in the property to which it relates. A purchaser cannot go on with safety to complete a purchase after learning the existence of a prior conveyance of the property by the vendor, from a person present as a witness, or even as a bystander,

to record it until he is so directed, it should not be recorded until such directions are given. This may be illustrated by a case where a mortgage was given to the recorder with directions not to place it on record until he received further directions, and the recorder's clerk recorded it without such directions having been received. It was held that under these circumstances the placing of the mortgage upon the record-book was not a registration which entitled it to priority over conveyances and encumbrances subsequently filed for record. If such directions were received, the instrument should be recorded as of that time, and not as of the time when it was left with the recorder.[5] And still more clear is the proposition that a deed left with the recorder with such instructions does not, before registration, afford constructive notice of its contents as though recorded.[6]

§ 709. **Priority between deeds recorded on the same day.**—Generally, of two deeds, the one first filed for record is given the preference. Two deeds of trust embracing the same property were delivered to the recorder on the same day by the same person, one after the other, and they were recorded in the order in which they were delivered. It was held that where nothing appeared that one of the trusts deeds was entitled to priority over the other as to the time for filing, the deed first recorded took precedence.[7]

at the execution of the deed by which it was conveyed. And it can hardly be doubted that the same result will follow from the statement of any fact within the knowledge of the party who stated it, which shows that the title purchased is subject to the legal or equitable claims of other persons.'"

[5] Brigham v. Brown, 44 Mich. 59. See, also, Horsley v. Garth, 2 Gratt. 471, 44 Am. Dec. 393.

[6] Haworth v. Taylor, 108 Ill. 275; Davis v. Whitaker, 114 N. C. 279, 41 Am. St. Rep. 793; 19 S. E. Rep. 699; Moore v. Ragland, 74 N. C. 343. If instructions are given not to record the deed until further notice, the rule that it shall be considered as recorded when filed does not apply: Turberville v. Fowler, 101 Tenn. 88, 46 S. W. 577.

[7] Brookfield v. Goodrich, 32 Ill. 363. Said Mr. Chief Justice Ca-

But where two deeds were so defectively acknowledged that neither was entitled to registration, it was held that the effect of a curative act passed subsequently was to record both deeds at the same instant of time, and hence left them to operate as at common law, by which the deed first executed would pass the title to the land described in it.[8] It may be shown by parol evidence which of two mortgages, signed, acknowledged, and deposited for record on the same day, was first filed for record.[9]

§ 710. **Facts of which the record gives notice.**—When a conveyance has been properly recorded, the record is constructive notice of its contents, and of all interests, legal and equitable, created by its terms.[1] A sold land to B, and exe-

ton: "In the absence of proof to the contrary, the presumption is that the deeds were filed for record in the order in which they were handed to the recorder as the law made it his duty to do, and upon this presumption the purchasers of the several classes of bonds secured by these deeds had a right to act. The trustee in these cases is not the true purchaser, and to be protected by the recording laws, but the purchasers of the bonds are the true purchasers. It was their right and their duty to examine the record of these deeds, and there they found that the deed securing the one thousand dollar bonds was first recorded, and by our recording laws was entitled to a preference, and upon this law they could securely repose in purchasing this class of bonds, knowing that the law gave them a preference; and so, too, the purchasers of the other bonds were in duty bound to examine the same record by which they were told that these bonds were secured by a second lien upon the premises, and that they must be postponed until all the bonds secured by the deed first recorded were all paid. If they took the assurance of the seller that these bonds were secured by a first lien, that was their own folly. To make good that assurance would be a fraud upon the purchasers of the first bonds, who had a right to rely upon the law and the record, which declare that they are entitled to a first lien."

[8] Deininger v. McConnel, 41 Ill. 228.

[9] Spaulding v. Scanland, 6 Mon. B. 353. The court will take notice of the fractional parts of a day: Lemon v. Staats, 1 Cowen, 592; Boone v. Telles, 2 Bradw. (Ill.) 539.

[1] Grandin v. Anderson, 15 Ohio St. 286; Humphreys v. Newman, 51 Me. 40; Bancroft v. Consen, 13 Allen, 50; George v. Kent, 7 Al-

cuted a bond for a conveyance upon payment of the purchase money; in the same manner B sold a portion of the land to C, and subsequently sold the residue at the same time to two persons, giving to each a bond for a title. Afterward B obtained a deed for the whole tract from A, and for the purpose of securing a part of the purchase money, executed at the same time a mortgage upon that portion of the premises which had been sold to one of the two persons purchasing last, such purchaser being then indebted on his purchase in an amount exceeding the mortgage debt. The mortgage was duly recorded, and the purchasers of the unencumbered portion of the land paid the several amounts due by them, and received deeds from B, and several years afterward the purchaser of the mortgaged premises, who had no actual notice of the mortgage, paid the sum remaining due upon his agreement, and received also a deed from B. A suit was brought to foreclose the mortgage, and the court held that the grantee of the mortgaged premises held the same in subjection to the full encumbrance of the mortgage, and that there was no vendor's lien which would render any other portion of the land liable to contribute to the discharge of the debt secured by the mortgage.[2] Where

len, 16; Orvis v. Newell, 17 Conn. 97; Bolles v. Chauncey, 8 Conn. 389; Clabaugh v. Byerly, 7 Gill, 354, 48 Am. Dec. 575; Bush v. Golden, 17 Conn. 594; Thomson v. Wilcox, 7 Lans. 376; Peters v. Goodrich, 3 Conn. 146; Harrison v. Cachelin, 23 Mo. 117; Kyle v. Thompson, 11 Ohio St. 616; Buchanan v. International Bank, 78 Ill. 500; Souder v. Morrow, 33 Pa. St. 83; Hetherington v. Clark, 30 Pa. St. 393; Barbour v. Nichols, 3 R. I. 187; Youngs v. Wilson, 27 N. Y. 351; Dimon v. Dunn, 15 N. Y. 498; Ogden v. Walters, 12 Kan. 282; Dennis v. Burritt, 6 Cal. 670; Mesick v. Sunderland, 6 Cal. 297; McCabe v. Grey, 20 Cal. 509; Montefiore v. Browne, 7 H. L. Cas. 341; Parkest v. Alexander, 1 Johns. Ch. 394; Leach v. Beattie, 33 Vt. 195. And see Johnson v. Stagg, 2 Johns. 510; Doyle v. Stevens, 4 Mich. 87; Tripe v. Marcy, 39 N. H. 439; Leiby v. Wolf, 10 Ohio, 83. The record of a deed showing on its face that it was properly executed and acknowledged is evidence that it was in fact executed as it purports to have been, notwithstanding by reason of extrinsic facts it may be void or voidable: Clague v. Washburn, 42 Minn. 371.

[2] Grandin v. Anderson, 15 Ohio St. 286.

the whole of a lot of land is subject to a mortgage, one who takes a subsequent mortgage, with notice of a prior unrecorded deed of warranty of an adjoining portion of the same lot from the mortgagor to a third person, cannot enforce contribution from the latter toward redeeming the mortgage; and a direct reference in the mortgage to such third person as owning the adjoining land is equivalent to notice.[3] A purchaser received a deed for the undivided one-half of a church and lot, "together with all and singular the rights, liberties, privileges, hereditaments, and appurtenances thereunto belonging, in as full and ample a manner, and with all the same rights and conditions, authorities and agreements, with which Hugh Bellas, and Esther, his wife [the vendors], now hold the said premises as regards all or any assemblies for divine worship." Subsequently the vendee purchased the other half of the premises from the same vendor. It was held in an action of covenant to recover the purchase money, in which the vendee claimed there was a defect of title, that the first deed gave legal notice of a valid subsisting right in an assembly for divine worship.[4] If the conveyances under which a grantee holds refers to previous deeds containing restrictions as to the use of the property, and those deeds are recorded, he will, although he may not have express notice of these restrictions, be deemed in law to have such notice, and will be bound in the same manner as though the restrictions were contained in the deed made to him.[5]

[3] George v. Kent, 7 Allen, 16.

[4] Bellas v. Lloyd, 2 Watts, 401.

[5] Gilbert v. Peteler, 38 Barb. 488. The facts of the case cited pertinent to this point are thus stated by the court: "The premises to which this controversy relates consists of two parcels; one, the westerly portion, designated in the report of the referees the hotel plat; the other, or easterly part, designated the Bartlett plat. There is no question of the ability of the plaintiff to convey a good title to the former of these. The two parcels were contracted to be sold together, however, and as one piece of land. They are not distinguished in the contract, but Gilbert agrees to sell and convey to Peteler lands in New Brighton lying between certain streets, and including all these

§ 710a. Presumption of knowledge of rights of others. —It is presumed that a purchaser has examined every deed and instrument affecting the title. He is charged with

premises. The plaintiff's title to the whole property is derived from one Fox. Fox obtained his title by two conveyances. One was from a person named Davis, dated October 14, 1846, of the hotel plat. This was an absolute deed, and conveyed a perfect and unqualified title. This Davis was originally the owner of the whole, and his title was absolute in fee. But on the 14th of September, 1846, before his deed to Fox, Davis had conveyed what was afterward known as the Bartlett plat to Edwin Bartlett. The deed from Davis to Bartlett was absolute, like the other, and contained no restriction. But it appears that Bartlett took this title at the request of one John C. Creen, who was the owner of certain adjoining premises which he desired to protect. Green advanced the purchase money, and Bartlett held the title for him, and subject to his direction, although there was no written evidence of the arrangement. On the 30th of October, 1846, Bartlett, at Green's request, and by his direction, conveyed the strip of which he thus held the title to Fox, who was already by Davis' deed, the owner of the residue. This deed of Bartlett contained a provision in the form of a covenant by the party of the second part (Fox) his heirs, executors, administrators, and assigns, to and with Bartlett, his heirs and assigns, not to erect or permit to be erected at any time thereafter, on any part of the premises, any building whereby the view or prospect of the bay from the dwelling-house of John C. Green could be obstructed or impaired unless Green should first destroy his own prospect by building on his own lot. The deed added a clause of forfeiture in favor of Green in the event of a breach of this covenant. It was not signed or executed by Fox. Fox afterward conveyed to Theodosius O. Fowler subject to this covenant, and to an express stipulation by Fowler to observe it. Fowler conveyed to Victor Forgeaud, subject to the same covenant and stipulation. Forgeaud obtained also a release and quitclaim of title from Green, but with a clause preserving the restriction as to building etc. At or about this time there was erected a stone cottage upon the Bartlett lot, and Green afterward, by a deed reciting that he was the person for whose benefit the restriction was imposed, released Forgeaud from the restriction as to the land occupied by this cottage, but with a proviso that this should not remove the restriction or impair his rights as to the residue of the premises. After this Forgeaud conveyed to August Belmont, by a deed containing an express covenant on the part of Belmont to abide by the restrictions in the deed to Forgeaud; this latter deed, however, like the others, not being signed by the grantee. Belmont conveyed to Vanderbilt by a

notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed. If a mortgagee holding the mortgage in trust for another, releases it before it becomes due, in violation of the terms of the trust, subsequent purchasers are still bound by the mortgage, because they are deemed to know that the trustee had no such authority.[6] Where a deed from a corporation, under which a purchaser claims title, shows on its face that it was made in consideration of real for personal property, and the corporation was not authorized by its charter to convey lands for a consideration of this kind, such purchaser is not considered an innocent one, the recitals in the deed affecting all persons claiming under it with notice that the act was in excess of the power of the corporation.[7] Notice is given to a purchaser of recitals in a deed in his grantor's chain of title, suggesting a trust relation.[8] As an indorsement on the deed of the names of the grantor and grantee is not a part of the deed, the filing of the deed for record does not give constructive notice of a conveyance by the persons whose names are indorsed on the back of the in-

deed in similar terms. From Vanderbilt the title passed to the plaintiff by various mesne conveyances, none of which contained any express covenant or restriction, but all of which referred to the deed from Vanderbilt to his next grantee, which latter deed referred to the deed from Belmont to Vanderbilt, which contained the restriction." The court accordingly, held that plaintiff must be charged with notice of such restriction and its consequences. See, also, White v. Foster, 102 Mass. 375; Jacques v. Short, 20 Barb. 269; Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep. 355; Hamilton v. Nutt, 34 Conn. 501; Sigourney v. Munn, 7 Conn. 324; Baker v. Mather, 25 Mich. 51; Cambridge Valley Bank v. Delano, 48 N. Y. 326; Anderson v. Layton, 3 Bush, 87. And see Bazemore v. Davis, 55 Ga. 504; Bell v. Twilight, 18 N. H. 159, 45 Am. Dec. 367; Sioux City etc. R. R. Co. v. Singer, 49 Minn. 301, 15 L.R.A. 751, 32 Am. St. Rep. 554.

[6] McPherson v. Rollins, 107 N. Y. 316, 1 Am. St. Rep. 826.

[7] Franco-Texan Land Co. v. McCormick, 85 Tex. 416, 34 Am. St. Rep. 815.

[8] Knowles v. Williams, 58 Kan. 221, 48 Pac. 865.

strument but who are not parties to it.[9] Where an attorney supposing that a certain person was to execute a deed of trust, wrote in his name as that of the grantor, but it was signed and acknowledged by another, the record of the deed does not give notice to a subsequent grantee that it was the deed of the person whose signature was attached.[1] A person will be held to have purchased with notice when he finds the deed of a common grantor, valid on its face although he may not find of record any property to which it applies. He should inquire outside of the record and if he fails to make such a search, he will be bound, if it appears subsequently that the deed affects the property which he has purchased.[2]

§ 711. **Notice of unrecorded deed from notice of power of sale.**—Where a trust deed or a mortgage with a power of sale is recorded, subsequent purchasers are compelled to inquire if any sale has been made under the power. If a sale has been made by virtue of the power, although the deed has not been recorded, a subsequent purchaser from the mortgagor does not acquire the estate. The equity of redemption is cut off by the sale, notwithstanding the deed may not be

[9] Gibson v. Clark, 132 Ala. 370, 31 So. 472.

[1] Henry Marx & Sons v. Jordan, 84 Miss. 334, 36 So. 386, 105 Am. St. Rep. 457.

[2] Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250. See, also, as to facts of which records give notice: Scherer v. Ingerman, 110 Ind. 428, 11 N. E. 8; Talcott v. Noel, 107 Iowa, 470, 78 N. W. 39; Lockhart v. Vandyke, 97 Va. 356, 33 S. E. 613; San Augustine County v. Madden, 39 Tex. Civ. App. 257, 87 S. W. 1056; Fisher v. Bush, 133 Ind. 315, 32 N. E. 924; Holmes v. Newman, 68 Kan. 418, 75 Pac. 501; Livingstone v. Murphy, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. Rep. 400; Fritz v. Ramspott, 76 Minn. 489, 79 N. W. 520; Wait v. Baldwin, 60 Mich. 622, 27 N. W. 697, 1 Am. St. Rep. 551; Potter v. Sachs, 61 N. Y. Supp. 426, 45 App. Div. 454; White v. McGregor, 92 Tex. 556, 50 S. W. 564, 71 Am. St. Rep. 875; McCoy v. Cunningham, 27 Tex. Civ. App. 476, 65 S. W. 1084; Smith v. Farmers Loan & Trust Co., 21 Tex. Civ. App. 170, 51 S. W. 515; Passumpsic Sav. Bank v. Buck, 71 Vt. 190, 44 Atl. 93.

recorded.[3] "The recording of the trust deed gave notice of its existence to subsequent claimants of the equity of redemption, and pointed out the source of information of what might be done in pursuance of the deed, and they were bound to take notice of the proceedings thereunder."[4] Where the provisions of a mortgage or trust deed require for their execution that the trustees should have an estate in fee simple, and such mortgage or trust deed has been recorded in full, the record, though words of inheritance have been inadvertently omitted from the instrument, is notice that it was intended to pass the fee.[5]

§ 712. **Record is not notice to prior parties.**—The rule to be deduced from the authorities is, that only those whose duty it is to search for a deed are charged with notice by its record. The expression is frequently used that the record of a deed is a constructive notice "to all the world." But Mr. Justice Sharswood very justly says that this assertion is "too broad and unqualified an enunciation of the doctrine. It is constructive notice only to those who are bound to search for it; thus subsequent purchasers and mortgagees, and perhaps all others who deal with or on the credit of the title, in the line of which the recorded deed belongs. But strangers to the title are in no way affected by it."[6] Hence, a purchaser at a sheriff's sale, who does not claim under a deed made between third persons, is not affected with notice by the registration of such deed.[7] "If conveyances from one stranger to another would be notice to all the world, miserable would be the situation of the purchaser. The registering act would afford him no pro-

[3] Heaton v. Prather, 84 Ill. 330.

[4] Farrar v. Payne, 73 Ill. 82, 88, per Sheldon, J.

[5] Randolph v. N. J. West Line R. R. Co., 28 N. J. Eq. (1 Stewt.), 49. And see, also, Dimon v. Dunn, 15 N. Y. 498; Youngs v. Wilson, 27 N. Y. 351; Hickman v. Perrin, 6 Coldw. 135; Bright v. Buckman, 39 Fed. Rep. 243.

[6] Maul v. Rider, 59 Pa. St. 167, 171.

[7] Keller v. Nutz, 5 Serg. & R. 245.

tection because it would give him no notice."[8] If a mortgage of land is executed, and a right of way is reserved in a deed of the same land made subsequently, the right is held subject to the title of the mortgagee. It is destroyed by a sale under the mortgage.[9] "The whole object of the recording acts is to protect subsequent purchasers and encumbrances against previous deeds, mortgages, etc., which are not recorded, and to deprive the holder of the prior unregistered conveyance or mortgage of the right which his priority would have given him at the common law. The recording of a deed or mortgage, therefore, is constructive notice only to those who have subsequently acquired some interest or right in the property under the grantor or mortgagor."[1] The actual possession of land by a puchaser holding a bond for a deed, is notice to all of his rights. The recording of a subsequent deed or mortgage affords no notice whatever to such prior purchaser. If he has no actual notice of a subsequent conveyance, he may, without incurring any liability to a subsequent vendee or mortgagee, make the payment agreed upon to his vendor.[2] *Bona fide* purchasers for value are not affected by the record of deeds

[8] Duncan, J., in Keller v. Nutz, *supra.*

[9] King v. McCully, 38 Pa. St. 76.

[1] Chancellor Walworth in Stuyvesant v. Hall, 2 Barb. Ch. 151, 158. See, also, James v. Brown, 11 Mich. 25; Straight v. Harris, 14 Wis. 509; Deuster v. McCamus, 14 Wis. 307; Birnie v. Main, 29 Ark. 591; Kyle v. Thompson, 11 Ohio St. 616; Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 Am. Dec. 478; Doolittle v. Cook, 75 Ill. 354; Hoy v. Bramhall, 19 N. J. Eq. 563; Hill v. McCarter, 27 N. J. Eq. 41; Blair v. Ward, 2 Stockt. Ch. 126; Halstead v. Bank of Kentucky, 4 Marsh. J. J. 558; Dennis v. Burritt, 6 Cal. 670; Taylor v. Maris, 5 Rawle, 51; Iglehart v. Crane, 42 Ill. 261; George v. Wood, 9 Allen, 80, 85 Am. Dec. 741; Ward's Ex'r v. Hague, 25 N. J. Eq. 397; McCabe v. Grey, 20 Cal. 509; Leiby v. Wolf, 10 Ohio, 83; Cooper v. Bigly, 13 Mich. 463; King v. McVickar, 3 Sand. 392; West brook v. Gleason, 14 Hun, 245; Truscott v. King, 6 Barb. 346; Raynor v. Wilson, 6 Hill, 469; Van Orden v. Johnson, 14 N. J. Eq. 376, 82 Am. Dec. 254; Wheelwright v. De Peyster, 4 Edw. Ch. 232; Tarbell v. West, 86 N. Y. 280; Stuyvesant v. Hone, 1 Sand. Ch. 419.

[2] Doolittle v. Cook, 75 Ill. 354.

not in the chain of title.[3] It is not proper to receive in evidence as constructive notice to a person claiming in the record chain of title, the records of a probate court showing a claim of title made by a stranger to the record chain of title.[4] Generally the question of notice between claimants under distinct and hostile titles is immaterial, as the constructive notice given by the record is effectual only among those who claim rights under the same title.[5] Notice is not given of an outstanding equity by the recordation of a mortgage executed by another than the legal owner of the land.[6] If, however, the grantor is in possession, such fact will give constructive notice of a prior deed made by him of the mineral rights in the land, although he never had the legal title to the land.[7] The record of a deed is not notice to the holder of antecedent rights notwithstanding the fact that in pursuance of the statute the prior deed may defeat such antecedent right.[8]

§ 713. Record is notice only to purchasers under same grantor.—Courts, frequently, in cases where it is not necessary that they should speak with precision of what persons are embraced under the category of subsequent purchasers, declare in somewhat comprehensive terms that subsequent purchasers are bound by all the information they might ob-

[3] Meacham v. Blaess, 141 Mich. 258, 104 N. W. 579; Thompson v. Rust, 32 Tex. Civ. App. 441, 74 S. W. 924; Boynton v. Haggart, 120 Fed. 819, 57 C. C. A. 301

[4] Prest v. Black, 63 Kan. 682, 66 Pac. 1017.

[5] Webb v. Ritter, 60 W. Va. 193, 64 S. E. 484.

[6] Pearce v. Smith, 126 Ala. 116, 28 So. 37.

[7] Eversole v. Virginia Iron, Coal & Coke Co., 122 Ky. 649, 92 S. W. 593. That the record of deed not in the chain of title does not impart notice, see: Rozell v. Chicago Mill & Lumber Co. 76 Ark. 525, 89 S. W. 469; Becker v. Stroeher, 167 Mo. 306, 66 S. W. 1083; Advance Thresher Co. v. Esteb, 41 Or. 469, 69 Pac. 447; White v. McGregor, 92 Tex. 556, 50 S. W. 564, 71 Am. St. Rep. 875; Fullenwider v. Ferguson, 30 Tex. Civ. App. 156, 70 S. W. 222.

[8] Bridgewater Roller Mills Co. v. Strough, 98 Va. 721, 37 S. E. 290.

tain from an examination of the records. But the subsequent purchasers of whom the law speaks are those claiming title under the same grantor, and it is to these only that the record is constructive notice.[9] If a purchaser of land actually knows that another person has a prior deed for the same land, this mere fact is not sufficient to put him upon inquiry as to the title of the grantor of such prior purchaser. When he has no other information, the subsequent purchaser may rely on the presumption that the title of the prior purchaser, whatever it may be, is on record, as the law requires it should be, and may act on the assumption that such prior purchaser has no title if the records disclose none.[1] Hence, where a person has

[9] George v. Wood, 9 Allen, 80, 85 Am. Dec. 741; Calder v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163; Long v. Dollarhide, 24 Cal. 218; Hager v. Spect, 52 Cal. 579; Kerfoot v. Cronin, 105 Ill. 609; Baker v. Griffin, 50 Miss. 158; Woods v. Farmere, 7 Watts, 382, 32 Am. Dec. 772; Losey v. Simpson, 3 Stockt. Ch. 246; Odle v. Odle, 73 Mo. 289; Tilton v. Hunter, 24 Me. 29; Brock v. Headen, 13 Ala. 370; Blake v. Graham, 6 Ohio St. 580, 67 Am. Dec. 360; Lightner v. Mooney, 10 Watts, 407; Bates v. Norcross, 14 Pick. 224; Embury v. Conner, 2 Sandf. 98; Keller v. Nutz, 5 Serg. & R. 246; Murray v. Ballou, 1 Johns. Ch. 566; Hetherington v. Clark, 30 Pa. St. (6 Casey), 393; Crockett v. Maguire, 10 Mo. 34; Stuyvesant v. Hall, 2 Barb. Ch. 151; Hoy v. Bramhall, 19 N. J. Eq. (4 Green, C. E.) 563; Iglehart v. Crane, 42 Ill. 261; Leiby v. Wolf, 10 Ohio, 80; Blake v. Graham, 6 Ohio St. 580, 67 Am. Dec. 360; Whittington v. Wright, 9 Ga. 23; Dolin v. Gardner, 15 Ala. 758; Farmers' etc. Co. v. Maltby, 8 Paige, 361; Cook v. Travis, 20 N. Y. 402; Page v. Waring, 76 N. Y. 463; Roberts v. Bourne, 23 Me. 165, 39 Am. Dec. 614; Holmes v. Buckner, 67 Tex. 107; Huber v. Bossart, 70 Iowa, 718; Leach v. Beattie, 33 Vt. 195; Doolittle v. Cook, 75 Ill. 354; Cooper v. Bigly, 13 Mich. 463; James v. Brown, 11 Mich. 25; Helms v. Chadbourne, 45 Wis. 60; Draude v. Bohrer Mfg. Co., 9 Mo. App. 249; Hill v. McCarter, 27 N. J. Eq. 41; Tarbell v. West, 86 N. Y. 280; Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 Am. Dec. 478; Calder v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163; Traphagen v. Irwin, 18 Neb. 195.

[1] St. John v. Conger, 40 Ill. 537. Mr. Justice Lawrence, who delivered the opinion of the court, said: "It is also urged that the subsequent deed from Schenck to Whittemore should have put the defendant, and those under whom he claims, upon inquiry as to whatever title Schenck had. This proposition in effect is, that if a person

no right to the land, the registry of a deed made and acknowledged by him, is not constructive notice of its execution to the true owner. "It is only notice to after-purchasers under the same grantor. To hold the proprietors of land to take notice of the record of deeds, to determine whether some stranger has without right made conveyance of their lands, would be a most dangerous doctrine, and cannot be sustained with any color of reason or authority." [2] The grantee in an unrecorded deed placed on record a deed of trust from himself to a third person, reciting that it was made for the purpose of securing two notes to his grantor. After the registration of the trust deed the grantor in the unrecorded deed conveyed to innocent purchasers for value, and it was held that as the trust deed was not in the chain of their title, the recording of it was not notice to them.[3] In the absence of fraud or actual notice, a grantee is not affected with notice of a deed fraudulently executed and recorded by a married woman under her maiden name.[4]

has made a deed of a tract of land having no recorded title, he must, nevertheless, be supposed to have had some title, and subsequent purchasers must take notice of whatever title he had. Much as registry laws have been frittered away by the doctrine of putting parties upon inquiry, we do not think any court has ever gone to the extent of adopting this rule; it would substantially defeat the object of the registry laws. Their object is to provide a public record, which shall furnish, to all persons interested, authentic information as to titles to real estate, and enable them to act on the information thus acquired. This rule would require a person purchasing from one who has the title on record, to take subject to the unrecorded deeds of persons claiming under a chain of title having no connection of record with the true source of title. If such purchaser is to be held to notice of such a chain of title at all, he has the right to presume, in the absence of any other information, that whatever title the persons claiming under such chain have, is on record, as the law requires it to be, and that they have no title if the record shows none."

[2] Bates v. Norcross, 14 Pick. 224, 231.

[3] Kerfoot v. Cronin, 105 Ill. 609.

[4] Draude v. Rohrer Christian Mfg. Co., 9 Mo. App. 249. In a recent case, Gannt, P. J., after reviewing the authorities says: "Our conclusion is, that a recorded deed

§ 714. Illustrations.—A conveyed to B two tracts of land by an absolute deed, taking a portion of the consideration in money and the balance in the notes of the purchaser. Subsequently B sold and conveyed one of these tracts to C, by a deed which was likewise absolute. But in this latter transfer no money was paid, B taking the notes of C, who had notice that B was still indebted to A. A year afterward, B, with the consent and approval of C, executed a trust deed which embraced *both* these trusts, to secure to A the amount of the purchase money remaining due him. Although C had agreed to join in this deed of trust, as a matter of fact, he did not do so. After the execution of the trust deed, C sold and conveyed the one tract he had purchased to D. The latter made no search in the recorder's office and had no actual knowledge of the trust deed, and it was held that he was a *bona fide* purchaser, unaffected by the trust deed. "The rule upon this state of facts," said the court, "is understood to be, that the purchaser of the legal title is not bound to take notice of a registered lien or encumbrance of an estate, created by any person other than those through whom he is compelled to deraign his title." [5] A purchaser from A, a trustee, is not charged with notice of the trust from the fact that B executed a deed to C, reciting the execution of a declaration of trust on the part of A.[6] Nor is the registration of a deed between third persons, notice to a purchaser at an execution sale who does not claim under such deed.[7] Following out the principle that

by one who has no title, but who afterward acquires the title by recorded deed, is not constructive notice to a subsequent purchaser in good faith from the common grantor. We think that when he searches till he finds the deed by which his grantor acquires the title, he is not bound to look for deeds made prior to that time. Such prior deeds are not 'in the line of title,' as that term is used by conveyancers and searchers": Ford v. Unity Church Society, 120 Mo. 498, 23 L.R.A. 561, 41 Am. St. Rep. 711.

[5] Baker v. Griffin, 50 Miss. 158, 163. See, also, Harper v. Hopkins, 34 Miss. 472.

[6] Murray v. Ballou, 1 Johns. Ch. 566.

[7] Keller v. Nutz, 5 Serg. & R. 245.

a purchaser of land is not charged with constructive notice of any fact which is not connected with the course of his title, it is held that he is not presumed to know of the registry of a will containing a devise of the land which he claims by a superior title.[8] It is said that a judgment debtor, who retains possession of land sold under execution against him, may be presumed to hold under the title of the purchaser at the sale. But in a case where a judgment debtor remained in possession for a long period of time, claiming that he was holding as the life tenant of a purchaser under a senior judgment, the deed to whom had never been filed for record, it was held that his possession could not be considered as constructive notice to a subsequent mortgagee, under the junior judgment of such asserted title, or of the title of the one, who, he claimed, was his lessor.[9] Where a subsequent purchaser has no actual knowledge of prior equities, he is not charged with constructive notice of such equities because they are expressed in the recitals of an unauthorized deed duly recorded, from the executors of an individual through whose heirs the subsequent purchaser derives his title.[1]

§ 715. Record of deeds subsequent to mortgage not notice to mortgagee.—It results from the principle we have just stated that after the registration of a mortgage, the mortgagee is not charged with notice of deeds or mortgages subsequently made by the mortgagor.[2] "The effect of record-

[8] Woods v. Farmere, 7 Watts, 382, 32 Am. Dec. 772.

[9] Cook v. Travis, 20 N. Y. 400.

[1] Blake v. Graham, 6 Ohio St. 580, 67 Am. Dec. 360. The court said that this rule rested on the reason, "that a searcher can be fairly supposed to be made acquainted with the contents of such deeds only as, in the process of tracing, link by link, his chain of title on the record, necessarily pass under his inspection."

[2] Iglehart v. Crane, 42 Ill. 261; King v. McVickar, 3 Sand. Ch. 192; Birnie v. Main, 29 Ark. 591; Cooper v. Bigly, 13 Mich. 463; Heaton v. Prather, 84 Ill. 330; James v. Brown, 11 Mich. 25; Stuyvesant v. Hone, 1 Sand. Ch. 419; George v. Wood, 9 Allen, 80, 85 Am. Dec. 741; Deuster v. McCamus, 14 Wis. 307;

ing a mortgage or other conveyance is not retrospective, or its object to affect rights already vested and secured, and a mortgagee, after having his deed recorded, is not required to search the record from time to time to see whether other encumbrances have been put upon the land with which he is in nowise concerned."[3] Where there are two mortgages, the court may prevent the first mortgagee, in case he has released lands primarily liable for his claim to the prejudice of the second mortgagee, whose lien extends to only part of the lands affected by the first mortgage, from enforcing his mortgage upon the land included in both mortgages, until he makes a deduction of the value of the land released from this debt. But this action will not be taken unless the first mortgagee has knowingly prejudiced the rights of the other. He is not liable to these consequences if he releases without notice, and the record is not notice for this purpose.[4] "The law requires every man so to deal with his own as not unnecessarily to injure another. He may sell his property to whom he pleases, without consulting his neighbor, or inquiring how it may affect his interests. And if he take a mortgage of A to-day, he may to-morrow or next week release a part or the whole of the mortgaged prem-

Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 Am. Dec. 478; Straight v. Harris, 14 Wis. 509; Doolittle v. Cook, 75 Ill. 354; Westbrook v. Gleason, 14 Hun, 245; Van Orden v. Johnson, 14 N. J. Eq. 376, 82 Am. Dec. 254; Halstead v. Bank of Kentucky, 4 Marsh. J. J. 555; Wheelwright v. De Peyster, 4 Edw. Ch. 232, 3 Am. Dec. 345; Truscott v. King, 6 Barb. 346; Blair v. Ward, 10 N. J. Eq. (2 Stockt. Ch.) 119; Talmage v. Wilgers, 4 Edw. Ch. 239, n; Hoy v. Bramhall, 19 N. J. Eq. 563; Taylor v. Maris, 5 Rawle, 51; Leiby v. Wolf, 10 Ohio, 83; Hill v. McCarter, 27 N. J. Eq. 41; Raynor v. Wilson, 6 Hill, 469; Patty v. Pease, 8 Paige, 277, 35 Am. Dec. 683; Kipp v. Merselis, 30 N. J. Eq. 99; Meacham v. Steele, 93 Ill. 135; Cogswell v. Stout, 32 N. J. Eq. 240; Guion v. Knapp, 6 Paige, 35, 29 Am. Dec. 741; Brown v. Simons, 44 N. H. 475; Sarles v. McGee, 1 N. Dak. 365, 26 Am. St. Rep. 633, 48 N. W. Rep. 231; Bright v. Buckman, 39 Fed. Rep. 243; Johnson v. Valido Marble Co., 64 Vt. 337, 25 Atl. Rep. 441.

[3] Birnie v. Main, 29 Ark. 591, 595, per Harrison, J.

[4] Blair v. Ward, 19 N. J. Eq. (2 Stockt. Ch.) 119.

ises, on the request of the mortgagor, without troubling himself to inquire whether in the meantime some one has not taken a subsequent mortgage, and, if so, whether it would be agreeable to such person that he should release. It is the duty of a subsequent mortgagee, if he intends to claim any rights through the first mortgage, or that may affect the rights of the mortgagee under it, to give the holder thereof notice of his mortgage, that the first mortgagee may act with his own understandingly. If he does not, and the first mortgagee does with his mortgage what it was lawful for him to do before the second mortgage was given, without knowledge of its existence, the injury is the result of the second mortgagee's negligence in not giving notice. While the law requires every man to deal with his own so as not to injure another, it imposes a greater obligation on the other to take care of his own property than on a stranger to take care of it for him. And to make it the duty of the first mortgagee to inquire before he acts, lest he may injure some one, would reverse this rule, and make it his duty to do for the second mortgagee what the latter should do for himself. To affect the conscience, therefore, of the first mortgagee—for this whole doctrine is one of equity jurisprudence, and not of positive law—it would seem that he should have actual knowledge of the second mortgage. We do not say notice from the second mortgagee is absolutely necessary to enable him to claim the rights of which we have been speaking; but we do think that the existence of the second mortgage should clearly be brought home to the knowledge of the first mortgagee, in such a way as to show an intentional disregard by him of the interests of the subsequent mortgagee." [5]

§ 716. **Subsequent purchaser should notify mortgagee.** —If subsequent purchasers or lienholders desire to ob-

[5] James v. Brown, 11 Mich. 25, 30, per Manning, J.

tain any equity which they may compel a prior mortgagee to respect, they must give him actual notice of their claims.[6] Hence, when a whole lot of land is covered by a prior mortgage, the fact that a builder has possession of one part of it for the erection of a building, and is actually engaged in its construction, is not sufficient to charge the mortgagee with notice that the builder has a lien, and does not place on the mortgagee the obligation of inquiring as to the existence of the lien, or invest the builder with the equitable right to ask for a reduction of the mortgage debt in proportion to the value of other lots released from the operation of the mortgage.[7] But it was held, in Michigan, that where the land mortgaged was situated on one of the main streets of the village in which the mortgagee resided, and a purchaser of a part of the land had promptly placed his deed on record, and went into actual possession of the premises and made improvements to them as a place of residence, the knowledge of these facts on the part of the mortgagee was sufficient to put him upon inquiry before releasing from the operation of the lien of the mortgage other parts of the whole tract.[8]

§ 717. **Actual notice.**—If the deed of the purchaser is recorded, and the mortgagee is notified by letter of the sale and the name of the buyer, he cannot release any part of the land to the prejudice of such purchaser.[9] A mortgagee has a right to presume, when he has no express notice of anything to put him upon inquiry, that the condition of affairs is the same as when his mortgage was executed, and that the mortgagor is still the owner; and mere possession by itself alone, without the mortgagee's knowledge of who has possession, or knowledge of any facts to excite inquiry, does not amount to

[6] Cheever v. Fair, 5 Cal. 337; McIlvain v. Mutual Assurance Co., 93 Pa. St. 30.

[7] McIlvain v. Mutual Assurance Co., 93 Pa. St. 30.

[8] Dewey v. Ingersoll, 42 Mich. 17.

[9] Hall v. Edwards, 43 Mich. 473.

notice.[1] But if he has actual notice of a subsequent deed, a release of a part of the mortgaged premises, to the prejudice of the grantee, will have the effect of discharging his lien to the extent of the value of the land removed from the operation of the mortgage.[2]

§ 718. **Notice of unrecorded deed.**—If succeeding deeds contain proper recitals, a party may be charged with constructive notice of prior unrecorded deeds. But if a grantee in an unrecorded deed conveys the land described therein to a party, and the latter to another, and neither of the two deeds last executed contains any reference to the unrecorded deed, the record of these latter deeds give no notice of the unrecorded deed.[3] And in this connection it may be observed that a purchaser is not charged with notice that there exists an adverse unrecorded deed of the land purchased by him, from the mere fact that before the purchase, in an interview with his grantor, he was informed by him that he was not able to make a good title, but would be in a short time.[4] Both parties claimed title from a common source. One claimed under a deed to A, which was first executed, but was not recorded until after the record of a deed to B, under whom the other party claimed. It was held that it was immaterial that the deed from A was recorded before the deed to B. If the latter deed had acquired priority by reason of its precedence on the record, no valid title against it could be obtained from A. It was also held to be immaterial that A's deed was recorded prior to a deed from B, or from the latter's grantee, for if the latter is protected by the recording laws, so are all claiming under him.[5] When a person has notice of an unrecorded deed he is

[1] Cogswell v. Stout, 32 N. J. Eq. 240.

[2] Cogswell v. Stout, *supra*. See Gilbert v. Haire, 43 Mich. 283.

[3] The City of Chicago v. Witt, 75 Ill. 211.

[4] The City of Chicago v. Witt, *supra*.

[5] Page v. Waring, 76 N. Y. 463. See, also, Roberts v. Bourne, 23 Me. 165, 39 Am. Dec. 614; Felton v. Pitman, 14 Ga. 536; Calder v. Chap-

considered as having notice also of its contents.[6] A subsequent purchaser from the holder of the record title is not charged with notice by the registration of a conveyance made to a third person by the grantee in an outstanding unrecorded deed.[7] The fact that a mortgage to the grantor is of record does not give notice of a prior unrecorded deed executed by him to the mortgagor.[8] A deed in which a vendor's lien to

man, 52 Pa. St. 359, 91 Am. Dec. 163; Fenno v. Sayre, 3 Ala. 458; Harris v. Arnold, 1 R. I. 125; Lightner v. Mooney, 10 Watts, 407; Cook v. Travis, 22 Barb. 338. "An open and continued possession of land by a person having an unrecorded deed, and claiming the land as his own is not presumptive notice of the existence of such a deed, to a subsequent purchaser. If a deed could be presumed from possession, it would not be necessary to record it. Possession, though evidence of some title, is not necessarily evidence of *any particular* title, but should put the party on inquiry; and the intent of the registry act is to protect purchasers from secret or concealed conveyances, by requiring every deed to be recorded, on the peril of forfeiture of the estate": Harris v. Arnold, *supra*.

In Felton v. Pitman, *supra*, the court say: "Mr. Pitman is about to purchase lot No. 374, in Sumter county, of Allen Marshall, who informs him that he derived title from Mrs. Jane Carlisle, the only heir at law of Benjamin Carlisle, deceased, and also from the estate of said deceased. How could the registration of deeds from Sullivan to Marshall, and from Marshall to Rushin, put Mr. Pitman upon inquiry as to the ownership of this land? He searches the records alphabetically to see whether the Carlisles, husband or wife, his original grantors, have conveyed. He finds no deed passing out of them. What is there upon the books to direct his attention or inquiry to deeds, executed by other persons having no connection with the Carlisles? We look to the index for the names of the grantor and grantee, and not to the body of the deed to see what property they convey. Such a rule as this would devolve upon every citizen, for his safety and security, to search the books in the clerk's office almost as diligently as his Bible, to see what property was passing from hand to hand, throughout the entire community. It would be practically to convert him into that most odious of characters, a busy body into other people's matters."

[6] Hill v. Murray, 56 Vt. 177.

[7] Pyles v. Brown, 189 Pa. St. 164, 42 Atl. 11, 69 Am. St. Rep. 794; Booker v. Booker, 208 Ill. 529, 70 N. E. 709, 100 Am. St. Rep. 250; McCreary v. Reliance Lumber Co., 16 Tex. Civ. App. 45, 41 S. W. 485.

[8] Sternberger v. Ragland, 57 Ohio St. 148, 48 N. E. 811.

secure the purchase price is secured and which recites that a deed of trust has been executed as additional security, is notice to all who claim through it, not only of the lien but also of the unrecorded trust deed.[9]

§ 719. **Unrecorded deed, and recorded purchase money mortgage.**—If a person sells a piece of land executing a deed therefor, and the grantee makes a mortgage back, the deed being unrecorded, the registration of the mortgage is not notice of the existence of the unrecorded deed.[1]

§ 720. **Comments.**—In such a case, the title upon the records would appear to be in the grantor, and if a third person should execute a mortgage to him, its record could not of itself alone give any notice that the mortgagor had title under a prior unrecorded deed. It is possible, however, that if it could be shown that a subsequent purchaser had actual knowledge of this mortgage, aside from the presumption of constructive notice from the fact of its registration, he might be deemed to have information of sufficient facts to put him upon inquiry, and might be charged with notice if he failed to prosecute it. But this is extremely doubtful.

§ 721. **Subsequently acquired title inuring to benefit of grantee to prejudice of purchaser.**—If a person, who has no title at the time, conveys or mortgages a piece of land to another with warranty, any title he may subsequently ac-

[9] Garrett v. Parker (Tex. Civ. App.) 39 S. W. 147. As to notice given by record of instruments not recorded, see: Tennessee Coal, Iron & R. Co. v. Gardner, 131 Ala. 599, 32 So. 622; Scotch Lumber Co. v. Sage, 132 Ala. 598, 32 So. 607, 90 Am. St. Rep. 932; Equitable Building & Loan Assn. v. Corley, 72 S. C. 404, 52 S. E. 48, 110 Am. St. Rep. 615; Bunker v. Barron, 93 Me. 87, 44 Atl. 372; Babcock v. Young, 117 Mich. 155, 75 N. W. 302; Advance Thresher Co. v. Esteb, 41 Or. 469, 69 Pac. 447; Peterborough Sav. Bank v. Pierce, 54 Neb. 712, 75 N. W. 20.

[1] Veazie v. Parker, 23 Me. 170; Pierce v. Taylor, 23 Me. 246.

quire will inure to the benefit of the grantee or mortgagee, and in some States, this rule prevails by force of statute, even in the absence of an express warranty in the instrument itself. It is held that this principle applies to a case where the grantor procures title and, at the same time, conveys or mortgages the premises to another. The title thus acquired inures to the benefit of the first grantee under the deed made prior to the acquisition of title.[2] A person purchased a piece of land and put his son into possession, who forged a deed of the land from his father to himself and placed it upon record. Subsequently the son, for the purpose of securing a loan, executed a mortgage with covenants of warranty. Some years afterward the father made a deed to his son, and this was placed upon record. Afterward the son conveyed the land to another, who purchased it for a full consideration without notice of the mortgage. It was held by a majority of the court that the record of the mortgage was constructive notice to such subsequent purchaser, and, under the recording laws, was entitled to priority over his title.[3] Commissioner Earl, who spoke for the majority of the court, said: "It is a principle of law, not now open to doubt, that ordinarily, if one who has no title to lands, nevertheless makes a deed of conveyance with war-

[2] Jarvis v. Aikens, 25 Vt. 635; Wark v. Willard, 13 N. H. 389; Tefft v. Munson, 57 N. Y. 97; Doyle v. Peerless etc. Co., 44 Barb. 239; Pike v. Galvin, 29 Me. 183; Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476; Somes v. Skinner, 3 Pick. 52; Farmer's L. & T. Co. v. Maltby, 8 Paige, 361; Salisbury Savings Society v. Cutting, 50 Conn. 113; Philly v. Sanders, 11 Ohio St. 490, 78 Am. Dec. 316; Douglass v. Scott, 5 Ohio, 194; Crane v. Turner, 67 N. Y. 437; Christy v. Dana, 34 Cal. 548, 42 Cal. 174; Kirkaldie v. Larrabee, 31 Cal. 455, 89 Am. Dec. 205; Gotham v. Gotham, 55 N. H. 440; Cooke v. Watson, 30 N. J. Eq. 345; Lemon v. Terhune, 40 N. J. Eq. 364; Russ v. Alspaugh, 118 Mass. 368, 19 Am. Rep. 464; Knight v. Thayer, 125 Mass. 25; Boone v. Armstrong, 87 Ind. 168; McInniss v. Pickett, 65 Miss. 354, 3 So. Rep. 660; Kaiser v. Earhart, 64 Miss. 492, 1 So. Rep. 635; Bramlett v. Roberts, 68 Miss. 325, 10 So. Rep. 56; Edwards v. Hillier, 70 Miss. 803, 13 So. Rep. 692.

[3] Tefft v. Munson, 57 N. Y. 97.

ranty, and afterward himself purchases and receives the title, the same will vest immediately in his grantee, who holds his deed with warranty as against such grantor by estoppel. In such case the estoppel is held to bind the land, and to create an estate and interest in it. The grantor, in such case, being at the same time the warrantor of the title, which he has assumed the right to convey, will not, in a court of justice, be heard to set up a title in himself against his own prior grant; he will not be heard to say that he had not the title at the date of the conveyance, or that it did not pass to his grantee in virtue of his deed.[4] And the doctrine, as will be seen by these authorities, is equally well settled that the estoppel binds not only the parties, but all privies in estate, privies in blood, and privies in law; and in such case, the title is treated as having been previously vested in the grantor, and as having passed immediately upon the execution of his deed, by way of estoppel. Assuming it to be the rule that the record of a conveyance made by one having no title is ordinarily a nullity, and constructive notice to no one, the plaintiff cannot avail himself of this rule, as he is estopped from denying that the mortgagor had the title at the date of the mortgage." But Commissioner Reynolds, with whom concurred Chief Commissioner Lott, dissented from these views, and said: "The forged deed was, of course, a nullity, and could not in the eye of the law have any effect by way of constructive notice or otherwise. It conveyed nothing, and was not a 'conveyance' within the meaning of the recording acts, and did not affect the title to the land 'in law or in equity.' It may be assumed, therefore, that the loan commissioners took the mortgage knowing that Martin B. Perkins had no title, it being very clear that they acquired no legal rights by being imposed upon,

[4] Citing Wark v. Willard, 13 N. H. 389; Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476; Somes v. Skinner, 3 Pick. 52; The Bank of Utica v. Mesereau, 3 Barb. Ch. 528, 567, 49 Am. Dec. 189; Jackson v. Bull, 1 Johns. Cas. 81, 90; White v. Patten, 24 Pick. 324; Pike v. Galvin, 29 Me. 183.

against anyone save Martin B. Perkins. They got no interest in the land, either in law or equity. It is not in principle unlike the case of a forged negotiable promissory note, where a *bona fide* holder for value can have no protection. It follows, therefore, that the entry of the mortgage in the books of the loan office at the time it was made was of no legal consequence whatever, except as against the mortgagor. It was no notice under the recording acts, for it did not in the remotest degree affect the title to the land described in it. It is urged that there was no necessity of making any further record of the mortgage, because the title in the mortgagees come under the warranty by way of rebutter or estoppel. This will not do. It is sufficient to say that by virtue of the transactions under which the defendants look to enforce the lien of the mortgage, the title to the land is affected, and such a paper must be properly put on record to bind subsequent purchasers in good faith. If this be not so, it is impossible to see how a subsequent *bona fide* purchaser can have any protection, and when it is said to be impossible to record the estoppel which gave the mortgage vitality, it may be answered, that until the estoppel became operative, the mortgage was a nullity, and the record of it no notice whatever. When, however, Martin B. Perkins obtained the title to the premises, it became by some operation of law valid against him, but it was of no greater force or effect, than if he had on that day given it to the loan commissioners. It then for the first time affected the title to the land, and in order to bind subsequent purchasers in good faith must be duly recorded, and this was not done in any such way as to operate as constructive notice under the recording acts. It is not questioned but that the plaintiff is to be protected as a *bona fide* purchaser for value, unless the mortgage given in 1850, and then entered in proper order in the books of the loan office, which at the time did not affect the title to the land in any way, was constructive notice of the lien. It is well settled that a conveyance that is not

duly recorded according to law, even when the actual title has passed, is not effectual as constructive notice. Much less can it be, that a conveyance which does not affect the title can give any legal notice whatever. In the very best aspect of the defendant's case, the record of the mortgage was made out of the order required by law, and failed to give notice to anybody dealing with the title to the land. In this view the deed of the plaintiff was first recorded, and he is entitled to protection in his title." [5]

§ 722. **Comments.**—Of course, the legal principle that an after-acquired title of the grantor, when there is an express or implied covenant of warranty, inures to the benefit of the grantee, cannot be disputed. This rule is founded on the principle of estoppel, and it cannot be contended that such estoppel does not bind privies as well as the grantor himself. But it does seem that some way should be provided for giving notice of this after-acquired title by the record. The theory of our registration laws is, that the records disclose all interests and claims affecting title to real estate. It is against their policy to allow claims to be set up founded on facts or transactions of which the records give no information. And it is essential to the security of land titles and to their marketable value, that the community should know that they may deal with perfect confidence on the assumption that the title is such as the records show it to be. A person taking a chain of title, and following it down until he finds the title in a certain person, may generally act on the belief that such person is the owner of the title. But in the case we have been considering in the previous section, he cannot always safely do this. Suppose that A is the owner of a piece of land, and B has no title whatever to it, but nevertheless conveys it by deed with covenant of warranty to C, who has his deed recorded. A person searching the records would find the title in A, and if A con-

[5] Tefft v. Munson, 57 N. Y. 101.

veyed his title to B, he would find that A's title had passed to B, and would naturally conclude that B was the owner, if he found no subsequent conveyances from B. But if B had previously conveyed the land to C, with covenant of warranty as we have supposed, his title would, by the doctrine of estoppel, inure at once to the benefit of C. If B, after acquiring the title, should convey to D, the latter would obtain no title, because his grantor had none to convey, whatever he had having passed to C. There is no escape from this conclusion. Yet it must be apparent that a person who relied upon the records alone for the claim or title would be misled. It certainly is desirable that some method should be provided of having the record show all the rights of the parties. This might be partially attained in the case under consideration by giving the grantee under the prior deed a specified time after knowledge of the acquisition of title by the grantor in which to re-record his deed.

§ 723. **How far back purchaser must search.**—In ordinary practice, a person who relies upon his own examination of the records will feel perfectly satisfied with the grantor's title, if he finds that title vested in him at a particular date, and nothing occurring subsequently to affect it. Such purchaser will not generally search the records to ascertain if, anterior to the acquisition of title, the grantor had not made some transfer of it. The interesting question presents itself of how far back it is the duty of an intending purchaser to search for conveyances from his grantor. May he act on the assumption that no conveyances have been made by the grantor previously to the time that he obtained title, or is he compelled to search beyond this period? The authorities do not afford a positive and unanimous answer to this question. On one hand, the rule announced by the Supreme Court of Missouri is, that a purchaser must, at his risk, inquire into the condition of the record title of his grantor, and will be charged with construc-

tive notice of all conveyances made by him affecting the title, which have been duly recorded. The court applied this rule in a case where a person, having a bond for a deed, sold and assigned it to another, who, in turn, conveyed it to a third person, whom we will designate as A. The second holder of the bond however, conveyed in trust all his right, title, and interest in the premises to secure a portion of money due to his immediate grantor before he conveyed his interests to A, the third party. This deed of trust was duly recorded prior to the purchase by A. The latter paid the amount due upon the bond to the original grantor and obtained a deed. A sale was had under the trust deed, and the premises were purchased by a person whom we will designate as B. The controversy was between A and B. B, the purchaser at the trustee's sale, tendered to A the amount paid by him to the original grantor with the accrued interest, and asked that A might be divested of title, and the same be vested in him. The court held, that, although at the time the deed of trust was made, the grantor therein had vested in himself no title, still subsequent purchasers were charged with constructive notice from the fact that it was recorded; and said of A, that if he had "searched the records as a prudent man should, he must have acquired actual knowledge of the deed and its contents, as shown by the record. If he neglected this reasonable precautionary search, the consequences of that neglect he must bear. It would be unjust to visit them upon an innocent third party." [6]

[6] Digman v. McCollum, 47 Mo. 372, 377. Currier, J., delivered the opinion of the court and remarked: "The deed was on record, and the defendant, according to the plaintiff's view, must be presumed to have searched the records and come to a knowledge of the contents of the deed. The defendant is sought to be affected with constructive notice from the fact that the instrument was duly recorded. The general rule on this subject undoubtedly is, that a purchaser must, at his own peril, inquire into the state of the grantor's title, since he will be affected with constructive notice of all duly recorded convey-

§ 724. **Correct rule.**—On the other hand, it is held that a purchaser is not charged with constructive notice of deeds made by his grantor before he acquired title. This rule, we believe, is sustained by the weight of authority, and may be declared to be the general principle supported by the de-

ances by his grantor affecting that title. I am aware of no exception to this rule, although it has repeatedly been decided that a purchaser is not affected with constuctive nottice of anything that does not lie within the course of the title with which he is dealing, or that is not in some way connected with it; or, as Judge Scott expressed it in Crockett v. Maguire, 10 Mo. 34, the 'registry of a deed is only evidence of notice to after-purchasers from the same grantor'; that is, from the grantor in the registered deed. In the case now before the court, Williams, the grantor in the recorded deed of trust, was the defendant's vendor, as respects the equitable title to the premises in contest. That title passed from him to the defendant in virtue of the transaction between them; that is, by the sale, receipt of the purchase money, and delivery of the bond. Had Williams passed the title by deed, he would have been the defendant's technical grantor, as well as vendor. But the form of the conveyance does not affect the substance of the transaction. Williams had an interest in the property to convey. He still held the equitable title, subject to the encumbrances, for the deed of trust had not then been foreclosed. That title he passed to and vested in the defendant. Is he not to be regarded as the grantor of that interest? As between Williams and the defendant, they were dealing with the equitable title and nothing else. As respected the recorded condition of that title, was it not as much the business of the purchaser to search the record as though he had been negotiating for the legal title? Where is the difference in principle? If the defendant searched the record of deeds with common prudence and care, he must have found the deed of trust under which the plaintiff claims, and thus come to a knowledge of its contents. It is no objection to this view that Williams had vested in himself no title of record. That happens more or less frequently in regard to legal as well as equitable estates. Titles are acquired as well by adverse possession as by deed. So, a party may hold a title in fee under an unrecorded deed. If a party has in fact a title, whether of record or not, he may encumber it, and that may be shown by the record. Prudent men will make the proper search preliminary to their purchases. The law presumes that they do so, and courts, as has already been remarked, act upon that presumption. This is the undisputed doctrine in relation to legal titles, and we are furnished with no decided case, dictum, or reason, against applying the rule

cided cases.[7] One having an unrecorded contract for the purchase of a tract of land executed a mortgage, which was placed on record. The mortgagor subsequently acquired the title by deed from his vendor, and then sold the premises to another, who had his deed duly recorded. It was held, that the registration of the mortgage having occurred before the records disclosed title in the mortgagor, was not constructive notice to the second grantee, who purchased the property after the title had been transferred to his grantor.[8]

§ 724a. **Admission in evidence of copy of record from other States.**—Many States have statutes providing that copies of the record of conveyances, when executed and acknowledged with certain formalities, may be received in evidence. But in the absence of such legislation, they may be received in evidence under the provisions of the statutes of the United States, and upon compliance with their requirements. The Constitution of the United States declares that: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof."[9] The first statute passed by Congress to give this act effect applied only to judicial proceedings, and under it the Federal courts held that they were obliged to give the judgments of the State courts the same faith and credit that the courts of one State are obliged to give to the judgments of the courts of other States.[1] The

to equitable as well as legal titles and interests."

[7] Farmers' Loan and Trust Co. v. Maltby, 8 Paige, 361; Losey v. Simpson, 3 Stockt. Ch. 246; Calber v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163; Page v. Waring, 76 N. Y. 463; Buckingham v. Hanna, 2 Ohio St. 551; Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 280; Hetzel v. Barber, 69 N. Y. 1.

[8] Farmers' Loan and Trust Co. v. Maltby, 8 Paige, N. Y. 361.

[9] Const. U. S. Art. IV. Sec. 1.

[1] Cooper v. Newell, 173 U. S. 567.

object of this constitutional provision was to require that the same effect should be given by the courts of one State to the public acts of every State that they possessed by law and usage at home.[2] Inquiry, however, is not prevented into the jurisdiction of the court in which the judgment is given, or into the facts which by law are essential to confer jurisdiction.[3] But if the court rendering the judgment had jurisdiction, and personal service was had upon the defendant, or if his property was lawfully attached, its judgment is entitled to as much force and effect, in the court of another State, as it has in the State in which it was made.[4] In other words, the rule is one of evidence rather than jurisdiction.[5] As a matter of pleading, protection, under this clause, must be pleaded when reliance is placed upon it,[6] and the courts of one State will not give a greater effect to the judgment of another State than the courts of the latter State give.[7] The judgments of other States are between the parties conclusive proof of the rights determined;[8] but, while they bind the parties, they need not necessarily be followed as precedents in other cases.[9] To secure an execution on the judgment a new suit is necessary,[1] and an inquiry can be made whether the judgment is impeach-

[2] Chicago etc. R. Co. v. Wiggins Ferry Co., 119 U. S. 622, 30 L. ed. 522.

[3] Simmons v. Saul, 138 U. S. 448, 34 L. ed. 1059. See, also, Thorman v. Frame, 176 U. S. 356, 44 L. ed. 503.

[4] Allison v. Chapman, 19 Fed. 448; Hanley v. Donoghue, 116 U. S. 3, 29 L. ed. 536; Cheever v. Wilson, 9 Wall. (U. S.) 123, 19 L. ed. 608.

[5] Wisconsin v. Pelican Ins. Co., 127 U. S. 291, 32 L. ed. 243. See, also, Clifford v. Williams, 131 Fed. 105; Anglo-American Provision Co. v. Davis Provision Co. No. 1, 191 U. S. 374, 48 L. ed. 227; Israel v. Israel, 130 Fed. 237.

[6] Wabash R. Co. v. Flannigan, 192 U. S. 37, 48 L. ed. 331.

[7] Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. ed. 687.

[8] Huntington v. Atrill, 146 U. S. 657, 36 L. ed. 1123; Mills v. Duryee, 7 Cranch, 485, 3 L. ed. 413.

[9] Chicago etc. R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 27 L. ed. 636, affirming 11 Fed. 383.

[1] Cole v. Cunningham, 133 U. S. 112, 33 L. ed. 541.

able for fraud,[2] as well as whether the judgment is responsive to the issues tendered by the pleadings.[3] Such judgments are conclusive only on their merits, and it is competent for a State to prescribe a statute of limitations within which they must be enforced.[4] But still a reasonable time must be allowed for that purpose.[5]

§ 724b. Statute of the United States as to admission of copy of record.—In 1804 Congress passed another statute which prescribed the manner of proving records other than judicial, and this statute is now embraced in the Revised Statutes and declares: "All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with the certificate of the presiding jusice of the court of the county parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Terri-

[2] Cole v. Cunningham, 133 U. S. 112, 33 L. ed. 541.

[3] Reynolds v. Stockton, 140 U. S. 264, 35 L. ed. 467.

[4] M'Elmoyle v. Cohen, 13 Pet. 328, 10 L. ed. 185.

[5] Lamb v. Powder River Live Stock Co., 67 L.R.A. 558, 132 Fed. Rep. 442; Keyser v. Lowell, 117 Fed. Rep. 400.

tory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts of the State, Territory, or country, as aforesaid, from which they are taken." [6] Congress has the constitutional power to pass such a statute, because the provision of the constitution confers authority to prescribe rules of evidence not only as to judicial acts and records, but also as to all other official records.[7]

§ 724c. What is a record under this statute.—It may be stated, as a general rule, that, within the meaning of this

[6] R. S. U. S. § 906. Section 907 of the Revised Statutes relates to recoveries of any foreign government relating to the title to lands claimed by or under the United States and is as follows: "It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the Departments, the Solicitor of the Treasury, or the Commissioner of the General Land Office, to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the Solicitor of the Treasury, who shall file them in his office, and cause them to be recorded in a book to be kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence, or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed by or under the United States may come into question, equally with the originals." R. S. U. S. sec. 907. Where it is the duty of a foreign officer to record certain documents his certificate is generally admissible in evidence, but as to other matter it is not generally competent. Succession of Justices, 47 La. Ann. 302, 16 South. 841. Unless a statute expressly or impliedly so provides a certificate of a consul is not evidence between third persons. Levy v. Burley, 2 Sumn. (U. S.) 355.

[7] Chase v. Caryl, 57 N. J. L. 545, 31 Atl. 1024; Wilcox v. Bergman, 96 Minn. 219, 5 L.R.A.(N.S.) 938, 104 N. W. 955.

statute, every document of a public nature, whose removal would produce inconvenience, and which a party has a right to inspect, may be proven by a duly authenticated copy. If, under the statute of a State, only an abstract of a mortgage is received, the record of such abstract when authenticated according to the statute of the United States is competent evidence.[8] The registry of the original deed, however, must be authorized by law.[9] This act of Congress gives the record of deeds the force of evidence everywhere, when certified as required.[1] If the officer recording a deed has no power to record it, he cannot certify to a copy.[2] In Alabama, a certified copy of a deed conveying lands in Georgia, notwithstanding it is authenticated as prescribed by the act of Congress, cannot be received in evidence without proving the loss of the original, because the statute of Georgia provides that in the case of the loss of a recorded deed, a copy is admissible in evidence, if the court is satisfied that its loss has occurred, and it would not without such proof be admissible in evidence in Georgia.[3] It is held in Missouri that a copy of a record

[8] Garrigues v. Harris, 17 Pa. St. 344. "The act of Congress of March 27, 1804," said the court, "gives to this office copy the effect it would have in the courts of New Jersey, and necessarily draws into cognizance here, as a question of domestic law under our government, the law and usages of that state. We are required to take judicial notice that the recording of an abstract of a mortgage is all that there is enjoined and that a certified copy of that record is competent evidence in that state. It is therefore competent evidence here, when authenticated, as this document was, according to the act of Congress."

[9] Brown v. Edson, 23 Vt. 435; Johnston v. Griswold, 8 W. Va. 240. The county court of Virginia or its clerk at a certain period had no power to admit to record a power of attorney, executed in Kentucky, where it was acknowledged before a notary public and certified to by him. In such a case, a copy of the document authenticated by the clerk is not competent evidence in lieu of the original: Johnston v. Griswold, 8 W. Va. 240.

[1] Pennel v. Weyant, 2 Har. (Del.) 502.

[2] Mitchell v. Mitchell, 3 Stew. & P. (Ala.) 81.

[3] Whaun v. Atkinson, 84 Ala. 592, 4 South. 681. See for other cases in Alabama stating condition under which authenticated copies may be

in another State of a deed is not admissible in evidence, unless it be shown that such copy is evidence by the laws of the State in which the deed is recorded.[4] The Wisconsin statute provides that all instruments relating to real property in that State, which before its passage, had been recorded in the office of a register of deeds, purporting to have been proven without the state, and having substantially the ordinary form of certificate shall be considered as having been proved in accordance with the laws of their place of proof and may be read in evidence in like manner and with the same effect as the originals. The statute also provides that the record of such documents may be read with the same effect as the originals. Under this statute it is held that the record of a power of attorney which has been attested, acknowledged, and recorded in another State, is to be deemed without proof of the laws of the State in which it was recorded, as *prima facie* competent in proving a link in a chain of title.[5]

received in evidence: Swift v. Fitzhugh, 9 Port. 39; Martin v. Martin, 22 Ala. 86; Tatum v. Young, 1 Port. 298; Lee v. Mathews, 10 Ala. 682, 44 Am. Dec. 498; Powell v. Knox, 16 Ala. 364.

[4] Clardy v. Richardson, 24 Mo. 295. Said the court: "It may be remarked, in relation to the copy of the record of the deed made in Tennessee, that it does not appear from any thing before us that there was any law in Tennessee which made such copies evidence. After our statute of conveyances in relation to lands was passed by which they were required to be recorded, it was held that copies of the record were not evidence of the execution of the deed without the warrant of the statute making them such (Miller v. Wells, 5 Mo. 6). The act of 27th March, 1804, passed by Congress, in relation to this subject, and under which the copy must be read (if it is read at all), enacts that copies of such records shall only have the force and effect in a sister state that they had in the state where they were made. If, by our law, such copies of our records would not be evidence in our courts, like records from our sister states of course could not be evidence here." See, also, Peterman v. Laws, 6 Leigh. (Va.) 523.

[5] Slaughter v. Bernards, 88 Wis. 111, 59 N. W. 576. See, generally for other cases relating to various kinds of records: Barcello v. Hapgood, 118 N. C. 712, 24 S. E. 124; State v. Pagels, 92 Mo. 300, 4 S. W. 931; Florsheim v. Fry, 109 Mo. App. 487, 84 S. W. 1023; James v. Kirk, 29 Miss. 206; Tucker v. People, 117 Ill. 91, 7 N. E. 51; Munk-

§ 724d. **Requirements of statute to be observed.**—In order that the copy of the record may be received in evidence, the requirements of the statute as to its authentication must be observed.[6] Although the certificate of the presiding judge of a county that a copy of a deed to be used in another state declares that it was "duly and properly authenticated in due form of law" yet unless it also states "by the proper officer," it is not sufficient to allow the copy to be received in evidence.[7] It must be shown that it is required by the laws of the State where the instrument is recorded, that its recordation is necessary before an office copy will be admitted in evidence in another State.[8] If it does not appear that the officer taking the acknowledgment was authorized by the laws of his State to take acknowledgments, the copy of the instrument is not properly proven.[9] A certificate by a justice of the peace is not sufficient. It should be by the judge, chief justice, or presiding magistrate of the court.[1] Nor is a certificate of the clerk of the court without the attestation of the presiding judge

res v. M'Caskill, 64 Kan. 516, 68 Pac. 42; Dickson v. Grissom, 4 La. Ann. 538; Norwood v. Green, 5 Mart. (N. S.) 175; Leggo v. New Orleans Canal Co., 3 La. Ann. 138; Francis v. Scott, 5 La. Ann. 668; Graham v. Williams, 21 La. Ann. 594; De Riesthal v. Walton, 66 Md. 470, 8 Atl. 462; Bryant v. Kelton, 1 Tex. 433; Watrous v. McGrew, 16 Tex. 512; Mornson v. Wiggins Ferry Co., 47 Mo. 521; Richmond v. Patterson, 3 Ohio 368; Moore v. Ann, 9 B. Mon. 36; Condit v. Blackwell, 19 N. J. Eq. 193; Trinity Co. Lumber Co. v. Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015.

[6] James v. James, 35 Wash. 650, 77 Pac. 1080; State v. Kniffen, 44 Wash. 485, 87 Pac. 387; Taylor v. McKee, 118 Ga. 874, 45 S. E. 672; Key v. Vaughn, 15 Ala. 497; Richards v. Hicks, 1 Overt. (Tenn.) 207; Hollister v. Armstrong, 5 Houst. (Del.) 46; Pennel v. Weyant, 2 Harr. (Del.) 501; Moore v. Ann, 9 B. Mon. (Ky.) 36; Reynolds v. Rowley, 3 Rob. (La.) 201, 38 Am. Dec. 233; Parham v. Murphee, 4 Mart. (La.) N. S. 200; Kidd v. Manley, 28 Miss. 156; Petermans v. Laws, 6 Leigh (Va.) 523.

[7] Hollister v. Armstrong, 5 Houst. (Del.) 46.

[8] Mitchell v. Mitchell, 3 Stew. & P. 81.

[9] McCormick v. Evans, 33 Ill. 327.

[1] Waller v. Cralle, 8 B. Mon. (47 Ky.) 11.

sufficient.[2] "Records from public offices of sister States other than courts, must be certified in accordance with the United States statutes, to be admissible in evidence in the courts of this State."[3] Accordingly, a mere certificate of the keeper of the record in another State given under his hand and seal is not sufficient.[4] Provided that the judge certifies that the attestation is in due form, the form of attestation used by the clerk is immaterial,[5] nor is it necessary that the signature of the clerk should be his full Christian name.[6] The proper seal of office should be attached to the certificate of the officer who certifies that the custodian of the record is the proper officer to have its custody.[7]

§ 724e. **Not the only method of proof.**—While the act of Congress provides a mode of proving a record from another State, it is not exclusive, but such record may also be proven by the statutes of the State in which it is offered in evidence.[8] In speaking of the general purpose of the Federal

[2] Johnson v. Rannels, 6 Mart. (N. S.) 621. See, also, Paca v. Dutton, 4 Mo. 371; Drummond v. Magruder, 9 Cranch, 122, 3 L. ed. 677.

[3] James v. James, 35 Wash. 650, 77 Pac. 1080.

[4] James v. James, 35 Wash. 650, 77 Pac. 1080.

[5] Crawford v. Simonton, 7 Port. (Ala.) 110.

[6] Harryman v. Roberts, 52 Md. 64.

[7] Phillips v. Flint, 3 La. 146; Brock v. Burchett, 2 Swan (Tenn.) 27.

[8] Willock v. Wilson, 178 Mass. 68, 59 N. E. 757; Parke v. Williams, 7 Cal. 247; Dusenberry v. Abbott, 1 Neb. (Unof.) 101, 95 N. W. 466; Hawes v. State, 88 Ala. 39, 7 So. 302; Garden City Sand Co. v. Miller, 157 Ill. 225, 41 N. E. 753; Ordway v. Conroe, 4 Wis. 45; Coffee v. Neely, 2 Heisk. 304; Johnson v. Martin, 68 Miss. 330, 8 South. 847; Re Ellis, 55 Minn. 401, 23 L.R.A. 287, 56 N. W. 1056, 43 Am. St. Rep. 514; Latterett v. Cook, 1 Iowa, 1, 63 Am. Dec. 428; Pickett v. Boyd, 11 Lea, 498; Otto v. Trump, 115 Pa. 425, 8 Atl. 786; Ellsworth v. Barstow, 7 Watts, 314; Petty v. Hayden Bros., 115 Iowa, 212; Thrasher v. Ballard, 33 W. Va. 285, 10 S. E. 411, 25 Am. St. Rep. 894; People ex rel. Johnson v. Miller, 195 Ill. 621, 63 N. E. 504; Tomlin v. Woods, 125 Iowa, 367, 101 N. W. 135; Kean v. Rice, 12 S. & R. 203; St. Louis Expanded Metal Fireproofing Co. v. Beilharz, (Tex. Civ. App.) 88 S. W. 512; Ritchie

statute, in a case where a foreign judgment was involved, Mr. Justice Hammond said that the statute was passed "for the purpose of prescribing the kind of proof of the existence of a record in one State upon which a sister State might insist before it could be called upon to give to the record the full faith and credit imposed by the federal constitution; and it is well settled that the method of authentication therein prescribed is not exclusive. Neither the federal constitution nor the statute forbids the States from authorizing the proof of records in other modes in their own State courts, providing always, of course, that the State statute, if put into force, shall not have the effect of excluding a record authenticated according to the requirements of the federal statute." [9] The act of Congress said the Supreme court of Pennsylvania "prescribes a general rule which makes records admissible in every State, but it does not exclude any other evidence which the courts of a particular State may deem competent." [1] Nor is the statute of the United States to be construed as abolishing the common law method of proving records.[2] Thus a copy of a deed recorded in another State was admitted in evidence when it was proved in compliance with the requirements of the common law,[3] and so the court received in evidence a copy of a decree of divorce, where a witness testified that he had veri-

v. Carpenter, 2 Wash. 512, 26 Am. St. Rep. 877, 28 Pac. 380; Droop v. Ridenour, 11 App. D. C. 224; Gardner v. Ladeer, 47 Ill. 211, 95 Am. Dec. 487; Sloan v. Wolfsfeld, 110 Ga. 70, 35 S. E. 344; Hawes v. State, 88 Ala. 39, 7 South. 302; English v. Smith, 26 Ind. 445; Knight v. Wall, 19 N. C. 125; Kingman v. Cowles, 103 Mass. 283.

[9] Willock v. Wilson, 178 Mass. 68, 59 N. E. 757, citing 1 Greenl. Ev. § 505; Kingman v. Cowles, 103 Mass. 283.

[1] State of Ohio v. Hinchman, 27 Pa. St. (3 Casey) 485; Baker v. Field, 2 Yeates, 532; Kean v. Rice, 12 Serg. & R. 203.

[2] Garden City Sand Co. v. Miller, 157 Ill. 225, 41 N. E. 753; Goodwyn v. Goodwyn, 25 Ga. 203.

[3] Smith v. Gillum, 80 Tex. 120, 15 S. W. 794. See, also, Frost v. Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761; Karr v. Jackson, 28 Mo. 316; Hall v. Bishop, 78 Ind. 370.

fied by personally examining the original.[4] Likewise, where it becomes necessary to prove the contents of a record relating to the British army, it is competent to show by means of a deposition of an officer who has the possession and charge of the record, that its removal from the country is not permitted. Upon such showing a copy of the record which by the oath of the officer appears to be true and correct may be received in evidence.[5]

[4] Harvey v. Cummings, 68 Tex. 599, 5 S. W. 513. See, also, Otto v. Trump, 115 Pa. 425, 8 Atl. 786. See, however, Hope v. Hurt, 59 Miss. 174; Peterman v. Laws, 6 Leigh, 523.

[5] In re McClellan's Estate, 20 S. D. 498, 107 N. W. 681.

CHAPTER XXIII.

THE DOCTRINE OF NOTICE.

PART I.

THE GENERAL RULES OF NOTICE.

§ 725. In general.
726. Forged deeds.
727. Notice and knowledge.
728. Kinds of notice.
729. Rumors.
730. Same subject continued—Illustrations.
731. Partnership property.
731a. Information imparted to purchaser that title is in one partner.
732. Information must be from credible source.
733. Inadequacy of price.
734. Statement from holder of adverse title.
735. Information given by recorder.
736. Time of payment of consideration.
737. Intimate relationship or business connections.
738. Notice of a trust.
738a. Designation of grantee as trustee.
739. Structures upon the land.
740. Searching the record not alone sufficient.
741. Further inquiry.
742. Contradiction of information.
743. What is due inquiry.
§ 743a. Due diligence.
743b. How notice may be proven.
744. Third persons.
745. Presumption may be rebutted.
746. Second purchaser without notice.
747. Second purchaser with notice from bona fide purchaser.
748. Former owner with notice.
749. Tenant in common without notice.
750. Notice of intention to execute a deed.
751. Fraud and mistake.
752. Negligence.
753. Notice of right of way from ordinance.
754. Laying down sidewalk.
755. Deed from surviving widow.
756. Notice of lien.
757. Exception of encumbrance in covenant.
758. Deed modified by annexed schedule.
759. Notice from title deeds not between parties.

PART II.

POSSESSION.

760. Possession as notice.
761. Possession by grantor—Comments.

§ 762. View that possession is notice of grantor's rights.
763. Opposite view—Possession not notice of grantor's rights.
764. Comments.
765. Absolute deed and grantor's possession under unrecorded defeasance.
766. Parol evidence to show grantor's right of possession.
767. Absolute deed with mortgage for support.
768. Residence of husband and wife.
769. Character of possession.
770. Possession under one kind of right as notice of other rights.
771. Sign of real estate agent.
772. Possession of church.
773. Possession distinct.
774. Possession continuous.
775. Tenant's possession as notice of landlord's title.
775a. Notice from clause of option to purchase in lease.
776. Comments.
777. An inference of fact.

PART III.

AGENCY.

778. Notice to an agent.
779. Matter material to the transaction.
780. Agent for both parties.
781. Fraud of agent.
782. Notice to a partner.
783. Consulting attorney.
784. Notice to trustee.
785. Agent to examine title.
786. Advertisement of sale.
787. Resale by vendor.

PART IV.

LIS PENDENS.

788. Doctrine of lis pendens.
789. Alienation void as against judgment.
790. Subject continued.
791. Grantee of party to partition suit.
792. Purchaser from person not a party to suit.
792a. Unrecorded deed.
793. Cross-complaint.
794. Principle applies also to actions at law.
795. Actions of ejectment.
796. Diligence in prosecution of suit.
797. Continued.
798. Reasonable diligence.
799. Rule of lis pendens not favored.
800. Effect of lis pendens on attorney's lien for fees.
801. Suit must affect specific property.
802. When lis pendens commences.
803. Statutory lis pendens.
804. Effect of these statutes.
805. Actual notice.

§ 725. **In general.**—It is a well-settled rule, both in England and in this country, that subsequent purchasers who have notice of a prior unrecorded deed, acquire their rights in subordination to it. They are affected by their knowledge

of its existence in the same mode, and to the same extent, as if the deed had, prior to their purchase, been properly recorded.[1]

[1] Le Neve v. Le Neve, Amb. 436; Crealand v. Potter, Law R. 10 Ch. 8; Chadwick v. Turner, Law R. 1 Ch. 310; Ford v. White, 16 Beav. 120; Davis v. Earl of Strathmore, 16 Ves. 419; Rolland v. Hart, Law R. 6 Ch. 678; Benham v. Keane, 3 De Gex, F. & J. 318; Finch v. Beal, 68 Ga. 594; Greaves v. Tofield, Law R. 14 Ch. D. 563; Dunham v. Dey, 15 Johns. 555, 8 Am. Dec. 282; Cabeen v. Breckenridge, 48 Ill. 91; Brinkman v. Jones, 44 Wis. 498; Britton's Appeal, 9 Wright, 172; Tuttle v. Jackson, 6 Wend. 213, 21 Am. Dec. 306; Williamson v. Brown, 15 N. Y. 354; Maupin v. Emmons, 47 Mo. 304; White v. Foster, 102 Mass. 375. And see Wyatt v. Barwell, 19 Ves. 435; Doe v. Allsop, 5 Barn. & Ald. 142; Hine v. Dodd, 3 Atk. 275; Janvrin v. Janvrin, 60 N. H. 169; Jolland v. Stainbridge, 3 Ves. 478; Brown v. Volkenning, 64 N. Y. 76; Dey v. Dunham, 2 Johns. Ch. 182; Bonner v. Stephens, 60 Tex. 616; Lawton v. Gordon, 37 Cal. 202; Jackson v. Van Valkenburg, 8 Cowen, 260; Tuttle v. Jackson, 6 Wend. 213, 21 Am. Dec. 306; Bergeron v. Richardott, 55 Wis. 129; Grimstone v. Carter, 3 Paige, 421, 24 Am. Dec. 230; Fleming v. Burgin, 2 Ired. Eq. 584; Crassen v. Swoveland, 22 Ind. 427; Wilson v. Hunter, 30 Ind. 466; Ellis v. Horrman, 90 N. Y. 466; Norcross v. Widgery, 2 Mass. 505; McMechan v. Griffing, 3 Pick. 149, 15 Am. Dec. 198; Truesdale v. Ford, 37 Ill. 210; U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; General Life Ins. Co. v. U. S. Ins. Co. 10 Md. 517, 69 Am. Dec. 174; Lamb v. Pierce, 113 Mass. 72; Clark v. Plumstead, 11 Ill. App. 57; Allen v. Holding, 29 Ga. 485; Wyatt v. Elam, 19 Ga. 335; Poulet v. Johnson, 25 Ga. 403; Allen v. Holden, 32 Ga. 418; Lee v. Cato, 27 Ga. 637, 73 Am. Dec. 746; Brown v. Wells, 44 Ga. 573; Downs v. Yonge, 17 Ga. 295; Virgin v. Wingfield, 54 Ga. 451; Seabrook v. Brady, 47 Ga. 650; Bryant v. Booze, 55 Ga. 438; Williams v. Adams, 43 Ga. 407; Wimbish v. Montgomery Mut. Building & Loan Assn., 69 Ala. 575; Helms v. May, 29 Ga. 121; Doe v. Roe, 25 Ga. 55; Reynolds v. Ruckman, 35 Mich. 80; Hommel v. Devinney, 39 Mich. 522; Fitzhugh v. Barnard, 12 Mich. 105; Munroe v. Eastman, 31 Mich. 283; Baker v. Mather, 25 Mich. 51; Hosley v. Holmes, 27 Mich. 416; Shotwell v. Harrison, 30 Mich. 179; Cain v. Cox, 23 W. Va. 594; Stetson v. Cook, 39 Mich. 750; Waldo v. Richmond, 40 Mich. 380; Case v. Erwin, 18 Mich. 434; Barnard v. Campau, 29 Mich. 162; Sigourney v. Munn, 7 Conn. 324; Wheaton v. Dyer, 15 Conn. 307; Bank of New Milford v. New Milford, 36 Conn. 94; Blatchley v. Osborn, 33 Conn. 226; Clark v. Fuller, 39 Conn. 238; Bush v. Golden, 17 Conn. 594; Hamilton v. Nutt, 34 Conn. 501; Kirkwood v. Koester, 11 Kan. 471; Jones v. Lapham, 15 Kan. 540; Setter v. Alvey 15 Kan. 157; Greer v. Higgins, 20 Conn. 430; Johnson v. Clark, 18 Conn. 157; Lyons v. Bodenhamer, 7 Conn. 455; School District v.

Whatever is notice enough to excite attention and put a party on guard and call for inquiry is notice of everything to which

Taylor, 19 Conn. 287; Dearing v. Watkins, 16 Ala. 20; Boyd v. Beck, 29 Ala. 703; Lambert v. Newman, 56 Ala. 623; Newsome v. Collins, 43 Ala. 656; Wyatt v. Stewart, 34 Ala. 716; Wallis v. Rhea, 10 Ala. 451; Corbett v. Clenny, 52 Ala. 480; Burch v. Carter, 44 Ala. 115; De Vandal v. Malone's Executors, 25 Ala. 272; Smith's Heirs v. Branch Bank, 21 Ala. 125; Dudley v. Witter, 46 Ala. 664; Ponder v. Scott, 44 Ala. 241; Johnson v. Thweatt, 18 Ala. 741; Campbell v. Roach, 45 Conn. 667; Hoole v. Attorney General, 22 Ala. 190; Lindsay v. Veasey, 62 Ala. 421; Bernstein v. Humes, 60 Ala. 582, 31 Am. Rep. 52; Chapman v. Holding, 60 Ala. 522; Fair v. Stevenot, 29 Cal. 486; Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172; Moss v. Atkinson, 44 Cal. 3; Jones v. Marks, 47 Cal. 242; O'Rourke v. O'Connor, 39 Cal. 442; Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167; Thompson v. Pioche, 44 Cal. 508; Ricks v. Doe, 2 Blackf. 346; Paul v. Connersville etc. R. R., 51 Ind. 527, 530; Wiseman v. Hutchinson, 20 Ind. 40; Croskey v. Chapman, 26 Ind. 333; Brose v. Doe, 2 Ind. 666; Kirkpatrick v. Caldwell's Administrators, 32 Ind. 299; Holman v. Patterson's Heirs, 29 Ark. 357; Stidham v. Mathews, 20 Ark. 650, 659; Follweiler v. Lutz, 102 Pa. St. 585; Haskell v. The State, 31 Ark. 91; Redden v. Miller, 95 Ill. 336; Erickson v. Rafferty, 79 Ill. 209; Frye v. Partridge, 82 Ill. 267; Shepardson v. Stevens, 71 Ill. 646; Ogden v. Haven, 24 Ill. 57; Chicago etc. R. R. v. Kennedy, 70 Ill. 350; Chicago v. Witt, 75 Ill. 211; Watson v. Phelps, 40 Iowa, 482; Jones v. Bamford, 21 Iowa, 217; Wilson v. Miller, 16 Iowa, 111; Smith v. Dunton, 42 Iowa, 48; Blanchard v. Ware, 43 Iowa, 530; Johnston v. Gwathmey, 4 Litt. 317, 14 Am. Dec. 135; Hopkins v. Garrard, 7 Mon. B. 312; Mueller v. Engeln, 12 Bush, 441; Honore v. Bakewell, 6 Mon. B. 67, 43 Am. Dec. 147; Thornton v. Knox, 6 Mon. B. 74; Hardin v. Harrington, 11 Bush, 367; Forepaugh v. Appold, 17 Mon. B. 631; Vanmeter v. McFaddin, 8 Mon. B. 442; Roberts v. Grace, 16 Minn. 126; Doughaday v. Paine, 6 Minn. 443; Ross v. Worthington, 11 Minn. 438, 88 Am. Dec. 95; Coy v. Coy, 15 Minn. 119; Rich v. Roberts, 48 Me. 548; Webster v. Maddox, 6 Me. 256; Hull v. Noble, 40 Me. 459, 480; Spofford v. Weston, 29 Me. 140; Butler v. Stevens, 26 Me. 484; Kent v. Plummer, 7 Me. 464; Goodwin v. Cloudman, 43 Me. 577; Merrill v. Ireland, 40 Me. 569; Porter v. Sevey, 43 Me. 519; Hanley v. Morse, 32 Me. 287; Smith v. Lambeths, 15 La. Ann. 566; Moore v. Jourdan, 14 La. Ann. 414; Swan v. Moore, 14 La. Ann. 833; Bell v. Haw, 8 Martin, N. S., 243; Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep. 355; Page v. Waring, 76 N. Y. 463; Gibert v. Peteler, 38 N. Y. 165, 97 Am. Dec. 785; Griffith v. Griffith, 1 Hoff. Ch. 135; Howard Ins. Co. v. Halsey, 8 N. Y. 271, 56 Am. Dec. 478; Murrell v. Watson, 1 Tenn. Ch. 342; Tharpe v. Dun-

such inquiry might lead. When a person has sufficient information to lead him to a fact he shall be deemed conversant of

lap, 4 Heisk. 674, 686; Mara v. Pierce, 9 Gray, 306; Pingree v. Coffin, 12 Gray, 288; Sibley v. Leffingwell, 8 Allen, 584; Parker v. Osgood, 3 Allen, 487; George v. Kent, 7 Allen, 16; Dooley v. Walcott, 4 Allen, 406; Connihan v. Thompson, 111 Mass. 270; Curtis v. Mundy, 3 Met. 405; Buttrick v. Holden, 13 Met. 355; Hennessey v. Andrews, 6 Cush. 170; Lawrance v. Stratton, 6 Cush. 163; Baynard v. Norris, 5 Gill, 483, 46 Am. Dec. 647; Green v. Early, 39 Md. 223; Johns v. Scott, 5 Md. 81; Winchester v. Baltimore etc. R. R., 4 Md. 231; Price v. McDonald, 1 Md. 403, 54 Am. Dec. 657; Wasson v. Connor, 54 Miss. 351; Buck v. Paine, 50 Miss. 648; Allen v. Poole, 54 Miss. 323; McLeod v. First Nat. Bank, 42 Miss. 99; Deacon v. Taylor, 53 Miss. 697; Avent v. McCorkle, 45 Miss. 221; Parker v. Foy, 43 Miss. 260, 55 Am. Rep. 484; Loughridge v. Bowland, 52 Miss. 546, 553; Gilson v. Boston, 11 Nev. 413; Grellett v. Heilshorn, 4 Nev. 526; Major v. Bukley, 51 Mo. 227, 231; Maupin v. Emmons, 47 Mo. 304; Digman v. McCollum, 47 Mo. 372, 375; Ridgway v. Holliday, 59 Mo. 444; Fellows v. Wise, 55 Mo. 413; Eck v. Hatcher, 58 Mo. 235; Rhodes v. Outcalt, 48 Mo. 367; Speck v. Riggin, 40 Mo. 405; Muldrow v. Robinson, 58 Mo. 331; Masterson v. West End etc. R. R., 5 Mo. App. 64; Roberts v. Moseley, 64 Mo. 507; Norton v. Meader, 8 Saw. 603; Hardy v. Harbin, 4 Saw. 536; Helms v. Chadbourne, 45 Wis. 60, 73; Hoppin v. Doty, 25 Wis. 573, 591; Hoxie v. Price, 31 Wis. 82; Gilbert v. Jess, 31 Wis. 110; Fallass v. Pierce, 30 Wis. 443; Brinkman v. Jones, 44 Wis. 498, 519; Ely v. Wilcox, 20 Wis. 523, 91 Am. Dec. 436; Willis v. Gay, 48 Tex. 463, 26 Am. Rep. 328; Rodgers v. Burchard 34 Tex. 441, 7 Am. Rep. 283; Littleton v. Giddings, 47 Tex. 109; Allen v. Root, 39 Tex. 589; Stafford v. Ballou, 17 Vt. 329; Brackett v. Wait, 6 Vt. 411; Blaisdell v. Stevens, 16 Vt. 179; Corliss v. Corliss, 8 Vt. 373; Cox v. Cox, 5 W. Va. 335; Martin v. Sale, 1 Bail. Eq. 1, 24; Wallace v. Craps, 3 Strob. 266; Cabiness v. Mahon, 2 McCord, 273; City Council v. Page, 1 Spear Eq. 159, 212; Vest v. Michie, 31 Gratt. 149, 31 Am. Rep. 722; Mundy v. Vawter, 3 Gratt. 518; Newman v. Chapman, 2 Rand. 93, 14 Am. Dec. 766; Wood v. Krebbs, 30 Gratt. 708; Long v. Weller's Executors, 29 Gratt. 347; Doswell v. Buchanan's Executors, 3 Leigh, 365, 23 Am. Dec. 280; McClure v. Thistle, 2 Gratt. 182; Stannis v. Nicholson, 2 Or. 332; Carter v. City of Portland, 4 Or. 339, 350; Colby v. Kenniston, 4 N. H. 262; Warner v. Swett, 31 N. H. 332; Bell v. Twilight, 22 N. H. 500; Rogers v. Jones, 8 N. H. 264; Hoit v. Russell, 56 N. H. 559; Brown v. Manter, 22 N. H. 468; Patten v. Moore, 32 N. H. 382; Harris v. Arnold, 1 R. I. 125; Tillinghast v. Champlin, 4 R. I. 173, 215, 67 Am. Dec. 510; McKenzie v. Perrill, 15 Ohio St. 162; Morris v. Daniels, 35 Ohio St. 406; Lahr's

it.[2] Courts have frequently doubted the wisdom of allowing the question of notice other than that furnished by the record

Appeal, 90 Pa. St. 507; Smith's Appeal, 11 Wright, 128; Speer v. Evans, 11 Wright, 141; Britton's Appeal, 9 Wright, 172; Butcher v. Yocum, 61 Pa. St. 168, 100 Am. Dec. 625; Parke v. Neeley, 90 Pa. St. 52; Nice's Appeal, 54 Pa. St. 200; Maul v. Rider, 59 Pa. St. 167; Cordova v. Hood, 17 Wall. 1, 21 L. ed. 587; Brush v. Ware, 15 Peters, 93, 10 L. ed. 672; Holmes v. Stout, 2 Stockt. Ch. 419; Smith v. Vreeland, 16 N. J. Eq. 199; Van Keuren v. Central R. R., 38 N. J. L. 165; Hoy v. Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687; Smallwood v. Lewin, 2 McCart. 60; Raritan Water Co. v. Veghte, 21 N. J. Eq. 463; Van Doren v. Robinson, 16 N. J. Eq. 256. See, also, Blackburn v. Perkins, 138 Ala. 305, 35 So. 250; Seawell v. Young, 77 Ark. 309, 91 S. W. 544; Price v. Bassett, 168 Mass. 598, 47 N. E. 243; Schwartz v. Woodruff, 132 Mich. 513, 93 N. W. 1067; Moore v. Moran, 64 Neb. 84, 89 N. W. 629; Kidder v. Flanders, 73 N. H. 345, 61 Atl. 675; Vallely v. First Nat. Bank, 14 N. D. 580, 5 L.R.A.(N.S.) 387, 106 N. W. 127; Beebe v. Wisconsin etc. Co., 117 Wis. 328, 93 N. W. 1103; Emmons v. Harding, 162 Ind. 154, 70 N. E. 142; Handy v. Rice, 98 Me. 504, 57 Atl. 847; E. B. Miller & Co. v. Olney, 69 Mich. 560, 37 N. W. 558; Sanford v. Lumber Co., 83 Miss. 478, 36 So. 10; Scott v. City of Marlin, 25 Tex. Civ. App. 353, 60 S. W. 969; Chesterman v. Bolling, 102 Va. 471, 46 S. E. 470; Cummins v. Beavers, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881; Reel v. Reel, 59 W. Va. 106, 52 S. E. 1023; Crossly v. Campian Min. Co., 1 Alaska, 391; Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433; Hunt v. Nance, 122 Ky. 274, 92 S. W. 6; Rollins v. Blackden, 99 Me. 21, 58 Atl. 69; Benn v. Pritchett, 163 Mo. 560, 63 S. W. 1103; Dennis v. Dennis, 119 Mich. 380, 78 N. W. 333; Ladmer v. Stewart, (Miss.) 38 So. 748; Wetzstein v. Largey, 27 Mont. 212, 70 Pac. 717; Masterson v. Harris, 37 Tex. Civ. App. 145, 83 S. W. 428; Weeks v. Hathaway, (Ind. App.) 90 N. E. 647; McCall v. McCall, 159 Mich. 144, 123 N. W. 550; Barney v. Chamberlain, 85 Neb. 785, 124 N. W. 482; Kinney v. McCall, 57 Wash. 545, 107 Pac. 385; Morrison v. Gosnell, 84 Neb. 275, 121 N. W. 236; Kollock v. Bennett, 53 Ore. 395, 100 Pac. 940; Parks v. Worthington, (Tex. Civ. App.) 104 S. W. 921. One having notice is bound thereby: White v. Lippincott, 86 Neb. 82, 124 N. W. 833; George v. Crim, 66 W. Va. 421, 66 S. E. 526; Griffin v. Franklin, 224 Mo. 667, 123 S. W. 1092; Haring v. Shelton, (Tex.) 122 S. W. 13; Lowry v. McDaniel, (Tex. Civ. App.) 124 S. W. 710; Schwoebel v. Storrie, (N. J. Eq.) 74 A. 969. That notice may be imputed as a result of statements of the vendor, see So. R. Co. v. Carroll, 86 S. C. 56, 67 S. E. 4.

[2] Wetzler v. Nichols, 53 Wash. 285, 101 Pac. 867, 132 Am. St. Rep. 1075; Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240. See, also, Dor-

to be litigated. The statutes providing for a system of registration would undoubtedly become more effective if all conveyances should take effect in the order in which they are filed for record, aside from any inquiry as to other notice. But the manifest injustice of allowing a subsequent purchaser, with full knowledge of another's rights, to gain a priority over him through the latter's negligence to record his deed, induced the courts, at an early day, to ingraft the equitable rule upon the law of registration, that such purchaser should not take advantage of his own fraud. He was viewed as a purchaser in bad faith, and his rights accordingly were considered as inferior to those of the prior purchaser. It perhaps would be useless to the reader to enter into a long history of the growth of the doctrine of notice, and it will be sufficient to say that it generally prevails. But North Carolina and Ohio are exceptions, and, in those States, the general rule of binding a subsequent purchaser or mortgagee with notice does not apply.[3] If a person has a bond for a deed, and has given notes for the purchase money, a purchaser who knows that one of the notes is unpaid, although he may take a deed from the original vendor as well as from the vendee, cannot protect himself against the note held by one who took it before the purchase.[4]

§ 726. **Forged deeds.**—As forged deeds cannot affect the title to land, and, therefore, are not entitled to record, the provision of the statute that deeds affecting the title to land shall be void as against subsequent purchasers and creditors without notice, if not recorded has no application to deeds

mitzer v. German etc. Ass'n, 23 Wash. 123, 62 Pac. 862; Bullock v. Wallace, 47 Wash. 690, 92 Pac. 675.

[3] Fleming v. Burgin, 2 Ired. Eq. 584; Robinson v. Willoughby, 70 N. C. 358; Legget v. Bullock, Busb. 283; Bercaw v. Cockerill, 20 Ohio St. 163; Stansell v. Roberts, 13 Ohio, 148, 42 Am. Dec. 193; Bloom v. Noggle, 4 Ohio St. 45; Mayham v. Coombs, 14 Ohio, 428; Collins v. Davis, 132 N. C. 106, 43 S. E. 579.

[4] Lytle v. Turner, 12 Lea (Tenn.) 641.

which are forged.[5] Where a person signs a deed under the belief that he is signing a duplicate copy of a lease, never intending to sign a deed, the deed is a forgery, and no title passes thereby.[6] The fact that a deed has been placed on record does not afford notice of any fraud that may have occurred in its execution.[7] It is immaterial what the good faith of the party claiming under a forged deed may be, as no person can be deprived of his property by a forged deed. There can be no rights of a *bona fide* purchaser "when the real owner of property stolen, or attempted to be stolen, from him has done nothing to lead the purchaser of it to buy it under the belief that it was not stolen. Reliance on a forged deed, recorded on an absolutely false certificate of acknowledgment, may bring loss upon him who so relies, but neither such deed nor such certificate appended to it can ever affect the owner of the property."[8] As succinctly said: "No man can be deprived of his property by a forged deed or mortgage, no matter what may be the *bona fides* of the party who claims under it."[9] Cir-

[5] Pry v. Pry, 109 Ill. 466.

[6] McGinn v. Tobey, 62 Mich. 252, 4 Am. St. Rep. 848.

[7] Martin v. Smith, 1 Dill. 98, 4 Nat. Bank Reg. 287; Godbold v. Lambert, 8 Rich. Eq. 155, 70 Am. Dec. 192. See, also, as to the effect of forged deeds, § 240, *ante*, and Haight v. Vallett, 89 Cal. 245, 23 Am. St. Rep. 465; Meley v. Collins, 41 Cal. 663, 10 Am. Rep. 279.

[8] Smith v. Markland, 223 Pa. 605, 72 Atl. 1047, 132 Am. St. Rep. 747. Notice of the forgery is immaterial as no one can acquire land by a forged deed: Gross v. Watts, 206 Mo. 373, 121 Am. St. Rep. 662.

[9] Reineman v. Moon, 12 Pitts. L. J. N. S. 167. See, also, Michener v. Cavender, 38 Pa. 334, 80 Am. Dec. 486, in which speaking of a forged mortgage the court said: "To call the mortgagee a *bona fide* purchaser, and to put her to proof that he knew she has been cheated, would be like making her right to reclaim stolen goods dependent on the receiver's knowledge of the felony. Suppose the mortgage was a forgery out and out, and Cavender chose to invest his money in a purchase of it, must it be enforced because he did not know he was buying a forged instrument? An instrument known to be forged would not be purchased, and would, therefore, be worthless to the forger. Counterfeit notes would never be issued if a herald went before to proclaim their spuriousness. But because they are taken without notice, do they become genuine?

cumstantial evidence may be sufficient to prove the forgery of a deed.[1]

§ 727. **Notice and knowledge.**—Though sometimes the terms "notice" and "knowledge" are used indiscriminately and interchangeably, there is a manifest distinction between them. A person may have notice of a thing without having any actual knowledge of it. If a person has sufficient information to put him upon inquiry, and he fails to prosecute that inquiry, and hence does not learn the true state of the title through his own negligence, or a desire not to learn it, he has *notice* of all he might have learned, had the prosecuted that inquiry. But he has not *knowledge* of such facts because he does not actually *know* them, but the law presumes that he does know them from the notice he has received. Knowledge means the actual acquaintance with a fact. Notice means information about a fact, which information, in its legal effect, is equivalent to knowledge of the fact, and to which the law attaches the same consequences as it would to knowledge. Notice has been defined as "Information given of some act done, or the interpellation by which some act is required to be done."[2] Mr. Pomeroy suggests as an acceptable definition, "Information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent in its

Is every bank and individual to redeem whatever obligations *bona fide* holders may obtain aganist them, without regard to the question whether the obligation was ever issued or not? To carry the doctrine of notice to such extent would subvert all law and justice."

[1] Horeston Oil Co. v. Kimball (Tex.) 122 S. W. 533.

[2] Bouv. Law Dict., Tit. Notice. That notice is equivalent to knowledge, see Strahorn-Hutton-Evans Commission v. Flavor, 7 Okl. 499, 54 Pac. 710. That they are not synonymous, see R. Co. v. Bunt, 131 Ala. 591, 32 So. 557; Clarke v. Ingram, 107 Ga. 565, 33 S. E. 802. "Actual notice" does not necessarily mean actual knowledge: Schnavely v. Bishop, 8 Kan. App. 301, 55 Pac. 667.

legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge," and adds: "It should be most carefully observed that the notice thus defined is not knowledge, nor does it assume that knowledge necessarily results. On the other hand, the information which constitutes the notice may be so full and minute as to produce complete knowledge." [3] In a case recently decided by the Supreme Court of Rhode Island it was held that "notice" is equivalent to "information," "intelligence" or "knowledge." The court decided, accordingly, that the mere fact that a person had received a letter, together with a copy of a lease, would not be sufficient, in and of itself, to charge him with actual knowledge of their contents.[4] The court in that case says: "The law prescribes the recording of a conveyance of title to real estate as the method of giving legal notice of the conveyance to all the world. If the claimant under such a conveyance chooses to neglect this method and attempts to give actual notice of his title to another person, he assumed the task of actually bringing this information to the apprehension of the person to be affected by it. The delivery of the notice in writing to a blind man or to one unable to read is not enough. The delivery of a letter may be ground of inference that the information was communicated, but this information may be rebutted by contrary evidence. The question was thus properly left to the jury whether, if the letters were received by the plaintiff, he acquired actual knowledge of its contents." [5]

[3] 2 Pomeroy's Eq. Jur. § 594. Whatever puts a purchaser on inquiry amounts in law to notice provided the inquiry becomes a duty and would lead to knowledge of the requisite fact by the exercise of ordinary diligence: Ohio etc. R. Co. v. Pa. Co., 222 Pa. 573, 72 Atl. 271. See, also, W. L. Moody & Co. v. Martin, (Tex. Civ. App.) 117 S. W. 1015; Pocahontas etc. Co. v. St. Lawrence etc Co., 63 W. Va. 685, 60 S. E. 890; Jennings v. Lentz, 50 Or. 483, 29 L.R.A.(N.S.) 584, 93 Pac. 327.

[4] Veva v. Norigian, 28 R. I. 319, 67 Atl. 327, 125 Am. St. Rep. 741.

[5] Per Douglas, C. J. See, also, in this connection: Prouty v. De-

§ 728. **Kinds of notice.**—It is difficult to divide notice into classifications to which objections cannot be found. Notice, however, may be classified as being of three kinds, actual, implied, and constructive. Under this classification actual notice signifies personal knowledge.[6] Implied notice is such as the law implies from the relations existing between the parties, as principal and agent, where notice to the principal is implied from notice to his agent.[7] Constructive notice is that which the law attributes to a person of things which he knows, or ought to know, or which, by using ordinary diligence, he might know.[8]

§ 729. **Rumors.**—Rumors of a vague and uncertain character not emanating from some person interested in the property will not affect a purchaser with notice of conflicting claims to the land.[9] "The general doctrine is, that whatever puts a party on inquiry, amounts, in judgment of law, to notice, provided the inquiry becomes a duty, as in case of pur-

vine, 118 Cal. 258, 50 Pac. 380; Cleveland Woolen Mills Co. v. Sibert, 81 Ala. 140, 1 So. 773.

[6] Story's Eq. Jur. § 399; Rogers v. Jones, 8 N. H. 264; Lamb v. Pierce, 113 Mass. 72; Baltimore v. Williams, 6 Md. 235; Williamson v. Brown, 15 N. Y. 354; Crassen v. Swoveland, 22 Ind. 427. And see, also, Smith v. Smith, 2 Cromp. & M. 231; Michigan Mut. L. Ins. Co. v. Conant, 40 Mich. 530; North Brit. Ins. Co. v. Hallett, 7 Jur. N. S. 1263; Vest v. Michie, 31 Gratt. 149, 31 Am. Rep. 722.

[7] See Josepthal v. Heyman, 2 Abb. N. C. 22; Hovey v. Blanchard, 13 N. H. 145; Fuller v. Bennett, 2 Hare, 394; Walker v. Schreiber, 47 Iowa, 529; Williamson v. Brown, 15 N. Y. 354; Bank of United States v. Davis, 2 Hill, 451.

[8] See Weilder v. Farmers' Bank of Lancaster, 11 Serg. & R. 134; Hewitt v. Loosemore, 9 Hare, 449; Plumb v. Fluitt, 2 Anstr. 432; Kennedy v. Green, 3 Mylne & K. 699; Griffith v. Griffith, Hoff. Ch. 153.

[9] Hall v. Livingston, 3 Del. Ch. 348; Butler v. Stevens, 26 Me. 484; Jolland v. Stainbridge, 3 Ves. 478; Hottenstein v. Lerch, 104 Pa. St. 454; Parkhurst v. Hosford (U. S. Cir. Ct. Or.), 4 West C. Rep. 311; Jacques v. Weeks, 7 Watts, 261; Woodworth v. Paige, 5 Ohio St. 70; Shepard v. Shepard, 36 Mich. 173; Wilson v. McCullough, 23 Pa. St. 440, 62 Am. Dec. 347; Doyle v. Teas, 4 Scam. 202; Lamont v. Stimson, 5 Wis. 443.

chasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. Notice of a deed is notice of its contents; and notice to an agent is notice to his principal. But notice of a rumor of a conveyance or encumbrance seems not to be considered as either actual or implied notice. Indeed, to set on foot an inquiry into the foundation of mere rumors would, in most cases, be a vain and impracticable pursuit. *Lex neminem cogit ad vana seu impossibilia.*"[1] The fact that a purchaser applies to a stranger for information as to the value of the land, and the latter, in the course of conversation which resulted from the inquiries made relative to the expediency of making the purchase at the price named, informs the purchaser that he does not know that there is any equitable title to the land, but heard a person say that he intended to prosecute a claim further, and thought he should get the land, is not sufficient to charge the purchaser with notice. This information is nothing but mere rumor.[2] The notice must be so clear that the purchaser cannot take and hold the property without fraud.[3]

§ 730. **Same subject continued—Illustrations.**—A purchaser is not charged with notice of the existence of an adverse unrecorded deed to a piece of land by the mere fact that

[1] Jacques v. Weeks, 7 Watts, 261, 267, per Sergeant, J.

[2] Lamont v. Stimson, 5 Wis. 443. Reputed ownership in the neighborhood of land by parties claiming under a prior unrecorded deed cannot be regarded as notice to subsequent grantees not living in the neighborhood: Hopkins v. O'Brien, 57 Fla. 444, 49 So. 936.

[3] Hall v. Livingston, 3 Del. Ch. 348. In this case, where a grantee held under an absolute deed, it was held that to affect a *bona fide* purchaser from him with knowledge of a secret trust, that it requires a more definite notice than a remark by a party in interest "he understood the grantee had taken the land for seven years to pay off the grantor's debts," and a question "if he knew whose land he was trading for." See, also, Shepard v. Shepard, 36 Mich. 173; Wailes v. Cooper, 24 Miss. 208; Hawley v. Bullock, 29 Tex. 222; Martel v. Somers, 26 Tex. 551; Wethered v. Boon, 17 Tex. 143; Bugbee's Ap-

he, sometime before his purchase, had an interview with his grantor, who told him that he was not able at that time to make a good title, but in a brief time would be.[4] Nor is payment of taxes by the grantee in an unrecorded deed of itself notice to a subsequent purchaser of his claim of title.[5] "While it is difficult to lay down a general rule as to what facts would, in every case, be sufficient to charge a party with notice or put him upon inquiry, yet it is safe to say, that the information received ought to be of that character that a prudent person, by the exercise of reasonable and ordinary diligence, could, upon inquiry and investigation, arrive at the fact that a prior conveyance had been made."[6] Speaking of the statute of Pennsylvania, Sharswood, J., says: "We are bound to apply to the interpretation of this statute that principle in regard to constructive notice which has been so long and well settled—that whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, as in case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. Even a general rumor of a conveyance would not have been enough to have made it the duty of the plaintiff to search the record. Notice of such a rumor is not considered as either actual or implied notice. Indeed, to set on foot an inquiry into the foundation of mere rumors, would in most cases be a vain and impracticable pursuit. There must be some act, some declaration from an authentic source—which a person would be careless if he disregarded—which is necessary to put a party on inquiry, and call for the exercise

peal, 110 Pa. St. 331; Lambert v. Newman, 56 Ala. 623; Ratteree v. Conley, 74 Ga. 153.

[4] The City of Chicago v. Witt, 75 Ill. 211.

[5] Shelden v. Powell, 31 Mont. 249, 781, 78 Pac. 491, 107 Am. St. Rep. 429.

[6] The City of Chicago v. Witt, *supra*, per Mr. Justice Craig. And see Sicher v. Rambousek, 193 Mo. 113, 91 S. W. 68; Rankin Mfg. Co. v. Bishop, 137 Ala. 271, 34 So. 991; McAlpine v. Resch, 82 Minn. 523, 85 N. W. 545.

of reasonable diligence."[7] When an absolute deed contains a recital that the purchase money has been paid, the grantor, when seeking to enforce as against a sub-purchaser for a valuable consideration, a lien on the land for the unpaid purchase money, has the burden of proving that such sub-purchaser had notice. And the positive testimony of the sub-purchaser himself denying notice, cannot be overcome by proof of conversations or declarations, repeated after an interval of fourteen or fifteen years, and not appearing to have been connected with any circumstances apt to impress them on the memory.[8]

§ 731. **Partnership property.**—If, under separate deeds of different dates and from different grantors, two persons hold undivided interests in the same piece of land, a party who deals in good faith with one of them with respect to his interest, is not charged with notice of the character of the property as partnership property from the knowledge merely that the owners are partners, and use the premises for the purposes of the partnership, where the records contain nothing indicating a partnership holding. "The record ought generally to be the guide on which parties may safely rely in dealing with the titles which appear there," said Mr. Chief Justice Cooley, "and they should not be held chargeable with notice of equities controlling the title on facts which are ambiguous. Real estate held by partners may or may not be partnership property, but usually it is not so unless

[7] Maul v. Rider, 59 Pa. St. 167, 171.

[8] Lambert v. Newman, 56 Ala. 623. See, also, as to the insufficiency of mere rumor to charge a purchaser with notice, Loughbridge v. Bowland, 52 Miss. 546; Miller v. Cresson, 5 Watts & S. 284; Butler v. Stevens, 26 Me. 484; Parker v. Foy, 43 Miss. 260, 55 Am. Rep. 484; Wailes v. Cooper, 24 Miss. 208; Epley v. Witherow, 7 Watts, 163; Hood v. Fahnestock, 1 Barr. 470, 44 Am. Dec. 147; Wilson v. McCullough, 23 Pa. St. 440, 62 Am. Dec. 347; Churcher v. Guernsey, 3 Wright, 84.

partnership assets have been used to purchase it, or unless it was put in originally as a part of the joint estate. But generally the fact that two or more persons make use of property in which their interests are apparently several, for partnership purposes, is very far from indicating an understanding that others would be found to take notice. The several interests still remain several, and each may deal with his own as he will, and any private arrangement that would change this could not bind third parties who had acted in ignorance of it."[9] But where the lands are bought by the firm, and title taken in the firm name, a purchaser from one of the partners is chargeable with notice of the rights of the others.[1]

§ 731a. **Information imparted to purchaser that title is in one partner.**—Likewise if the title stands on record in the names of two persons, and the purchaser is informed prior to the completion of the purchase that a claim is made to the whole of the land by one of such persons or his grantee, the title is taken subject to this claim, and may be defeated by showing that the land had been acquired by the owners of record as partners, and on a settlement of their partnership affairs it had been awarded to one of them.[2] On the same principle, a purchaser of land may be charged with notice of the existence of a vendor's lien on land if he knows, at the time of his purchase, that a part of the consideration still remained unpaid. Information of this character will impose upon him the duty of inquiring, and he will be charged, in accordance with the rules of notice, with what he might with reasonable diligence have ascertained.[3]

[9] Reynolds v. Ruckman, 35 Mich. 80, 81.

[1] Brewer v. Browne, 68 Ala. 210.

[2] Murrell v. Mandelbaum, 85 Tex. 22, 34 Am. St. Rep. 777.

[3] Woodall v. Kelly, 85 Ala. 368, 7 Am. St. Rep. 57.

§ 732. **Information must be from credible source.**— To bind a subsequent purchaser, the notice must come from some person interested in the property,[4] or from some source entitled to credit.[5] Thus, where a widow had the legal title to a piece of real estate, and a party intending to purchase was informed by the grandfather of the minor children of the widow that the equitable title had been in the deceased husband, and was then in his heirs, it was held that the grandfather was a proper person to give notice, and that the notice so communicated would affect such party if he subsequently purchased.[6] So a person is bound by notice derived from an uncle of a female in a state of idiocy.[7] "It is exceedingly difficult," says Putman, J., "if not impossible, to define beforehand what information shall or shall not be sufficient. But if it were given by those persons who (as in the case at bar) knew the party, and much of his transactions, and who spake not vaguely, especially if the party himself, who was to be affected by the notice, was so well satisfied of its truth as again and again to state or acknowledge the fact, it must be sufficient. No honest man after such notice could undertake, or, if he did, should be permitted, to acquire title to the land, which from information given on certain knowledge he believed had been conveyed. We think the notice should be so express and satisfactory to the party, as that it would be a fraud in him sub-

[4] Van Duyne v. Vreeland, 12 N. J. Eq. 142; Peebles v. Reading, 8 Serg. & R. 484; Rogers v. Hoskins, 14 Ga. 166; Lamont v. Stimson, 5 Wis. 443; Barnhart v. Greenshields, 9 Moore P. C. C. 18, 36; Natal Land Co. v. Good, 2 Law R. P. C. 121; Parkhurst v. Hosford, 21 Fed. Rep. 827.

[5] Curtis v. Mundy, 3 Met. 405; Mulliken v. Graham, 72 Pa. St. 484.

[6] Butcher v. Yocum, 61 Pa. St. 168, 100 Am. Dec. 625.

[7] Ripple v. Ripple, 1 Rawle, 386. Said Gibbon, C. J.: "Now, although a purchaser may disregard rumors set afloat by those who have no right to intermeddle, he is bound to attend to the admonitions of a party in interest. Here the daughters, although actually charged to the township, had an interest of their own, from attending to which they were disabled by idiocy; and surely one so near in blood as an uncle might lawfully interpose for their protection."

sequently to purchase, attach, or levy upon the land, to the prejudice of the first grantee." [8]

§ 733. **Inadequacy of price.**—The price for which the land may be offered for sale may be so small that a purchaser must know that it is intended to sacrifice somebody's rights, and he may accordingly be held to be put upon the strictest inquiry. "It is not necessary, in order to charge a purchaser with bad faith, that he should have definite knowledge or notice of the exact character and condition of the right which he attempts to defeat. If the circumstances are such as to inform him loudly that some wrong is about to be perpetrated, he cannot blindly shut his eyes, and then come into court in the character of a *bona fide* purchaser." [9] The circumstances that one knowing that a parcel of land was worth between two thousand and three thousand dollars, purchased it for one hundred dollars, and knowing also that although the title of his grantor was acquired several years previously, the original owner still continued to reside upon the land, are sufficient to put such purchaser upon the strictest inquiry as to the rights of other parties.[1] Still, as it is unnecessary to set out the full price paid for the land, it does not follow because a price less than the actual value of the land is stated in the deed as the consideration, that this is, of itself, a suspicious circumstance requiring a purchaser to take notice of it.[8]

[8] In Curtis v. Mundy, 3 Met. 405, 407.

[9] Hoppin v. Doty, 25 Wis. 573, 591, per Paine, J.; Peabody v. Finton, 3 Barb. Ch. 451; Eck v. Hatcher, 58 Mo. 235. See, also, Hoyt v. Hoyt, 8 Bosw. 511; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Interstate etc. Co. v. Bailey, 29 Ky. L. Rep. 468, 93 S. W. 578; Morris v. Wicks, 81 Kan. 790, 26 L.R.A.(N.S.) 681, 106 Pac. 1048.

[1] Hoppin v. Doty, 25 Wis. 573. But see Beadles v. Miller, 9 Bush, 405. See, also, Conway v. Rock, 139 Ga. 162, 117 N. W. 273; Wis. etc. Co. v. Selover, 135 Wis. 594, 16 L.R.A.(N.S.) 1073, 116 N. W. 265.

[8] Stewart's Appeal, 98 Pa. St. 377.

§ 734. Statement from holder of adverse title.—If a person about to purchase a piece of property from one assuming to act as owner is informed by a third party that the latter possesses, or claims to possess, some adverse title or interest in the property, this statement is sufficient to affect such intending purchaser with notice. Thus, if A has an unrecorded deed for certain land, and B hears A say that he has title to the land, B has sufficient notice of A's title to put him on further inquiry, and, if B afterward purchases the land from another without making such inquiry, he is held to have purchased with notice of A's title.[3] If there is an equitable encumbrance upon a piece of land, and the owner sells it, and informs the purchaser that no such encumbrance exists, yet, if the purchaser, at the time of making the purchase, had knowledge of the facts by which the equitable encumbrance was created, he takes the land subject to the charge, notwithstanding that he has paid all that the land was worth, and had searched the record title, and found it clear, and took his deed in the belief that in neither law nor equity could such an encumbrance be enforced.[4] The fact that a party has notice of an owner's intention to execute a deed is not sufficient to show that he has notice of the contents of the deed as executed.[5] Land was owned in common by three parties, who may be designated as A, B, and C. A portion of the land was charged as against them with an equitable encumbrance, which did not appear of record. D purchased without notice, in good faith, and for full value, the undivided interest of A. Subsequently B conveyed his undivided interest to E, who purchased for full value, but with notice of the encumbrance.

[3] Bartlett v. Glasscock, 4 Mo. 62. Where a man gave a mortgage on land after having invested his wife with full title thereto, said mortgage is void but purchasers from the wife take it free of the mortgage although they have notice of it where they buy with no intention of paying off the mortgage: Christopher v. Ferris, 55 Wash. 534, 104 Pac. 818.

[4] Blatchley v. Osborn, 33 Conn. 226.

[5] Ponder v. Scott, 44 Ala. 241.

An amicable and equal partition of the land was afterward made between C, D, and E, D being still ignorant of the encumbrance. The part assigned to E, under the exchange of deeds, included the whole of the portion that was encumbered. This portion was estimated at its full value, and no allowance was made for the encumbrance. A bill in equity was brought against E for the purpose of establishing the encumbrance, and it was held that he could not avail himself of the want of notice on the part of D, to afford protection to the title to the part which he then owned in severalty.[6]

§ 735. **Information given by recorder.**—If the recorder tells a person who is about to purchase property that the seller has already given a deed to another person which had been deposited for record, but had been withdrawn before it was actually recorded, this information is sufficient to put such purchaser upon inquiry. "The rules in respect to notice to purchasers," said Rhodes, J., "of adverse titles or claims, other than such as is imparted by the records, are not founded upon any arbitrary provisions of law, but have their origin in the considerations of prudence and honesty which guide men in their ordinary business transactions. No man, on being told by the recorder that a certain deed had been filed in his office, and that it had been withdrawn, would doubt that the deed existed; and if he was intending to purchase the property, common prudence would dictate to him the necessity of making inquiry of the grantee for the deed, unless he was incorrectly advised that deeds took precedence solely from priority of record."[7] A purchaser who has knowledge of an er-

[6] Blatchley v. Osborn, 33 Conn. 226. See, also, Epley v. Witherow, 7 Watts, 163; Barnes v. McClinton, 3 Pen. & W. 67, 23 Am. Dec. 62; Nelson v. Sims, 23 Miss. 383, 57 Am. Dec. 144; Jacques v. Weeks, 7 Watts, 261; Russell v. Petree, 10 Mon. B. 184; Hudson v. Warner, 2 Har. & G. 415; Price v. McDonald, 1 Md. 403, 54 Am. Dec. 657.

[7] Lawton v. Gordon, 37 Cal. 202, 207.

ror in the description of mortgaged property, or is able from his knowledge of the property to interpret the record, giving it the meaning intended, becomes a purchaser with notice.[8]

§ 736. **Time of payment of consideration.**—If the notice has been given to the intending purchaser before he has paid any part of the consideration, there is no doubt that he thus becomes a purchaser with notice, and if he sees proper to pay the money, he acquires a title subject to the rights of whose existence he had notice.[9] But where a part payment has been made at the time of receiving notice, there is a difference of opinion. It is held in England that if notice is given before the whole of the consideration has been paid, the party is charged with notice.[1] In this country the authori-

[8] Carter v. Hawkins, 62 Tex. 393.

[9] Hardingham v. Nicholls, 3 Atk. 304; Kitteridge v. Chapman, 36 Iowa, 348; Price v. McDonald, 1 Md. 403, 54 Am. Dec. 657; Wood v. Mann, 1 Sum. 506; Baldwin v. Sager, 70 Ill. 503; Maitland v. Wilson, 3 Atk. 814; English v. Waples, 13 Iowa, 57; Penfield v. Dunbar, 64 Barb. 239; Flagg v. Mann, 2 Sum. 486; Palmer v. Williams, 24 Mich. 338. See Farmers' Loan Co. v. Maltby, 8 Paige, 361; Blanchard v. Tyler, 12 Mich. 339, 86 Am. Dec. 57; Murray v. Ballou, 1 Johns. Ch. 566; Keys v. Test, 33 Ill. 316; Bennett v. Titherington, 6 Bush, 192; Haughwout v. Murphy, 21 N. J. Eq. (6 Green, C. E.) 118; Wells v. Morrow, 38 Ala. 125; More v. Mahow, 1 Cas. Ch. 34; Story v. Lord Windsor, 2 Atk. 630; Tildesley v. Lodge, 3 Smale & G. 543; Moshier v. Knox College, 32 Ill. 155; Boone v. Chiles, 10 Peters, 209, 9 L. ed. 399; Wormley v. Wormley, 8 Wheat. 429, 5 L. ed. 653; Jones v. Stanley, 2 Eq. Cas. Abr. 685; Union Canal Co. v. Young, 1 Whart. 410, 30 Am. Dec. 212; Wilson v. Hunter, 30 Ind. 466; Patten v. Moore, 32 N. H. 382; Collinson v. Lister, 7 De Gex, M. & G. 634, 20 Beav. 356; Tourville v. Naish, 3 P. Wms. 306; Rayne v. Baker, 1 Giff. 241; Brown v. Welch, 18 Ill. 343, 68 Am. Dec. 549; Wigg v. Wigg, 1 Atk. 382; Schultze v. Houfes, 96 Ill. 335. See, also, Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463; Stone v. Ga. etc. Trust Co., 107 Ga. 524, 33 S. E. 861; Trice v. Comstock, 61 L.R.A. 176, 121 Fed. 620, 57 C. C. A. 646; Steele v. Robertson, 75 Ark. 228, 87 S. W. 117; Mackey v. Bowles, 98 Ga. 730, 25 S. E. 834; Lain v. Morton, 23 Ky. L. Rep. 438, 63 S. W. 286; Cline v. Osborne, (Ky.) 63 S. W. 1083; Edwards v. R. Co., 82 Mo. App. 96; Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310.

[1] Tildesly v. Lodge, 3 Smale &

ties are divided. On the one hand, it is held that where payment has been made, but notice has been given before the delivery of the deed, the purchaser is affected with notice.[2] But on the other hand, it is held that the payment of the purchase money before the receipt of notice is sufficient to allow the purchaser to claim protection as a *bona fide* purchaser.[3] If a person taking a mortgage had a previous notice of a pre-existing lien upon the land, the fact that he has forgotten it at the time he took the mortgage will not be sufficient to free him from the consequences of such notice.[4]

§ 737. Intimate relationship or business connections. —As a question of evidence whether a person had notice, much attention has sometimes been paid to the circumstance that there was a close relationship or personal intimacy between the grantee and grantor. Thus, a person appointed an agent to purchase a piece of land, and gave him some money to pay on account. The agent's son subsequently bought the land with the knowledge of the father, and received

G. 543; Jones v. Stanley, 2 Eq. Cas. Abr. 685; Sharpe v. Foy, Law R. 4 Ch. 35; Rayne v. Baker, 1 Giff. 241; Story v. Lord Windsor, 2 Atk. 630; More v. Mahow, 1 Cas. Ch. 34; Wigg v. Wigg, 1 Atk. 382; Tourville v. Naish, 3 P. Wms. 307; Cotlinson v. Lister, 7 De Gex, M. & G. 684, 20 Beav. 356.

[2] Osborn v. Carr, 12 Conn. 195; Doswell v. Buchanan, 3 Leigh, 394, 23 Am. Dec. 280; Fash v. Ravesies, 32 Ala. 451; Duncan v. Johnson, 13 Ark. 190; Blight v. Banks, 6 Mon. 192, 17 Am. Dec. 136; Peabody v. Fenton, 3 Barb. Ch. 451; Simms v. Richardson, 2 Litt. 274; Grimstone v. Carter, 3 Paige, 421, 24 Am. Dec. 230; Blair v. Owles, 1 Munf. 38; Moore v. Clay, 7 Ala. 742; Wells v. Morrow, 38 Ala. 125; Bennett v. Titherington, 6 Bush, 192; Pillow v. Shannon, 3 Yerg. 508; Halstead v. Bank of Ken-Morris v. Meek, 57 Tex. 385.

[3] Leach v. Ansbacher, 55 Pa. St. 85; Carroll v. Johnson, 2 Jones Eq. 120; Gibler v. Trimble, 14 Ohio, 323; Baggarly v. Gaither, 2 Jones Eq. 80; Mut. etc. Society v. Stone, 3 Leigh, 218. See on the general subject, Baldwin v. Sager, 70 Ill. 503; Wormley v. Wormley, 8 Wheat. 421, 5 L. ed. 651, Wheaton v. Dyer, 15 Conn. 307; Zollman v. Moore, 21 Gratt. 313; Phelps v. Morrison, 24 N. J. Eq. 195. See Morris v. Meek, 57 Tex. 385.

[4] Hunt v. Clark's Administrator, 6 Dana, 56.

a deed for it. The principal brought an action in ejectment for the land against the father and the son. The court held that it was not error to charge the jury that the knowledge by the son of the trust might be inferred from the relation of father and son existing between the defendants, and from their transactions as to the contract between the principal and the father, and the other circumstances of the case.[5] It is unnecessary to say that a *bona fide* purchaser for value of the real estate of a partnership, the legal title to which is vested in the copartners, or in one of them for the firm, will, if he possesses no notice of the equitable rights of others in it as a part of the copartnership funds, be protected upon the ground of his own equities as such purchaser. But where a person buys the undivided half of a planing-mill and other property from a surviving partner of a firm of housewrights, knowing that the mill was built with money belonging to the copartnership, and knowing that the dissolving firm, if not insolvent, was greatly in debt, and that the surviving partner had paid none of its debts, and where the deed was taken, and the money paid secretly, the vendor absconding with it on the same night, the purchaser, notwithstanding that no proof can be adduced of his actual participation in the acts of his vendor, may be held to be affected by these circumstances with constructive notice of the breach of trust intended by the partner from whom he received his deed.[6] A person took a deed to land in his own name alone, but purchased it with money belonging jointly to himself, his mother, brother, and sister. To one of his individual creditors he subsequently made an offer to pay him by a sale or lease of the land, or to secure him by

[5] Trefts v. King, 18 Pa. St. 157. Said Coulter, J.: "The judge told the jury that they ought to consider the relation of the parties being father and son, and their transactions in relation to the contract, and all the other evidence in the cause. This instruction was right. In regard to such transactions it is impossible to shut our eyes to the relations of the parties."

[6] Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510.

a mortgage upon it. The creditor took a mortgage, and said afterward to a third person that he preferred a mortgage for the reason that he feared that the title was not clear, and that other parties might claim some right to the land. The creditor was on intimate terms with the grantor, and his mother, brother, and sister, and there was nothing to show that any other person asserted any claim to the premises. The court held that notice on the part of the creditor of the rights of the mother, sister, and brother of the grantor, at the time he took the mortgage, was sufficiently shown by these and similar facts, and that his mortgage should be made subject to their equities.[7] But in all these cases the fact of relationship or intimacy has been connected with others, from all of which, taken together, the court drew the inference of notice. Notice, however, would not reasonably be inferred from the existence of close relationship or intimate acquaintance unconnected with other circumstances.[8]

§ 738. **Notice of a trust.**—If a person has notice of a trust and purchases the trust property from the trustee, he will hold the property thus acquired subject to the same trust as that under which the trustee held it.[9] But if the purchaser

[7] Spurlock v. Sullivan, 36 Tex. 511. See, also, Hoxie v. Carr, 1 Sum. 173, 192; Flagg v. Mann, 2 Sum. 487.

[8] Dubois v. Barker, 4 Hun, 80, 86.

[9] Le Neve v. Le Neve, Amb. 436; Liggett v. Wall, 2 Marsh. A. K. 149; Bailey v. Wilson, 1 Dev. & B. Eq. 182; Peebles v. Reading, 8 Serg. & R. 495; West v. Fitz, 109 Ill. 425; Murray v. Ballou, 1 Johns. Ch. 566; Wright v. Dame, 22 Pick. 55; Jones v. Shaddock, 41 Ala. 362; Wilkins v. Anderson, 1 Jones, 399; James v. Cowing, 17 Hun, 256; Reed v. Dickey, 2 Watts, 459; Smith v. Walter, 49 Mo. 250; Clarke v. Hackerthorn, 3 Yeates, 269; Ryan v. Doyle, 31 Iowa, 53; Caldwell v. Carrington, 9 Peters, 86; Wormley v. Wormley, 8 Wheat. 421, 5 L. ed. 651; Pugh v. Bell, 1 Marsh. J. J. 403; Cary v. Eyre, 1 De Gex, J. & S. 149; Case v. James, 29 Beav. 512; Potter v. Sanders, 6 Hare, 1; Kennedy v. Daly, 1 Schoales & L. 355; Crofton v. Ormsby, 2 Schoales & L. 583; Wigg v. Wigg, 1 Atk. 383; Adair v. Shaw, 1 Schoales & L. 262; Mackreth v. Symmons, 19 Ves. 367;

has neither actual nor constructive notice of the trust, and acquires the title for a valuable consideration, he will hold the property freed from the trust.[1] Where the purchaser obtains his deed with notice of the trust, he cannot, by buying in other interests, defeat the interest of the *cestui que trust*.[2] Notice

Benzien v. Lenoir, 1 Car. Law Rep. 504; Taylor v. Stibbert, 2 Ves. Jr. 437; Ferras v. Cherry, 2 Vern. 384; Daniels v. Davidson, 16 Ves. Sr. 249; Brooke v. Bulkely, 2 Ves. Sr. 498; Grant v. Mills, 2 Ves. & B. 306; Mead v. Orrery, 3 Atk. 238; Birch v. Ellames, 2 Anstr. 427; Saunders v. Behew, 2 Vern. 371; Dunbar v. Tredennick, 2 Ball & B. 319; Jennings v. Moore, 2 Vern. 609, 2 Brown Parl. C. 278; Mansell v. Mansell, 2 P. Wms. 681; Phayre v. Peree, 3 Dow, 129; Oliver v. Piatt, 3 How. 333, 11 L. ed. 622; Massey v. McIlwaine, 2 Hill Eq. 426.

[1] See for various instances, Trull v. Bigelow, 16 Mass. 406, 8 Am. Dec. 144; Dana v. Newhall, 13 Mass. 498; Connecticut v. Bradish, 14 Mass. 296; Boynton v. Rees, 8 Pick. 329, 19 Am. Dec. 326; Learned v. Tritch, 6 Colo. 432; Colesbury v. Bart, 58 Ala. 573; Brackett v. Miller, 4 Watts & S. 102; Lacy v. Wilson, 4 Munf. 413; Dixon v. Caldwell, 15 Ohio St. 412, 86 Am. Dec. 487; High v. Batte, 10 Yerg. 335; Blight v. Banks, 6 Mon. 198, 17 Am. Dec. 136; Alexander v. Pendleton, 8 Cranch, 462, 3 L. ed. 624; Dillaye v. Commercial Bank, 51 N. Y. 345; Hamilton v. Mound City Mutual L. Ins. Co., 3 Tenn. Ch. 124; Tompkins v. Powell, 6 Leigh, 576; Owings v. Mason, 2 Marsh. A. K. 380; Goodtitle v. Cummings, 8 Blackf. 179; Heilner v. Imbrie, 6 Serg. & R. 401; Brown v. Budd, 2 Cart. 442; Bumpus v. Platner, 1 Johns. Ch. 213; Curtis v. Lanier, 6 Munf. 42; Griffith v. Griffith, 9 Paige, 315; Maywood v. Lubcock, 1 Bail. Eq. 382; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Boone v. Chiles, 10 Peters, 177, 9 L. ed. 388; Varick v. Briggs, 6 Paige, 325; Siddon v. Charnells, Bunb. 298; Willoughby v. Willoughby, 1 Term. Rep. 765; Charlton v. Low, 3 P. Wims. 328; Harcourt v. Knowell, 2 Vern. 159; Goleborn v. Alcock, 2 Sim. 552; Blake v. Hungerford, Prec. Ch. 158; Shine v. Gough, 1 Ball & B. 536; Jerrard v. Saunders, 2 Ves. Jr. 457; Sanders v. Deligne, Freem. 123; Jones v. Powles, 3 Mylne & K. 581; Walwyn v. Lee, 9 Ves. 24; Hughson v. Mandeville, 4 Desaus. Eq. 87; Watson v. Le Roy, 6 Barb. 485; Demarest v. Wynkoop, 3 Johns. Ch. 147, 8 Am. Dec. 467; Howell v. Ashmore, 1 Stockt. Ch. 82, 57 Am. Dec. 371; Mundine v. Pitts, 14 Ala. 84; Woodruff v. Cook, 1 Gill & J. 270; Whittick v. Kane, 1 Paige, 202; Halstead v. Bank of Kentucky, 4 Marsh. J. J. 554; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Vattier v. Hinde, 7 Peters, 252, 8 L. ed. 675; Holmes v. Stout, 3 Green Ch. 492.

[2] Brooke v. Bulkely, 2 Ves. Sr. 498; Kennedy v. Daly, 1 Schoales

of the trust to the agent while engaged in the transaction is notice to the principal.[3] A person who secures a deed by fraud becomes a trustee, and if another take a deed from him with full knowledge of the fraud, such second grantee will hold the property as a trustee.[4] A deed made on a good, as distinguished from a valuable, consideration, will not be sufficient to bar the title of the *cestui que trust*.[5] To enable the purchaser to claim protection as a *bona fide* purchaser without notice of the trust, the money must have been paid before he received notice.[6] Where a deed made to a person as a

& L. 37; Maloney v. Kernan, 2 Dru. & Walsh, 31; Bovey v. Smith, 1 Vern. 145.

[3] Hood v. Fahnestock, 8 Watts, 489, 34 Am. Dec. 489; Bank of United States v. Davis, 2 Hill, 451; Aster v. Wells, 4 Wheat. 466; Jackson v. Winslow, 9 Cowen, 13; Hovey v. Blanchard, 13 N. H. 145; Jackson v. Leak, 19 Wend. 339; Winchester v. Baltimore R. R. Co., 4 Md. 231; Griffith v. Griffith, 9 Paige, 315; Jackson v. Sharp, 9 Johns. 163, 6 Am. Dec. 267; Barnes v. McChristie, 3 Pa. 67; Bracken v. Miller, 4 Watts & S. 108; Fuller v. Bennett, 2 Hare, 394; Worsley v. Scarborough, 3 Atk. 392; Preston v. Tubbin, 1 Vern. 286; Tunstall v. Trappes, 3 Sim. 301; Espin v. Pemberton, 3 De Gex & J. 547; Maddox v. Maddox, 1 Ves. 61; Ashley v. Baillie, 2 Ves. Sr. 368; Tylee v. Webb, 6 Beav. 552; Finch v. Shaw, 19 Beav. 500; Warwick v. Warwick, 3 Atk. 291; Mountford v. Scott, 3 Madd. 34; Howard Ins. Co. v. Halsey, 4 Seld. 271, 59 Am. Dec. 478; Blair v. Owles, 1 Munf. 38; Westerwelt v. Hoff, 2 Sand. 98; Newstead v. Searles, 1 Atk. 265; Brotherton v. Hiett, 2 Vern. 574.

[4] Smith v. Bowen, 35 N. Y. 83; Sadler's Appeal, 87 Pa. St. 154; Lyons v. Bodenhamer, 7 Kan. 455; Saunders v. Dehew, 2 Vern. 271; Pye v. George, 1 P. Wms. 128.

[5] Boone v. Baines, 23 Miss. 136; Patten v. Moore, 32 N. H. 382; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314; Swan v. Ligan, 1 McCord Ch. 232; Upshaw v. Hargrove, 6 Smedes & M. 292; Frost v. Beekman, 1 Johns. Ch. 288.

[6] Warner v. Whittaker, 6 Mich. 133, 72 Am. Dec. 65; Dugan v. Vattier, 3 Blackf. 245, 25 Am. Dec. 105; Christie v. Bishop, 1 Barb. Ch. 105; Blanchard v. Tyler, 12 Mich. 339, 86 Am. Dec. 57; Dixon v. Hill, 5 Mich. 404; Thomas v. Stone, Walk. Ch. 117; Stone v. Welling, 14 Mich. 514; Perkinson v. Hanna, 7 Blackf. 400; Rhodes v. Green, 36 Ind. 10; Lewis v. Phillips, 17 Ind. 108, 79 Am. Dec. 457; Jackson v. Cadwell, 1 Cowen, 622; Heatley v. Finster, 2 Johns. Ch. 19; High v. Batte, 10 Yerg. 555; Jewett v. Palmer, 7 Johns. Ch. 65, 11 Am. Dec. 401; Patten v. Moore, 32 N. H. 382; Hunter v. Simrall, 5 Litt. 62; McBee v. Loftes, 1 Strob. Eq. 90; Palmer v. Williams, 24 Mich. 333;

trustee for a town did not disclose the existence of the trust, and the trustee bargained to sell the land to one who entered into possession and erected improvements, but received no deed, and was unaware of the equities of the town, it was held, in a suit in equity brought by the town to compel the execution of a deed, that, on the ground where the equities are equal, possession prevails, the decree should be for the amount of the purchase money paid for the land, and not for a conveyance.[7]

§ 738a. **Designation of grantee as "trustee."**—The general rule that prevades the whole doctrine of notice is that, whenever sufficient facts exist to put a person of common prudence upon inquiry, he is charged with constructive notice of everything to which that inquiry, if prosecuted with proper diligence, would have led. Therefore, if a deed is made to a person designated "trustee," although the nature of the trust, or the beneficiary under it, is not disclosed, still a purchaser is obligated to inquire as to the nature and limitations of the trust.[8] In a case in Massachusetts, where stock, issued

Story v. Winsor, 2 Atk. 630; Tourville v. Naish, 3 P. Wms. 387; Wigg v. Wigg, 1 Atk. 384.

[7] St. Johnsbury v. Morrill, 55 Vt. 165. See, also, Jeffersonville etc. R. R. Co. v. Oyler, 60 Ind. 383; Indiana B. & W. Ry. Co. v. McBroom, 114 Ind. 198, 15 N. E. Rep. 831; Paul v. Connersville etc. R. R. Co., 51 Ind. 527; Chicago etc. R. Co. v. Wright, 153 Ill. 307, 38 N. E. Rep. 1062.

[8] Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 55 N. W. Rep. 825, 40 Am. St. Rep. 299; Marbury v. Ehlen, 72 Md. 206, 20 Am. St. Rep. 467; Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Sturtevant v. Jacques, 96 Mass. 526; Loring v. Salisbury, 125 Mass. 151; Fisher v. Brown, 104 Mass. 259, 6 Am. Rep. 235; Solari v. Snow, 101 Cal. 387, 35 Pac. Rep. 1004. See, also, Golson v. Fielder, 2 Tex. Civ. App. 400, 21 S. W. Rep. 173. "It is a familiar doctrine," said Mitchell, J., "that a purchaser is chargeable with notice of facts recited in deeds under or through which he takes title; and, while the word 'trustee' in a deed gives no notice of the name of the beneficiary, or of the character of the trust, yet it does give notice of a trust of some description, which imposes the duty of inquiry as to its character and limitations; and whatever is sufficient

to a person described as "trustee," had been pledged to secure his own debt, the court held that, unless this term should be regarded as a mere *descriptio personæ,* and rejected as a nullity, there was notice of the existence of a trust of some kind. It held, however, that this term showed that the holder was a trustee for someone whose name was not disclosed, and that, in legal effect, it was the same as if the beneficiary had been named, as all persons were charged with notice of the existence of a trust of some description.[9] Where a deed is signed by one of the grantors, on the assumption that he is the attorney in fact for the other, but he has in fact no authority, such signature is sufficient to charge the purchaser with notice of the character and extent of the principal's interest in the land, of such pretended relation of agency existing at the time of, and antecedent to, the purchase of the land, and the purchaser acquires a title subject to the interest of the person described as principal.[1] A purchaser is not charged with notice of a trust in favor of a wife from the fact that she was living on the land with her husband, where

to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry would presumably have led": Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 40 Am. St. Rep. 299. The word "trustee" following the name of the grantee in a deed, is notice sufficient to put those dealing with him concerning the property on inquiry as to the existence and nature of the trust: Snyder v. Collier, 85 Neb. 552, 123 N. W. 1023. So as a general rule a person will be bound by recitals in the conveyance to him or in the chain of title: William etc. Co. v. King, (Tex. Civ. App.) 122 S. W. 581; Davidson v. Ryle, (Tex.) 124 S. W. 616, rehearing denied 125 S. W. 881; Chandley v. Robinson, (N. J.) 75 Atl. 180; Smith v. Fuller, 152 N. C. 7, 67 S. E. 48; Hardy Oil Co. v. Burnham, (Tex. Civ. App.) 124 S. W. 221; In re Mulholland's Estate, 224 Pa. 536, 73 Atl. 932; Moorhead v. Ellison, (Tex. Civ. App.) 120 S. W. 1049; Binder v. Weimberg, 94 Miss. 817, 48 So. 1013; Newbery v. Barkalow, (N. J. Eq.) 71 Atl. 752; Teague v. Sowder, 121 Tenn. 132, 114 S. W. 484; Crosdale v. Hill, 78 Kan. 140, 96 Pac. 37; Nelson v. Brown, (Tex. Civ. App.) 111 S. W. 1106.

[9] Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115.

[1] Solari v. Snow, 101 Cal. 387.

the title stood in his name.[2] A grantee is not obliged to inquire if there is an outstanding trust unless he has notice that there is one in existence.[3] As said by Mr. Justice Holmes: "When the title to land is dealt with, the intent of the registry laws is that purchasers should not be required to look beyond the registry of deeds further than is absolutely necessary."[4]

§ 739. Structures upon the land.—It has been frequently held, in accordance with the soundest equitable principles, that the fact that structures visible to every one exist upon land is sufficient to make it the duty of the purchaser to inquire by what right they exist, and to affect him with notice of an easement. If there is an open, graded railway track across land, with its embankments and excavations capable of being seen by everybody, a person who purchases the land under these circumstances takes his deed with notice of whatever rights in the track there may be outstanding in others. The warranty deed of his grantor is powerless to effect such outstanding rights in third persons. "The purchaser of real estate in the possession of a third person," said Biddle, C. J., "is bound to take notice of such person's title to the possession, whether his title be legal or equitable. This is a familiar principle of law, and we think the same rule should apply to a railroad track, graded and established at the time the vendee makes his purchase. Such a track, he must know, is inconsitsent with any exclusive right to the lands over which it runs."[5] Where land has been conveyed without a reservation, the occupation of an easement in land adjoining that conveyed is inconsistent with the grant. It follows, therefore, that a purchaser from the grantee in such deed has no-

[2] Paulus v. Latta, 93 Ind. 34.

[3] Swasey v. Emerson, 168 Mass. 118, 46 N. E. 426, 60 Am. St. Rep. 368.

[4] Swasey v. Emerson, 168 Mass. 118, 46 N. E. 426, 60 Am. St. Rep. 368.

[5] Paul v. Connersville etc. R. R. Co., 51 Ind. 527, 530.

tice of a reservation by parol of the easement. A was the owner of a piece of land on which a mill had been erected, and he had the privilege of diverting the water into the appurtenant millrace on the land of B, who had an equitable title only. A subsequently obtained the legal title to the whole tract, and conveyed by deed the legal title of that part of the tract on which the race and dam stood to B, free from encumbrances. The deed contained covenants of seisin, but made no reservation or mention of the millrace. The deed was recorded. The fact that A subsequently occupied the mill and used the race was held to be a sufficient notice to a purchaser from B of a parol reservation in favor of A of the right to the race.[6] But it has been held that knowledge merely that land is under cultivation is not of itself notice to a purchaser of an unrecorded deed therefor.[7]

A purchaser will be bound by the terms of an unrecorded agreement, where he has knowledge of such facts as would excite the suspicion of a prudent man dealing with the property. If a purchaser is aware that a house projects on the land purchased by him and has been in that position for a number of years, although he may not know that this was done in accordance with an oral agreement, fixing the boundary line, it would be unjust and inequitable to eject the owner of such house from such occupation, and in such a case it will be presumed that the purchaser acquired title in view of the fact of the possession by the adjoining owner of that portion of the lot occupied by the house; that is the presumption is that his purchase was made with the understanding that the boundaries visibly marked on the ground constituted the

[6] Randall v. Silverthorn, 4 Pa. St. 173. For further illustrations of this rule, see Hervey v. Smith, 22 Beav. 299; Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 463, 478; Blatchley v. Osborn, 33 Conn. 226; Hoy v. Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 287; Davis v. Sear, Law R. 7 Eq. 427. And see Atlantic City v. Pier Co., 63 N. J. Eq. 644, 53 Atl. 99.

[7] Cox v. Devinney, 65 N. J. Law, 389, 47 Atl. 569.

limits of the lot, and that the price paid was fixed in accordance with the value of the property as thus marked and used.[7a]

§ 740. **Searching the record not alone sufficient.**— When a person has received such information as to place upon him the duty of making an inquiry, he cannot discharge that duty by a mere examination of the records.[8] "The record, consequently, did not disprove the fact of which they were notified, but was merely silent on the subject; and to hold that they might rely upon it without further inquiry, would be equivalent to holding that notice of an unrecorded deed must always be ineffectual, at least unless the deed itself is produced. The authorities warrant no such doctrine, and it is inconsistent with the statute itself, which defeats such unrecorded deeds only at the instance of subsequent purchasers in good faith whose deeds are duly recorded. There is no ground for saying that one is a purchaser in good faith who, being notified of an unrecorded deed, and having the means of determining the truth of the notice, instead of making use of such means, resorts only to a record which can give him no information respecting unrecorded instruments, and

[7a] Campbell v. Grennan, 13 Cal. App. 481.

The price is presumed to have been fixed according to the value of the property defined and used where the boundary is visibly marked by buildings up to the agreed line: Young v. Blakeman, 153 Cal. 483, 95 Pac. 888. The court in the 13 Cal. App. distinguishes the case from those where there has been a joint occupancy or where the possession is according to the legal title. See, in that connection, the following cases cited in the opinion: Smith v. Yule, 31 Cal. 185, 89 Am. Dec. 167; Taylor v. Central Pac. R. R. Co. 67 Cal. 615, 8 Pac. 436; Schumacher v. Truman, 134 Cal. 431, 66 Pac. 591; Harris v. McIntyre, 118 Ill. 275, 8 N. E. 182; Lindley v. Martindale, 78 Iowa 379, 43 N. W. 233; Atwood v. Bearss, 47 Mich. 72, 10 N. W. 112; Wells v. American Mont. Co. 109 Ala. 430, 20 So. 136; Pope v. Allen, 90 N. Y. 298; McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Townsend v. Little, 109 U. S. 154, 3 Sup. Ct. Rep. 357.

[8] Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Littleton v. Giddings, 47 Tex. 109; Munroe v. Eastman, 31 Mich. 283; Brinkman v. Jones, 44 Wis. 498. See, also, Witter v. Dudley, 42 Ala. 616.

then purchases in disregard of the rights of the real owner. A second purchaser defeats the first conveyance only by bringing himself within the letter of the statute; but he is not within it, if knowingly he buys of one who has no title to sell." [9]

§ 741. **Further inquiry.**—To say that an examination of the record alone is sufficient, is in effect to defeat the doctrine of notice. An inquiry should at least be made among the vendor's neighbors.[1] A mortgage was made to a railroad company, but was defectively recorded. A person subsequently purchased a part of the mortgaged premises, and "had heard that there was a defective railroad mortgage upon them, but did not look for it, because his abstract did not show it." He was made a defendant in an action upon the mortgage, and it was held that he must be considered as having had actual notice of the mortgage.[2] But where a person equitably entitled to a conveyance is in the open and adverse possession of the premises, but the legal owner fraudulently mortgages the land to one who acts in good faith, and has no knowledge of the possession and claims of the party equitably entitled to a conveyance, the mortgagee is not chargeable with notice because he did not inquire who was in possession, and confined his search to the record title.[3] The records will protect a purchaser examining them so far as they can protect him, but he necessarily assumes the risk that the actual state of the title may not correspond with that which the records disclose.[4]

§ 742. **Contradiction of information.**—Where the grantor says that his title has been defective, or has been en-

[9] Mr. Justice Cooley, in Shotwell v. Harrison, 30 Mich. 179, in which case Barnard v. Campau, 29 Mich. 162, is distinguished.

[1] Littleton v. Gidding, 47 Tex. 109.

[2] Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772.

[3] Harral v. Leverty, 50 Conn. 46, 47 Am. Rep. 608.

[4] Reck v. Clapp, 98 Pa. St. 581.

cumbered, the purchaser has received sufficient information to put him upon inquiry, and the fact that the grantor adds that his title has been made perfect, or the encumbrance has been removed, will not relieve the purchaser from making inquiry, and determining this fact for himself.[5] In one case the court said that it must have been known to a purchaser "that a man who was proposing to sell land, if he was doing it in fraud of the heirs of his vendee, could easily manufacture a tale of falsehood, and would do it. If it would be sufficient diligence to rely upon his mere word of denial, and stop further inquiry on that account, it would not likely be wanting in any case."[6] If a purchaser is informed by his grantor that there is a mortgage upon the property, but that the mortgage has been satisfied, and he acts upon this statement without making further inquiry, he does so at his own peril. Before taking his deed, he should have endeavored to ascertain the truth of the statement from the mortgagee.[7] But where the information is given by a stranger, accompanied by a statement that the adverse claim no longer exists, the rule is different.[8]

§ 743. **What is due inquiry.**—It is impossible to lay down any absolute, unqualified rule to determine what is the due inquiry which a person is compelled to make when he has received such information as to make it his duty to inquire. The law holds him to good faith and reasonable diligence. Each case must depend for its decision upon its own

[5] Price v. McDonald, 1 Md. 403, 54 Am. Dec. 657; Littleton v. Giddings, 47 Tex. 109; Hudson v. Warner, 2 Har. & G. 415; Bunting v. Ricks, 2 Dev. & B. Eq. 130; Russell v. Petree, 10 Mon. B. 184. See Rogers v. Jones, 8 N. H. 264; Jones v. Smith, 1 Hare, 43.

[6] Littleton v. Giddings, 47 Tex. 109, 118.

[7] Russell v. Petree, 10 Mon. B. 184, 186.

[8] Buttrick v. Holden, 13 Met. 355; Williamson v. Brown, 15 N. Y. 354; In re Bright's Trusts, 21 Beav. 430; Rogers v. Wiley, 14 Ill. 65, 56 Am. Dec. 491.

peculiar facts. Still it is apparent to every reasonable man, that by resort to certain sources for information he will, in all probability, learn the truth. He may not learn the true facts after he has made inquiry, but a neglect to prosecute his search in certain directions is sufficient to show that he has not made that due inquiry which the law exacts. He should, for instance, make inquiry of his grantor as to the truth of any matter upon which he is put upon inquiry, and an omission to do so would manifest an absence of due care.[9] He should also examine the records which may give him the very information he seeks. If he fails to do so, he may be said to have failed in making due inquiry.[1] A purchaser is guilty of bad faith if he has knowledge of such facts as would cause a prudent man to make inquiry, which if followed, with ordinary diligence would cause him to have knowledge of the rights claimed by others adversely to the grantor and he fails to institute such an inquiry.[2]

§ 743a. Due diligence.—While due diligence is required of a purchaser to learn the status of his grantors at the time when they acquired title and conveyed it, he is not obligated to go beyond the record for the purpose of ascertaining if any grantor possessed an equity before he acquired title or whether he was married or unmarried at the time of the acquisition of the equity.[2] If, however, the purchaser is aware that a deed to another has been placed in escrow but, on account of a failure to comply with the conditions, it had been returned, he is not required to inquire as to the disposi-

[9] Sergeant v. Ingersoll, 7 Pa. St. 340. See Espin v. Pemberton, 3 De Gex & J. 547. But see Grundies v. Reid, 107 Ill. 304.

[1] Barnard v. Campau, 29 Mich. 162; Van Keuren v. Central R. R., 38 N. J. L. 165; Bellas v. McCarty, 10 Watts, 13, 28; Jackson v. Van Valkenburgh, 8 Cowen, 260.

[2] Cooper v. Flesner, (Okla.) 103 Pac. 1016, 23 L.R.A.(N.S.) 1180.

[2] Attebery v. O'Neil, 42 Wash. 487, 85 Pac. 270.

tion of the deed.[4] If a person has sufficient notice to place him upon inquiry and does not take advantage of the means at his command to learn the facts he must be considered as knowing the facts.[5] Where a purchaser has notice of an adverse claim, he ought to be held to have such information as would have been disclosed by a fair and reasonable inquiry.[6] He should be charged with notice in all cases not only where there is a presumption from the evidence that he knew, but also where a just ground exists for the inference that if he had exercised reasonable diligence, he would have discovered the truth.[7] If one has notice of a fact which should have caused him to make an inquiry to learn the truth, and if by due diligence he might have learned the truth, he will not be allowed to claim the protection afforded to a purchaser without notice.[8] If a purchaser is allowed a certain period in which to look up the title, with the privilege of reconveying if he finds the title defective, the fact that he finds a defect and does not reconvey is not notice of another defect.[9] That a purchaser has notice may be proven by direct evidence or it may be inferred from circumstances, but the proof should be so clear as to affect his conscience, and must cast upon him the imputa-

[4] Kenney v. Jaynes, 26 Colo. 154, 56 Pac. 562.

[5] Breaux-Renoudet Cypress Lumber Co. v. Shadel, 52 La. Ann. 2094, 28 So. 292.

[6] Drey v. Doyle, 99 Mo. 459, 12 S. W. 287.

[7] Oliver v. Sanborn, 60 Mich. 346, 27 N. W. 527. See, also, Ozark Lumber Co. v. Franks, 156 Mo. 673, 57 S. W. 540; Equitable Securities Co. v. Green, 113 Ga. 1013, 39 S. E. 434; Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Barnard v. Campau, 29 Mich. 162; Hayward v. Cain, 110 Mass. 273; Gardner v. Gardner, 123 Mich. 673, 82 N. W. 522; Derrett v. Britton, 35 Tex. Civ. App. 485, 80 S. W. 562; Levi v. Gardner, 53 S. C. 24, 30 S. E. 617; Lyon v. Gombert, 63 Neb. 630, 88 N. W. 474; Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. 598.

[8] Sicher v. Rambousek, 193 Mo. 113, 91 S. W. 68; Ray v. Yarnell, 118 Ind. 112, 20 N. E. 705; Hawes v. Chaille, 129 Ind. 435, 28 N. E. 96; Smith v. Schweigerer, 129 Ind. 363, 28 N. E. 696; Oliver v. Sanborn, 60 Mich. 346, 27 N. W. 527; Jackson, L. & S. R. Co. v. Davison, 65 Mich. 416, 32 N. W. 726.

[9] Allen v. Anderson, 96 S. W. 54.

tion of bad faith.[1]

§ 743b. How notice may be proven.—If, after having pursued the inquiry with proper diligence, he fails to obtain knowledge of the unrecorded deed, notice will not be presumed. Notice, therefore, is the ultimate fact to be proven, and possession is evidence upon that issue and it may or may not be sufficient according to the circumstances of of the particular case; it being understood of course, that the open, notorious and exclusive possession of the prior purchaser is sufficient to put the subsequent purchaser upon inquiry, and from that fact alone notice of the unrecorded deed should be found, unless he shows that he pursued the inquiry with proper diligence, and failed to attain knowledge of the deed.[2] A person who fails to make inquiry where the land is in the possession of a third person cannot urge that such inquiry, if prosecuted, would have been of no avail.[3] "The general rule is," said Mr. Justice Rhodes, "—except, in cases of conclusive presumptions like the recorded deed, actual notice of the deed to the agent of the subsequent purchaser, the recital in his deed of a former deed, etc.—that whatever puts the party upon inquiry, provided inquiry becomes his duty, is in judgment of law notice to him. Take the case where the holder of the unrecorded deed is personally in the open, notorious and exclusive possession of the premises, and who upon inquiry being made as to his title, asserts a claim derived from a hostile source; or the case where the person apparently in possession is subsequently shown to be the servant of the owner, and who refuses to answer any inquiry concerning the title by which he holds; in neither case will notice be implied. And so in every case, where possession in any of its various characters is proven if the facts of the case are not sufficiently certain as to time, place, persons and circumstances, to put the subsequent purchaser upon inquiry, or, if, after having pursued the inquiry with proper

[1] Hunton v. Wood, 101 Va. 54, 43 S. E. 186; Fischer v. Lee, 98 Va. 159, 35 S. E. 441.

[2] Fair v. Stevenot, 29 Cal. 486.

[3] Randall v. Lingwall, 43 Or. 383, 73 Pac. 1.

diligence, he fails to attain the knowledge of the unrecorded deed, notice will not be presumed. Notice, therefore, is the ultimate fact to be proven, and possession is evidence upon that issue, and it may or may not be sufficient, according to the circumstances of the particular case; it being understood, of course, that the open, notorious and exclusive possession of the prior purchaser is sufficient to put the subsequent purchaser upon inquiry, and from that fact alone, notice of the unrecorded deed should be found, unless he shows that he pursued the inquiry with proper diligence, and failed to attain knowledge of the deed." [4]

§ 744. **Third persons.**—And in many cases the proper course to pursue would be to make inquiry of third persons. When such a course is the one that a reasonable and prudent man would adopt, it must be pursued, or else there will not be sufficient diligence to enable the purchaser to say that he has made due inquiry.[5]

§ 745. **Presumption may be rebutted.**—The presumption that a person has knowledge of such facts as he might learn after making due inquiry, when he has notice of such facts as to put him upon inquiry, is not conclusive. He may rebut the presumption by showing that he made due inquiry and did not acquire the knowledge. "The true doctrine on

[4] Fair v. Stevenot, 29 Cal. 490.

[5] Littleton v. Giddings, 47 Tex. 109; Witter v. Dudley, 42 Ala. 616; Russell v. Sweezey, 22 Mich. 235; Penney v. Waits, 1 Macn. & G. 150, 165; Broadbent v. Barlow, 3 De Gex, F. & J. 570; Hewitt v. Loosemore, 9 Hare, 449; Hopgood v. Ernest, 3 De Gex, J. & S. 116; Atterbury v. Wallis, 8 De Gex, M. & G. 454; Maxfield v. Burton, Law R. 17 Eq. 15. And see Epley v. Witherow, 7 Watts. 163; McGehee v. Gondrat, 20 Ala. 95; Hunt v. Elmes, 2 De Gex, F. & J. 578; Greenfield v. Edwards, 2 De Gex, J. & S. 582; Ware v. Lord Egmont, 4 De Gex, M. & G. 460; Wilson v. McCullough, 23 Pa. St. 440, 62 Am. Dec. 347; Credland v. Potter, Law R. 10 Ch. 8; Ratcliffe v. Barnard, Law R. 6 Ch. 652; Roberts v. Croft, 2 De Gex & J. 1.

this subject is, that where a purchaser has knowledge of any fact, sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part." [6] A deed conveying the premises to the wife of the tenant in possession was duly executed and delivered. The deed contained a condition that if the wife paid a certain sum in a specified time, the deed should be in force, otherwise it should be void. The deed was not acknowledged, but was left in the hands of the grantor for the purpose of having him acknowledge it. The grantor on the same day made a mortgage to another person. At the time of making the first mortgage, he exhibited the first deed and declared that no delivery of it

[6] Williamson v. Brown, 15 N. Y. 354, 360, per Selden, J., and cases cited. See, also, Jones v. Smith, 1 Hare, 43; Hewitt v. Loosemore, 9 Hare, 449; Whitbread v. Boulnois, 1 Younge & C. 303; Flagg v. Mann, 2 Sum. 486, 554; Hanbury v. Litchfield, 2 Mylne & K. 629; Griffith v. Griffith, 1 Hoff. Ch. 153; Hunt v. Elmes, 2 De Gex, F. & J. 578; Espin v. Pemberton, 3 De Gex & J. 547. In Rogers v. Jones, 8 N. H. 264, 269, Mr. Justice Parker said: "To say that he was put upon inquiry, and that having made all due investigation without obtaining any knowledge of title, he was still chargeable with notice of a deed, if one really did exist, would be absurd." See, to same effect, Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep. 355; McGehee v. Gondrat, 20 Ala. 95; Schweiss v. Woodruff, 73 Mich. 473, 41 N. W. Rep. 511; Thompson v. Pioche, 44 Cal. 508; Parker v. Conner, 93 N. Y. 118, 45 Am. Rep. 178; Bell v. Davis, 75 Ind. 314; Wilson v. Williams, 25 Tex. 54. That the question of diligence is one of fact, see Schutt v. Large, 6 Barb. 373; Nute v. Nute, 41 N. H. 60; Rogers v. Wiley, 14 Ill. 65, 56 Am. Dec. 491; Parker v. Conner, 93 N. Y. 118, 45 Am. Rep. 178; Chiles v. Conley, 2 Dana, 21; McMechan v. Griffing, 3 Pick. 149, 15 Am. Dec. 198. That it is one of law, see Morris v. Daniels, 35 Ohio St. 406; Pollak v. Davidson, 87 Ala. 551.

had been made. There was no evidence of any change of possession or acts of ownership after the execution of the first deed, nor was there any other fact to give notice of its being a valid conveyance. It was held under these circumstances that the mortgagee whose conveyance was first recorded had the priority.[7] But if the purchaser fails to make due inquiry, the presumption of notice is conclusive.[8]

§ 746. Second purchaser without notice.—Although the first purchaser has notice, and takes title accordingly, yet a second purchaser from him for value and without notice is a *bona fide* purchaser, and takes a valid title.[9] The second

[7] Rogers v. Jones, 8 N. H. 264.

[8] Maul v. Rider, 59 Pa. St. 167; Chicago etc. R. R. v. Kennedy, 70 Ill. 350; Kennedy v. Green, 3 Mylne & K. 699; Helms v. Chadbourne, 45 Wis. 60; Loughbridge v. Bowland, 52 Miss. 546; Mullison's Estate, 68 Pa. St. 212; Maxfield v. Burton Law R. 17 Eq. 15; Petcher v. Rawlins Law R. 11 Eq. 53; Briggs v. Jones, Law R. 10 Eq. 92; Bellas v. McCarty, 10 Watts. 13. On the question as to whether a subsequent purchaser is presumed to have become such in good faith the authorities are divided. On one hand it is held that he is presumed to be a purchaser in good faith, and that he who attacks the deed has the burden of proof: Hiller v. Jones, 66 Miss. 636; Vest v. Michie, 31 Gratt. 149, 31 Am. Rep. 722; Roll v. Rea, 50 N. J. L. 264; Foust v. Moorman, 2 Ind. 17; Marshall v. Dunham, 66 Me. 539; Holmes v. Stout, 10 N. J. Eq. 419; Anthony v. Wheeler, 130 Ill. 128, 17 Am. St. Rep. 281; Coleman v. Barklew, 27 N. J. L. 357; Rogers v. Wiley, 14 Ill. 65, 56 Am. Dec. 491; Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Wilkins v. Anderson, 11 Pa. St. 399; Spofford v. Weston, 29 Me. 140; Pomroy v. Stevens, 11 Met. 244; Butler v. Stevens, 26 Me. 484; McGahee v. Sneed, 1 Dev. & B. Eq. 333; Bush v. Golden, 17 Conn. 594; Lacustrine Fertilizer Co. v. Lake Guano & F. Co., 82 N. Y. 476; Ryder v. Rush, 102 Ill. 338. On the other hand, it is held that one claiming to be innocent purchaser must prove the facts showing him to be such. See Moore v. Curry, 36 Tex. 668; Watkins v. Edwards, 23 Tex. 447; Hamman v. Keigwin, 39 Tex. 34; Colton v. Seavey, 22 Cal. 496; Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172; Landers v. Bolton, 26 Cal. 393; Root v. Bryant, 57 Cal. 48; Wallace v. Wilson, 30 Mo. 335; Nolen v. Heirs of Gwyn, 16 Ala. 725; Sillyman v. King, 36 Iowa, 207.

[9] Price v. Martin, 46 Miss. 489;

purchaser is entitled to protection for his own good faith. It would be inequitable to visit upon him the consequences of the notice possessed by his grantor. An additional reason for this rule is the insecurity of title that would otherwise result. If a man, acting in the utmost good faith, paying a valuable consideration, and not in any manner charged with notice, should be liable to lose his title because the person from whom he purchased had notice, no title would be safe. Its validity would depend upon the fact that all the persons through whom the last owner derived title were entirely free from notice of the rights of others, and a title apparently invulnerable might at any time be overthrown. Where A executed a deed to B, which was never recorded, B conveyed to C by a deed which was placed on record, and subsequently B surrendered to A the deed received from him, and it was then destroyed, and D, who knew of the fraudulent cancellation of A's first deed, received a deed from A, and he, D, conveyed to E, a purchaser for a valuable consideration, without notice of the fraud, it was decided that E's title was superior to that of C.[1] "Courts of equity grant relief against

Paris v. Lewis, 85 Ill. 597; Tompkins v. Powell, 6 Leigh, 576; Hardin v. Harrington, 11 Bush, 367; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Varick v. Briggs, 6 Paige, 323; Demarest v. Wynkoop, 3 Johns. Ch. 129, 8 Am. Dec. 467; Glidden v. Hunt, 24 Pick. 221. And see Fallass v. Pierce, 30 Wis. 443; Jackson v. Van Valkenburgh, 8 Cowen, 260; Truluck v. Peeples, 3 Kelly, 446; Knox v. Silloway, 10 Me. 201; Mallory v. Stodder, 6 Ala. 801; Connecticut v. Bradish, 14 Mass. 296; Somes v. Brewer, 2 Pick. 184, 13 Am. Dec. 406; Wood v. Mann, 1 Sum. 506; Galatian v. Erwin, Hopk. Ch. 48; Snyder v. Board of Commrs. of Boulder Co., 8 West Coast Rep. 533; Sayward v. Thompson, 11 Wash. 706, 40 Pac. Rep. 379; Lee v. Cato, 27 Ga. 637, 73 Am. Dec. 746; Hoit v. Russell, 56 N. H. 569; Bell v. Twilight, 18 N. H. 159, 45 Am. Dec. 367; Moore v. Curry, 36 Tex. 668; Sydnor v. Roberts, 13 Tex. 598, 65 Am. Dec. 84; Hill v. McNichol, 76 Me. 314; Slattery v. Schwannecke, 118 N. Y. 543, 23 N. E. Rep. 922; Decker v. Boice, 83 N. Y. 215; Danbury v. Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244; Smith v. Vreeland, 16 N. J. Eq. 198; Jones v. Hudson, 23 S. C. 494. See, also, Phillips v. Buchanan etc. Co., 151 N. C. 519, 66 S. E. 603.

[1] Knox v. Silloway, 10 Me. 201.

purchasers with notice for the reason alone that to purchase under such circumstances is a fraud on the rightful claimant or owner; but this rule has never been carried so far as to grant relief against an innocent purchaser, although his grantor may have purchased in bad faith, and to do so would be to subvert the very principle upon which the relief is given."[8]

§ 747. Second purchaser with notice from bona fide purchaser.—Where a person has bought land for value, without notice, or in other words, is a *bona fide* purchaser, he has a valid title so far as rights are concerned, of which he has neither actual nor constructive notice. He is the owner of the property. But his ownership would be practically valueless to him unless the right of disposition was an inseparable incident of it. To say that he can sell it only to persons who have no notice, is to limit the field of purchasers, and possibly to deprive him of the power of disposition altogether. His title is worth nothing to him unless he has the right to sell to whoever desires to buy. It is for these reasons, a well-settled rule that when a *bona fide* purchaser acquires land, he holds it free from equities of which he had no notice, and may convey his title as he holds it to others who have notice.[9] And the

[8] Hardin's Executors v. Harrington, 11 Bush, 367, 372, per Pryor, J.

[9] Funkhouser v. Lay, 78 Mo. 458; Harrison v. Forth, Prec. Ch. 51; Brandlyn v. Ord, 1 Atk. 571; Varick v. Briggs, 6 Paige, 323; Lindsey v. Rankin, 4 Bibb, 482; Holmes v. Stout, 3 Green Ch. 492; Dana v. Newhall, 13 Mass. 498; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Webster v. Van Steenbergh, 46 Barb. 211; Moore v. Curry, 36 Tex. 668; Allison v. Hagan, 12 Nev. 38; McShirley v. Birt, 44 Ind. 382; Blight's Heirs v. Banks, 6 Mon. 192, 17 Am. Dec. 136; Curtis v. Lunn, 6 Munf. 42; Shinn v. Shinn, 15 Bradw. (Ill.) 141; Trull v. Bigelow, 16 Mass. 406, 8 Am. Dec. 144; Lacy v. Wilson, 4 Munf. 313; Halstead v. Bank of Kentucky, 4 Marsh. J. J. 554; Ferrars v. Cherry, 2 Vern. 383; Lowther v. Carlton, 2 Atk. 242; McQueen v. Farquhar, 11 Ves. 467; Sweet v. Southcote, 2 Bro. Ch. 66; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Moore v. Allen, 26 Colo. 197, 57 Pac. 698, 77 Am. St. Rep. 255 (citing text); Phillips v. Lumber Co., 151 N. C. 519, 66 S. E. 603; Southern R. Co.

same rule in relation to the rights of subsequent purchasers applies in case of fraud, as well as in those cases which we have been treating. "If a suit be brought to set aside a con-

v. Carroll, 86 S. C. 56, 67 S. E. 4; Hawkes v. Hoffman, 56 Wash. 120, 24 L.R.A.(N.S.) 1038, 105 Pac. 156; Phillips v. Buchanan etc. Co., 151 N. C. 519, 66 S. E. 603; Southern Ry. Co. v. Carroll, 86 S. C. 56, 67 S. E. 4; Vattier v. Hinde, 7 Peters, 252, 8 L. ed. 675; Griffith v. Griffith, 9 Paige, 315; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Alexander v. Pendleton, 8 Cranch, 462, 3 L. ed. 624; Boone v. Chiles, 10 Peters, 177, 9 L. ed. 388; Boynton v. Rees, 8 Pick. 329, 19 Am. Dec. 326; Peavy v. Deire, 131 Ga. 104, 62 S. E. 47; Hendricks v. Calloway, 211 Mo. 536, 111 S. W. 60; Rutgers v. Kingsland, 3 Halst. Ch. 178; Bracken v. Miller, 4 Watts & S. 102; Abadie v. Lobero, 36 Cal. 390; Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. Rep. 713; Hill v. McNichol, 76 Me. 314; Blatchley v. Osborn, 33 Conn. 226; Whitfield v. Riddle, 78 Ala. 99, Bartlett v. Varner, 56 Ala. 580; Fargason v. Edrington, 49 Ark. 207, 4 S. W. Rep. 763; Holmes v. Buckner, 67 Tex. 107, 2 S. W. Rep. 452; Lewis v. Johnson, 68 Tex. 448, 4 S. W. Rep. 644; Gulf etc. Ry. Co. v. Gill, 5 Tex. Civ. App. 496, 23 S. W. Rep. 142; Grace v. Wade, 45 Tex. 522; Peterson v. McCauley, (Tex. Civ. App.) 25 S. W. Rep. 826; Arrington v. Arrington, 114 N. C. 151, 19 S. E. Rep. 351; Wallace v. Cohen, 111 N. C. 103, 15 S. E. Rep. 892; Shotwell v. Harrison, 22 Mich. 410; Foster v. Bailey, 82 S. C. 378, 64 S. E. 423; Thomason v. Berwick, (Tex. Civ. App.) 113 S. W. 567; Brown v. Cody, 115 Ind. 484, 18 N. E. Rep. 9; Klinger v. Lemler, 135 Ind. 77, 34 N. E. Rep. 698; Arnold v. Smith, 80 Ind. 417; Trentman v. Eldridge, 98 Ind. 525; Evans v. Nealis, 69 Ind. 148; Sharpe v. Davis, 76 Ind. 17; Doyle v. Wade, 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. Rep. 516; Eldridge v. Post, 20 Fla. 579; Day v. Clark, 25 Vt. 397; Barber v. Richardson, 57 Vt. 408; Church v. Ruland, 64 Pa. St. 432; Ashton's Appeal, 73 Pa. St. 153; Colquitt v. Thomas, 8 Ga. 258; Lee v. Cato, 27 Ga. 637, 73 Am. Dec. 746; Pierce v. Faunce, 47 Me. 507; Brackett v. Ridlon, 54 Me. 426; Card v. Patterson, 5 Ohio St. 319; East v. Pugh, 71 Iowa, 162; Henninger v. Heald, 51 N. J. Eq. 74, 29 Atl. Rep. 190; Roll v. Rea, 50 N. J. L. 264, 12 Atl. Rep. 905; Glidden v. Hunt, 24 Pick. 221; Lacustrine Fer. Co. v. Lake Guano & F. Co., 82 N. Y. 476; St. Joseph Mfg. Co. v. Daggett, 84 Ill. 556; Bartlett v. Varner, 56 Ala. 580; Calahan v. Monroe, 56 Ala. 303. And see Bumpus v. Plattner, 1 Johns. Ch. 213; Demarest v. Wynkoop, 3 Johns. Ch. 129, 8 Am. Dec. 467; Mott v. Clark, 9 Barr. 399, 49 Am. 566; Church v. Church, 1 Casey, 278; Filby v. Miller, 1 Casey, 264; City Council v. Page, Spear Eq. 159. See, also, Ryan v. Staples, 78 Fed. 563, 23 C. C. A. 551; English v. Lindley, 194 Ill. 181, 62 N. E. 522; Buck v. Foster, 147 Ind. 530, 46

veyance obtained by fraud," said Chief Justice Marshall, "and the fraud be clearly proved, the conveyance will be set aside as between the parties; but the rights of third persons, who are purchasers without notice for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned." [4] Where a person fraudulently acquires the equity of redemption of land on which there is a *bona fide* mortgage, he may, by purchasing at the mortgage sale obtain an indefeasible title.[5]

§ 748. **Former owner with notice.**—There is another rule in relation to this subject, which, while it may be considered an exception, is clearly just. If the title be conveyed to a person without notice, he is a *bona fide* purchaser and may transfer his title, freed from equities of which he had

N. E. 920, 62 Am. St. Rep. 427; Livingstone v. Murphy, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. Rep. 400; Equitable etc. Co. v. Sheppard, 78 Miss. 217, 28 So. 842; Ford v. Axelson, 74 Neb. 92, 103 N. W. 1039; Paul v. Kerswell, 60 N. J. L. 273, 37 Atl. 1102; Long v. Fields, 31 Tex. Civ. App. 241, 71 S. W. 774; Garner v. Boyle, 34 Tex. Civ. App. 421, 77 S. W. 987; Allen v. Anderson (Tex. Civ. App.) 96 S. W. 54. But see Johns v. Sewell, 33 Ind. 1, where it was held that where the first purchaser is a mere volunteer, this rule does not apply.

[4] Fletcher v. Peck, 6 Cranch, 87, 133, 3 L. ed. 162, 177. And see Galatian v. Erwin, Hopk. Ch. 48; Wood v. Mann, 1 Sum. 506; Somes v. Brewer, 2 Pick. 184 13 Am. Dec. 406.

[5] Funkhouser v. Lay, 78 Mo. 458.

no notice, to all persons but a *former owner* of the same land who had notice. When the land comes back to such a person again, it is subject to all the equities that attached to it while he held it.[6]

§ 749. **Tenant in common without notice.**—A tenant in common who has notice cannot avail himself of the want of notice of his cotenant. We have referred to a case in a previous section where this principle was involved.[7] The reason that courts give to a purchaser without notice, protection, is, that having acted in good faith, he should not suffer from the negligence of him whose duty it was to notify the public of his interest by the means afforded by law. But if he has notice, he cannot claim any benefit from the fact that another has no notice. The latter may claim this protection, if otherwise he would suffer injury. But this defense is personal to himself. His want of notice cannot avail a cotenant, who must suffer the consequences arising from knowledge of an outstanding encumbrance. In case of a partition, the encumbrance may be enforced against the part of the land held by him in severalty.[8]

[6] Ashton's Appeal, 73 Pa. St. 153; Trentman v. Eldridge, 98 Ind. 525; Church v. Ruland, 64 Pa. St. 432; Kennedy v. Daly, 1 Schoales & L. 355; Troy City Bank v. Wilcox, 24 Wis. 671; Allison v. Hagan, 12 Nev. 38; Schutt v. Large, 6 Barb. 373; Church v. Church, 25 Pa. St. 278; Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639. And see Andrews v. Robertson, 111 Wis. 334, 54 L.R.A. 673, 87 N. W. 190, 87 Am. St. Rep. 870.

[7] See § 734, *ante*.

[8] Blatchley v. Osborn, 33 Conn. 226. The court said that if E "saw fit heedlessly to accept of less than he was justly entitled to in making the division, when he had full knowledge of Blatchley's rights, he clearly ought not to be permitted now to deprive the petitioner of his rights to the passway, because of an injury which he has brought upon himself. The petitioner must suffer a great wrong if deprived of his passway, and he is in every respect an innocent party. The respondent does not stand in this favorable light toward the petitioner, whose equitable interest he attempted to take away on the ground that it had not become vested in him by virtue of any

§ 750. **Notice of intention to execute a deed.**—A purchaser is not bound by notice of the intention of parties to execute a deed. Until the deed is actually executed, notice of what the parties have in contemplation cannot affect him. Until the intention has been carried out, the title has not passed, and it may be that the intention of the parties will be altered by other causes, or may fail of being consummated. A purchaser had information that a draft of a deed had been prepared, but not that the deed had in fact been executed. It was held that although the deed had really been executed, he could be charged with notice of it as a deed.[9] So, on the same principle, where one or two creditors of an insolvent debtor knew only that a deed was being executed to convey the land of the debtor to the other creditor, and attached the land before the deed was recorded, but not before its execution and delivery, the lien of the attachment was allowed to prevail against the deed. "It was not, therefore," said Parker, C. J., "the knowledge of an intent to convey or attach, which will prevent the legal effect of an attachment by another creditor, which gets to be first in point of time, but the knowledge of an actual passing of the title which is complete against everyone with notice, whether by registry or personal." [1]

§ 751. **Fraud and mistake.**—Where a person is asked if he has an encumbrance or claim upon an estate, and answers

legally recorded deed, and if his speculation instead of proving a success has operated to his pecuniary injury, it is the subject of less regret than would have been occasioned if he had succeeded in unjustly depriving the petitioner of his equitable ownership in the passway."

[9] Cothay v. Sydenham, 2 Bro. Ch. 291.

[1] Cushing v. Hurd, 4 Pick. 252, 256, 16 Am. Dec. 335. See, also, Brackett v. Wait, 6 Vt. 411; Stewart v. Thompson, 3 Vt. 264; Denton v. Perry, 5 Vt. 382; Warden v. Adams, 15 Mass. 233, 237; McMechan v. Griffing, 3 Pick. 149, 154, 15 Am. Dec. 198. And see Priest v. Rice, 1 Pick. 168, 11 Am. Dec. 156.

that he has not, he will, if the circumstances are strong enough to justify a court in pronouncing him guilty of fraud, be postponed in the enforcement of his rights to the party whom he has misled.[2] "There is no principle better settled, nor one founded on more solid considerations of equity and public utility, than that which declares that if one knowingly, though he does it passively by looking on, suffers another to purchase and spend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterward be permitted to exercise his legal right against such person. . . . In equity, when a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent."[3] An owner of land executed two mortgage deeds of it on the same day to A and B, the interest of A having afterward been assigned to C. D attached the land as the property of B, and obtained a judgment against him. He sent an agent to C, who knew of the judgment, to ascertain if his mortgage was entitled to priority, and C responded that there was no priority, that both instruments had been executed at the same

[2] Fay v. Valentine, 12 Pick. 40, 22 Am. Dec. 397; Miller v. Bingham, 29 Vt. 82; Platt v. Squire, 12 Met. 494; McKelvey v. Truby, 4 Watts & S. 323; Lee v. Munroe, 7 Cranch, 366, 3 L. ed. 373; Chester v. Greer, 5 Humph. 26; Heane v. Rogers, 9 Barn. & C. 577; Stafford v. Vallou, 17 Vt. 329; Otis v. Sill, 8 Barb. 102; Lesley v. Johnson, 41 Barb. 359; Chapman v. Hamilton, 19 Ala. 121; Folk v. Beidelman, 6 Watts, 339; Lee v. Kirkpatrick, 1 McCart. Eq. (14 N. J. Eq.) 264; Wendell v. Van Rensselaer, 1 Johns. Ch. 344; Schitheimer v. Eiseman, 7 Bush, 298; Storrs v. Barker, 6 Johns. Ch. 166, 10 Am. Dec. 316; Berrisford v. Milward, 2 Atk. 49; Evans v. Bicknell, 6 Ves. 174; Plumb v. Fluitt, 2 Anst. 432; Beckett v. Cordley, 1 Brown Ch. 353; Peter v. Russell, 1 Eq. Cas. Abr. 322; Broome v. Beers, 6 Conn. 198; L'Amoureux v. Vandenburgh, 7 Paige, 316, 32 Am. Dec. 635. And see, also, Bright v. Boyd, 1 Story, 478; Nicholson v. Hooper, 4 Mylne & C. 179; Chautauque Co. Bank v. White, 6 Barb. 589; Carr v. Wallace, 7 Watts, 394; Pilling v. Armitage, 12 Ves. 78; Crocker v. Crocker, 31 N. Y. 507, 88 Am. Dec. 291.

[3] Carr v. Wallace, 7 Watts, 394, 400, per Rogers, J. See, also, Ep-

time, and that A had given a writing to that effect. This representation was not true, as the mortgage to A had been delivered first. But D took a mortgage from B to secure his claim, B being insolvent, and it was held that C was precluded by these facts from claiming the priority to which otherwise he would have been entitled.[4] But there is no fraud if the holder of a recorded mortgage prepare as counsel a subsequent mortgage, and maintain silence as to his own.[5] If, under a contract to purchase land, the nonpayment of the joint and several purchase-money note on a day specified is to work a forfeiture, and if two of the obligors fraudulently neglect to pay their share, a forfeiture thereby resulting, and if, at the same time, they deposit the money in the hands of another to avail himself of the forfeiture, a purchaser with notice can acquire no rights superior to those of the other obligors.[6] Where a deed is duly signed and acknowledged by husband and wife, a purchaser has the right to presume that the wife acted freely and with full knowledge of the effect of the deed. If he has no knowledge of the fraud of others in inducing her to sign, he is not affected.[7] If the purchaser has notice before completing his purchase that the title of the vendor is to be disputed for fraud, a court of equity will extend to him no consideration if the fraud be proven.[8] If a party procures a judgment in partition by a concealment of such material facts as would, if known, have defeated the action, and the party suppressing has sold a part of the land set off to him to a purchaser who has knowledge of the facts, suppressed, the purchaser is not protected.[9] A grantee acting as the grantor's agent for the sole purpose of conveying the property to a

ley v. Witherow, 7 Watts, 163; McCormick v. McMurtrie, 4 Watts, 195.

[4] Broome v. Beers, 6 Conn. 198.

[5] Paine v. French, 4 Ohio, 318. See Palmer v. Palmer, 48 Vt. 69; Brinckerhoff v. Lansing, 4 Johns. Ch. 65, 8 Am. Dec. 538. See, also, Marston v. Brackett, 9 N. H. 336; Rice v. Dewey, 54 Barb. 455.

[6] Hulett v. Fairbanks, 40 Ohio St. 233.

[7] Pierce v. Fort, 60 Tex. 464.

[8] Peter v. Wright, 6 Ind. 183.

[9] Daleschal v. Geiser, 36 Kan. 374, 13 Pac. 595.

third person, knowing that the deed to his grantor was fraudulent, cannot claim protection by reliance on the record title.[1] An attorney employed by a grantor, and having actual knowledge of the fraud practiced by the grantee upon such grantor, in procuring a deed, is not a purchaser in good faith when he immediately takes a conveyance of the land from such grantee.[2] A person acquiring title with full knowledge of prior legal or equitable rights is not considered a purchaser in good faith.[3] If a life tenant under a will has the power of sale and exercises such power by selling to the injury of the remainderman for a price grossly inadequate, to a person whose agent had full knowledge of all the circumstances of the transaction, the remainder-man will be protected and the purchaser will hold subject to his equities.[4] A party purchasing with notice that deeds by mistake of all parties did not contain a description of a strip of land intended to be conveyed will take subject to the equities.[5] If a mortgagee has knowledge that the title of his mortgagor has been obtained by fraud the fraud may be set up against him.[6] But if the mortgagee has no knowledge of the fraud he will be protected as an innocent purchaser.[7]

§ 752. **Negligence.**—There may be cases where a person has acted so negligently as to put it in the power of another to induce a third person to purchase in ignorance of the existence of other rights, and the party guilty of such negligence may lose the priority of his claim.[8] Thus, an owner of

[1] Ford v. Ticknor, 169 Mass. 276, 47 S. E. 877.

[2] Jordan v. Cathcart, 126 Iowa, 600, 102 N. W. 510.

[3] Smith v. Schweigerer, 129 Ind. 363, 28 N. E. 696.

[4] Price v. Bassett, 168 Mass. 598, 47 N. E. 243.

[5] Fond du Lac Land Co. v. Meiklejohn, 118 Wis. 340, 95 N. W. 142.

[6] Brummond v. Krause, 8 N. D. 573, 80 N. W. 686.

[7] State v. Matthews, 44 Kan. 596, 10 L.R.A. 308, 25 Pac. 36; Parsons v. Crocker, 128 Iowa, 641, 105 N. W. 162; Hedden v. Cowell, 37 N. J. Eq. 89.

[8] See Waldron v. Sloper, 1 Drew. 193; Briggs v. Jones, Law R. 10 Eq. 92; Rice v. Rice, 2 Drew. 73;

land mortgaged it to A, and afterward confessed judgment in favor of B. Later, he and his wife executed a deed of the land to C, and on the day following the execution of the deed, A executed a release to the mortgagor and former owner, reciting payment of the mortgage debt, and some days subsequently C executed a mortgage to A. The court held, that although the mortgage debt may not have been paid, yet A by releasing the mortgage, and reciting payment of the debt, forfeited the benefit of the mortgage lien, and that all liens attaching to the property prior to the date of the second mortgage were superior to it.[9] A somewhat hard case under this principle is where a mortgagee canceled his mortgage and took a deed of the land, but prior to the execution of the deed, the mortgagor had executed a second mortgage upon the land. Under these circumstances the decision was that in the absence of fraud the first mortgage would not be revived, nor would the second mortgagee lose the benefit of his priority obtained by the cancellation of the first mortgage.[1]

§ 753. **Notice of right of way from ordinance.**—A purchaser has notice of the existence of a right of way over land from the fact that the legislature had authorized the opening of a street, the council of the city in which the land was situated had passed an ordinance directing it to be laid out, and

Frazee v. Inslee, 2 N. J. Eq. (1 Green) 239; Banta v. Garmo 1 Sand. Ch. 383; Garland v. Harrison, 17 Mo. 282; Woollen v. Hillen, 9 Gill, 185, 52 Am. Dec. 690; Smith v. Brackett, 36 Barb. 571; Campbell's Appeal, 29 Pa. St. 401, 72 Am. Dec. 641; Hewit v. Loosemore, 9 Hare, 443; Neidig v. Whiteford, 29 Md. 178.

[9] Neidig v. Whiteford, 29 Md. 178.

[1] Frazee v. Inslee, 2 N. J. Eq. (1 Green) 239. "In the absence of any proof of fraud by the complainant or his agent," said the Chancellor, "when the mortgage was canceled intentionally and understandingly by the defendant, and a deed taken for the same property, I cannot, upon any safe principle, revive the mortgage, or prevent the complainant from reaping the benefit of his rights as a first mortgagee. This would be giving encouragement to negligence, and destroy the value of a public record."

a survey had been made by the proper officer, and filed before the purchaser received his deed.[3]

§ 754. **Laying down sidewalk.**—Among the evidences of ownership to be considered in passing upon the question of notice, is the fact that the party claiming title had laid down a sidewalk, and it is immaterial whether the sidewalk is constructed by order of the city or not.[3] It may be that this circumstance alone taken by itself would not be sufficient to create a presumption of notice; it is nevertheless a fact to be taken into consideration. In most of the cases that come before the courts where the question of notice is involved, notice is generally dependent upon a collection of facts which, in the aggregate, are considered sufficient to put a party upon inquiry.

§ 755. **Deed from surviving widow.**—A widow who had qualified under the statute in Texas as the survivor of the community, had sold land belonging to her husband in his lifetime, and the purchaser had paid most of the purchase price. It was held that as against one who derived title through an unrecorded deed made by the husband in his lifetime, but who never gave any notice of his claim, the purchaser from the widow would be protected as an innocent purchaser for value.[4]

§ 756. **Notice of lien.**—It is sufficient to charge a party with notice of all the particulars of a lien to show that he had notice of the lien. If a person takes a deed of land upon which there is a mortgage, of which he had notice, he is affected with all the notice which it is fair to presume he would obtain in regard to the mortgagee's claim to a lien if he had made inquiry from the mortgagee.[5] A party is not authorized

[3] Bailey v. Miltenberger, 31 Pa. St. 37.
[3] Hatch v. Bigelow, 39 Ill. 546.
[4] Morris v. Meek, 57 Tex. 385.
[5] Martin v. Cauble, 72 Ind. 67; Barr v. Kinard, 3 Strob. 73; Willink v. Morris Canal & Banking Co., 4 N. J. Eq. (3 Green) 377; George v. Kent, 7 Allen, 16; Pike v. Goodnow, 12 Allen, 472; Taylor

to assume that an encumbrance is already known to him when he hears that land is encumbered.[6]

§ 757. **Exception of encumbrance in covenant.**—Where a deed contains a covenant of warranty, an exception of a mortgage from such covenant, although the mortgage may not be recorded, charges the grantee in the deed with notice. In such case no cause of action can arise against the grantor in favor of the grantee from a foreclosure and sale of the mortgaged property.[7] But where a mortgagor inserts in the mortgage a covenant "to pay and discharge all legal mortgages and encumbrances, of whatever nature and description," on the mortgaged property, a person who acquires title by deed from the mortgagor is not put upon inquiry as to any mortgages or encumbrances not of record. And if the mortgage is not entitled to registration, the grantee would not be charged with constructive notice of it, though it may in fact be spread upon the records.[8]

§ 758. **Deed modified by annexed schedule.**—The general words of conveyance in a deed may be modified by an annexed schedule, and a purchaser takes with notice of the facts stated in such schedule. An owner of land had conveyed certain lots to a person by a deed absolute in form, but intended as security for the payment of certain notes. Subsequently he conveyed all his property, real and personal, without any particular description in the body of the deed, but in a schedule which he annexed to the deed, the land con-

v. Stibbert, 2 Ves. Jr. 437; Jones v. Williams, 24 Beav. 47; Gulf etc. Ry. Co. v. Gill, 5 Tex. Civ. App. 496, 23 S. W. Rep. 142; Ijames v. Gaither, 93 N. C. 358; Webb v. Robbins, 77 Ala. 176. See, also, Simons v. First Nat. Bank, 93 N. Y. 269; Wilson v. Vaughan, 61 Miss. 472. But see Morris v. Murray, 82 Ky. 36.

[6] Jones v. Williams, 24 Beav. 47.

[7] Morrison v. Morrison, 38 Iowa, 73, 80.

[8] Racouillat v. Rene, 32 Cal. 450.

veyed as security for the payment of the notes was described as: "Lots of ground in Stuart Street, the title to which is in name of David Dunham, given as collateral security to pay certain notes." This deed, absolute in form, but in reality a mortgage, had never been recorded, but the court held that the language of the schedule was notice of its existence to the grantee, and that he could not obtain a priority by the first registration of his deed.[9]

§ 759. **Notice from title deeds not between parties.**— In controversies between grantor and grantee, for the purpose of determining their respective rights, the rule that a grantee is chargeable with constructive notice of circumstances which came to the knowledge of his attorney or agent, for the purchase or in the examination of the title, or that notice of a deed is constructive notice of its contents, does not apply. The rules as to constructive notice are adopted by the courts for the purpose of upholding the prior equitable rights of third parties against subsequent purchasers, who are endeavoring to defeat such prior rights. Therefore, if an owner of land, misapprehending his legal rights sells the land which had been constructively dedicated for the purposes of a public street, under the terms of the deeds of adjoining lots to prior purchasers, and represents that the lot will not be taken for a street without payment to the grantee of its full value, but does not communicate the facts upon which are founded the rights of the prior purchasers, the grantee, if the lot is in fact worth nothing at the time of the purchase, is entitled to relief against a bond and mortgage given for the purchase money.[1]

[9] Dunham v. Dey, 15 Johns. 555, 8 Am. Dec. 282.

[1] Champlin v. Laytin, 6 Paige, 189.

PART II.[2]

Possession.

§ 760. **Possession as notice.**—It is well established both in England and in this country, that the open, visible, notorious, and exclusive possession of land, is either notice itself of the rights of the party in possession, or is sufficient to put a person upon inquiry as to his rights.[3] Where, therefore,

[2] For an exhaustive discussion of possession of land as notice of title, see 13 L.R.A.(N.S.) 49–140.

[3] Haworth v. Taylor, 108 Ill. 275; Penny v. Watts, 1 Macn. & G. 150; Holmes v. Powell, 8 De Gex, M. & G. 572; Hoover v. Redmond, 15 Bradw. (Ill.) 427; Taylor v. Stibbert, 2 Ves. 437; Allen v. Anthony, 1 Mer. 282; Galley v. Ward, 60 N. H. 331; Rowe v. Ream, 105 Pa. St. 543; Lord's Appeal, 105 Pa. St. 451; Yates v. Hurd, 8 West C. Rep. 276; Peasley v. McFadden, 9 West C. Rep. 715; Phillips v. Costley, 40 Ala. 486; Woods v. Farmere, 7 Watts, 382, 32 Am. Dec. 772; Perkins v. Swank, 43 Miss. 349; Johnson v. Clark, 18 Kan. 157; Barnes v. Union School Township, 91 Ind. 301; Strickland v. Kirk, 51 Miss. 795; Webber v. Taylor, 2 Jones Eq. 9; Preston v. Nash, 76 Va. 1; Sears v. Munson, 23 Iowa, 380; Rogers v. Jones, 8 N. H. 264; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Ill. 210; Dunlap v. Wilson, 32 Ill. 517; Baynard v. Norris, 5 Gill, 468, 46 Am. Dec. 647; Cox v. Prater, 67 Ga. 588; Moss v. Atkinson, 44 Cal. 3; Killey v. Wilson, 33 Cal. 690; Maloney v. Shattuck, 15 Bradw. (Ill.) 44; Bank of Orleans v. Flagg, 3 Barb. Ch. 316; Sailor v. Hertzog, 4 Whart. 259; School District v. Taylor, 19 Kan. 287; Noyes v. Hall, 7 Otto, 34; Loughbridge v. Bowland, 52 Miss. 546; McKinzie v. Perrill, 15 Ohio St. 162; Diehl v. Page, 3 N. J. Eq. (2 Green Ch.) 143; Massey v. Hubbard, 18 Fla. 688; Ringold v. Bryan, 3 Md. Ch. 488; Hull v. Noble, 40 Me. 459; Tankard v. Tankard, 79 N. C. 54; Russell v. Sweezey, 22 Mich. 235; Morrison v. Wilson, 13 Cal. 494, 73 Am. Dec. 593; Glidewell v. Spaugh, 26 Ind. 319; Edwards v. Thompson, 71 N. C. 177; Warren v. Richmond, 53 Ill. 52; Keyes v. Test, 33 Ill. 317; Reeves v. Ayers, 38 Ill. 418; Baldwin v. Johnson, Saxt. Ch. 441; Westbrook v. Gleason, 79 N. Y. 23; Farmers' Loan & Trust Co. v. Maltby, 8 Paige, 361; Brown v. Gaffney, 28 Ill. 149; Stagg v. Small, 4 Bradw. (Ill.) 192; Cowen v. Loomis, 91 Ill. 132; Stafford v. Lick, 7 Cal. 479; Morrison v. March, 4 Minn. 422; Doyle v. Stevens, 4 Mich. 87; Havens v. Dale, 18 Cal. 359; Groff v. Ramsey, 19 Minn. 44; Emmons v. Murray, 16 N. H. 385; Woodson v. McCune,

a person is in possession of land under an unrecorded agreement with the owner for its purchase, his possession is sufficient notice to put others on inquiry, and if they purchase

17 Cal. 298; Mullins v. Wimberly, 50 Tex. 457; Laraway v. Larue, 63 Iowa, 407; Laroe v. Gaunt, 62 Tex. 481; Moreland v. Richardson, 24 Beav. 33; James v. Litchfield, Law R. 9 Eq. 51; Wilson v. Hart, Law R. 1 Ch. App. 463; Taylor v. Stibbert, 2 Ves. Jr. 437. And see Pell v. McElroy, 36 Cal. 268; Daubenspeck v. Platt, 22 Cal. 330; Bradley v. Snyder, 14 Ill. 263, 58 Am. Dec. 564; Watkins v. Edwards, 23 Tex. 443; Brown v. Volkening, 64 N. Y. 76; Bogue v. Williams, 48 Ill. 371; Tunson v. Chamblin, 88 Ill. 378; Uhl v. Rau, 13 Neb. 357; Cent. R. R. v. McCullough, 59 Ill. 166; Warren v. Richmond, 53 Ill. 52; Smith v. Gibson, 15 Minn. 89; O'Rourke v. O'Connor, 39 Cal. 442; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Rogers v. Hussey, 36 Iowa, 664; Van Kueren v. Cent. R. R. Co., 38 N. J. L. (9 Vroom), 165; Dixon v. Lacoste, 1 Smedes & M. 107; Stafford Bank v. Sprague, 17 Fed. Rep. 784. See Harral v. Leverty, 50 Conn. 46, 47 Am. Rep. 608; Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285. See, also, Gray v. Zellmer, 66 Kan. 514, 72 Pac. 228; Butler v. Thweatt, 119 Ala. 325, 24 So. 545; Neal v. Jones, 100 Ga. 765, 28 S. E. 427; Burr v. Loomer, 103 Ga. 159, 29 S. E. 692; Baldwin v. Sherwood, 117 Ga. 827, 45 S. E. 216; Austin v. So. etc. Assn., 122 Ga. 440, 50 S. E. 382; Bridger v. Exchange Bank, 126 Ga. 821, 8 L.R.A.(N.S.) 463, 56 S. E. 97, 115 Am. St. Rep. 118; Mason v. Mullahy, 145 Ill. 383, 34 N. E. 36; Joiner v. Duncan, 174 Ill. 252, 51 N. E. 323; Dyer v. Eldridge, 136 Ind. 654, 36 N. E. 522; Rothschild v. Leonhard, 33 Ind. App. 452, 71 N. E. 673; Kruger v. Walker, 94 Ia. 506, 63 N. W. 320; Corey v. Smalley, 106 Mich. 257, 64 N. W. 13, 58 Am. St. Rep. 474; Holmes v. Deppert, 122 Mich. 275, 80 N. W. 1094; Banks v. Allen, 127 Mich. 80, 86 N. W. 383; Bartlett v. Smith, 146 Mich. 188, 109 N. W. 260, 117 Am. St. Rep. 625; Thompson v. Borg, 90 Minn. 209, 95 N. W. 896; Stovall v. Judah, 74 Miss. 747, 21 So. 614; Wiggenhorn v. Daniels, 149 Mo. 160, 50 S. W. 807; Mullins v. Butte etc. Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430; Scharman v. Scharman, 38 Neb. 39, 56 N. W. 704; Kahre v. Rundle, 38 Neb. 315, 56 N. W. 888; Pleasants v. Blodgett, 39 Neb. 741, 58 N. W. 423, 42 Am. St. Rep. 624; Monroe v. Hanson, 47 Neb. 30, 66 N. W. 12; Best v. Zutavern, 53 Neb. 604, 74 N. W. 64; Draper v. Taylor, 58 Neb. 787, 79 N. W. 709; Fall v. Fell, 75 Neb. 104, 106 N. W. 412; Holland v. Brown, 140 N. Y. 344, 35 N. E. 577; Cornell v. Maltby, 165 N. Y. 557, 59 N. E. 291; Red River etc. Co. v. Smith, 7 N. D. 236, 74 N. W. 194; O'Toole v. Omlie, 8 N. D. 444, 79 N. W. 849; Dickson v. Dows, 11 N. D. 407, 92 N. W. 798; Smith v. Phillips, 9 Okl. 297, 60 Pac. 117; Tate v. Clement, 176

the land from the owner, the contract of purchase may be enforced against them.[4] "It is the obvious design of our recording laws to protect purchasers fom latent legal or equitable titles. Hence, its operation in such cases in giving notice to the world protects all persons against fraud by the grantors wrongfully selling lands a second time. And, as a general rule, when the same person has executed two deeds for the same land, the first deed recorded will hold the title, unless the junior grantee has purchased with notice, in which case a prior recording of his deed would not avail against the prior deed of which he had notice. The statute has only given the priority to the junior deed first recorded, when the grantee has acted in good faith. If, at the time he makes the purchase, he has notice of an elder unrecorded deed, he must be regarded as acting in bad faith, and neither principles of justice nor the policy of the law will permit him to avail of the priority of the record. It then follows that actual, visible, open possession being regarded as notice equal to the recording of the deed under which the grantee is in possession, the person holding the first conveyance, and being in open, visible possession before the junior deed is recorded, must be held to be the owner of the title, as against the grantee in the junior deed." [5] Where an owner of a quarter section of land conveys by deed one acre of the tract to a school district, the school district

Pa. 550, 35 Atl. 214; Ramirez v. Smith, 94 Tex. 184, 59 S. W. 258; Jinks v. Moppen, (Tex. Civ. App.) 80 S. W. 390; Frugia v. Trueheart, (Tex.) 106 S. W. 736; Lynch v. Coviglio, 17 Utah, 106, 53 Pac. 983; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Schwoebel v. Storrie, (N. J. Eq.) 74 Atl. 969; Smith v. Fuller, 152 N. C. 7, 67 S. E. 48; Hughes Bros. v. Redus, 90 Ark. 149, 118 S. W. 414; Brady v. Sloman, 156 Mich. 423, 120 N. W. 795; Morris v. Blunt, 35 Utah, 194, 99 Pac. 686; Lucy v. Lucy, 107 Minn. 432, 120 N. W. 754; Seberg v. Ia. etc. Bank, 141 Ia. 99, 119 N. W. 378; Runyan v. Snyder, 45 Colo. 156, 100 Pac. 420. But see Foster v. Bailey (S. C. statute) 82 S. C. 378, 64 S. E. 424.

[4] Moss v. Atkinson, 44 Cal. 3; Hyde v. Mangan, 88 Cal. 327, and cases cited.

[5] Cabeen v. Breckenridge, 48 Ill. 91, 93, per Walker, J.

taking immediate possession of such acre, building a schoolhouse thereon and occupying the same for school purposes, but never recording its deed, and subsequently the grantor mortgages the whole of the quarter section to secure a promissory note, and the mortgage is recorded and another purchases the note and mortgage before maturity, having previously examined the records and made inquiries of the mortgagor as to the existence of encumbrances, but obtaining no notice concerning them, and having no actual notice of the claims of the school district, still, the possession of the school district is sufficient to cause him to inquire of it or of its agents as to its interests in the property. For a failure to do so, the interest of the purchaser of the note and mortgage becomes subordinate to the equities of the school district.[6] Although the land may be incorrectly described in the deed, yet actual possession as against a subsequent purchaser with knowledge, confers title.[7] Where an owner of land conveys it by deed of trust to secure a debt, and a year later executes a contract of purchase, the vendee paying the price and holding possession continuously and notoriously without knowledge of the trust deed, which was not recorded until eight years after its execution; and three years after its registration and eleven years after its execution the land is advertised for sale under the trust deed, the vendee's rights are superior to those of the *cestui que trust* in the trust deed.[8] Notice by possession never

[6] School District v. Taylor, 19 Kan. 287.

[7] Pike v. Robertson, 79 Mo. 615; White v. White, 105 Ill. 313. And see, also, Warbritton v. Demorett, 129 Ind. 346. But see, where possession was held insufficient, Lanford v. Weeks, 38 Kan. 319, 5 Am. St. Rep. 748.

[8] Preston v. Nash, 76 Va. 1. Where a grantor held title by a deed invalid in equity, and when he was never in possession, and others had controlled the property for many years, when an examination would have disclosed conveyances inconsistent with the full validity of the deed under which the grantor claimed, and when the purchase price was grossly inadequate, a purchaser may be charged with notice of the invalidity of his grantor's deed: Knapp v. Bailey, 79 Me. 195, 1 Am. St. Rep. 295.

extends beyond the rights of the occupant and of those under whom he claims.[9]

§ 761. **Possession by grantor—Comments.**—Where a grantor remains, after the execution of a deed, in possession of the land which he has conveyed, the question of whether his possession under these circumstances is such that a person contemplating a purchase or acquiring some interest in the land is compelled to take notice of the rights of such grantor, which he may have reserved, or which may exist *dehors* his deed, is a question on which the authorities are not agreed. By one class of decisions the rule laid down is that a grantor remaining in possession is entitled to protection to whatever rights he may have by virtue of the notice thereof given by his possession, in the same manner, and to the same extent, that any other person would be. While on the other hand, by another class of decisions, the rule is said to be that a person finding that the one in possession has conveyed away his rights by a deed duly recorded, is not obliged to go further and inquire whether the grantor has not some right or interest not disclosed by the record, and to which his possession may be referred.

§ 762. **View that possession is notice of grantor's rights.**—It is said by the cases holding that his possession is notice, that where the grantor continues in the open and adverse possession of land after the formal execution of a deed, this fact is in conflict with the legal effect of his deed. It is evidence that he still retains some interest in the land which by the record he has absolutely conveyed. A purchaser is put upon inquiry, and is subject to the same rules as would govern if the party in possession was a stranger to the record. Accordingly, where A, an owner of land, conveyed it by deed to B, which was immediately recorded, A not receiving any

[9] Smith v. Fuller, 152 N. C. 7, 67 S. E. 48.

portion of the purchase money, although the deed recited its payment, and B subsequently conveyed the land to C, but A remained in possession after the execution of his deed, and was in possession at the time B's deed was executed, the latter being insolvent when he executed his conveyance, it was held in an action brought by A to enforce a vendor's lien for the purchase money, that his continued possession was sufficient to impart notice of his rights.[1] Where A conveyed his farm

[1] Pell v. McElroy, 36 Cal. 268; Illinois Cent. R. R. Co. v. McCullough, 59 Ill. 166; Wright v. Bates, 13 Vt. 341; Webster v. Maddox, 6 Me. 256; Metropolitan Bank v. Godfrey, 23 Ill. 579; McKecknie v. Hoskins, 23 Me. 230; Grimstone v. Carter, 3 Paige, 421, 24 Am. Dec. 230; Hopkins v. Garrard, 7 Mon. B. 312; Hansen v. Berthelson, 19 Neb. 433; Lamoreu v. Meyers, 68 Wis. 34, 60 Am. Rep. 831; Stevens v. Castel, 63 Mich. 111; Davis v. Demming, 12 W. Va. 246; Daubenspeck v. Platt, 22 Cal. 330; McLaughlin v. Shepherd, 32 Me. 143, 52 Am. Dec. 646; Boggs v. Anderson, 50 Me. 161; White v. White, 89 Ill. 460; Ford v. Marcall, 107 Ill. 136; New v. Wheaton, 24 Minn. 406; Turman v. Bell, 54 Ark. 273, 26 Am. St. Rep. 35. See Eylar v. Eylar, 60 Tex. 315. In Pell v. McElroy, *supra*, Mr. Justice Sprague, in delivering the opinion of the court, said (p. 273): "The simple, independent fact of possession is sufficient to raise a presumption of interest in the premises on behalf of the occupant. And we can discover no just or rational ground for giving to this fact less significance as notice to a party purchasing the legal title from one not in possession, in consequence of the fact that such occupant had by deed divested himself of the legal title. For instance, should a vendor of lands make an absolute deed which is put of record, and immediately take from the grantee a mortgage upon the same lands to secure a part or all the purchase money, by the terms of which mortgage he is to retain the possession until the entire purchase money is paid, and such vendor and mortgagee should continue in the exclusive possession with his mortgage unrecorded, it is very clear that, under the decisions heretofore referred to, a party purchasing of his vendee while such a possession was in the vendor would take the premises with presumptive notice of the equities of the occupant. So, if a vendor of land make an absolute deed which is put of record, and take a note for the purchase money, and immediately receive from his vendee a reconveyance by absolute deed not put of record, which, by a verbal agreement of the parties, he is to retain, with the possession, as security for the payment of the purchase money, while such possession continued, it manifestly

to B by a deed duly registered, at the same time taking back a conveyance to himself and two minor sons, the latter deed not being recorded, but A remaining in possession as before, it was held this possession was sufficient to give notice of the second deed.[2] If a vendor of land leaves a deed, after execution, in the hands of the officer taking the acknowledgment, for delivery to a third person, to hold as an escrow until the payment of the purchase money, but the deed, without delivery

would operate as presumptive notice of his equities to purchasers of his grantees. So, in this case, if before or at the maturity of the note given by McElroy for the purchase money, he (McElroy) had reconveyed the land to Pell in consideration of the surrender of his notes, and then, before Pell had put the deed of record, and while he was still in the exclusive possession with his deed in his pocket, McElroy had sold and conveyed to defendants Kelly and Hearst, it would hardly be contended that they could be protected as purchasers in good faith in a court of equity. An absolute deed divests the grantor not *only* of his legal title, but right of possession; and when such grantor is found in the exclusive possession of the granted premises long after the delivery of his deed, here is a fact antagonistic to the fact and legal effect of the deed; and we cannot appreciate the justice sound reason, or policy of a rule which would authorize a subsequent purchaser, while such fact of possession continues, to give controlling prominence to the fact and legal effect of the deed, in utter disregard of the other notorious, prominent, antagonistic fact of exclusive possession in the original grantor. He cannot be regarded *a purchaser in good faith* who negligently or wilfully closes his eyes to visible pertinent facts, indicating adverse interest in or encumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when by the exercise of prudent, reasonable diligence he could fully inform himself of the real facts of the case." See, also, Smith v. Myers, 56 Neb. 503, 76 N. W. 1084; Shiff v. Andress, 147 Ala. 690, 40 So. 824; Rea v. Bluhm, 173 Ill. 277, 50 N. E. 694; Georgia etc. Co. v. Faison, 114 Ga. 655, 40 S. E. 760; Kahre v. Rundle, 38 Neb. 315, 56 N. W. 888; Jennings v. Salmon, (Ky.) 98 S. W. 1026; Bridger v. Exchange Bank, 126 Ga. 821, 8 L.R.A. (N.S.) 463, 56 S. E. 97, 115 Am. St. Rep. 118.

[2] Webster v. Maddox, 6 Me. (6 Greenl.) 256; Turman v. Bell, 54 Ark. 273, 26 Am. St. Rep. 35. Creditors of the grantee are bound as effectually by notice afforded by possession of the grantor as they are by possession by a stranger to the title: Groff v. State Bank, 50 Minn. 234, 36 Am. St. Rep. 640; citing §§ 761–765 of text.

to the depositary, is placed upon record without the grantor's knowledge or consent, he remaining in possession of the land, a subsequent purchaser from the grantee will hold subject to the equities of the grantor.[8]

§ 763. **Opposite view—Possession not notice of grantor's rights.**—On the other hand, by many authorities, it is held that while possession by a stranger is notice of any claim he may have to the property, a distinction is to be noted between that case and the case of a grantor remaining in possession after the execution of a deed. In a case in New Jersey, the court while admitting the full force of the general rule as to the effect of notice given by possession, declares that "this rule does not apply to a vendor remaining in possession, so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed. So far as the purchaser is concerned, the vendor's deed is conclusive upon that subject; having declared, by his conveyance, that he makes no reservation, he is estopped from setting up any secret arrangement by which his grant is impaired. The well-settled rule applies to this case, that a party is estopped from impeaching or contradicting his own deed, or denying that he granted the premises which his deed pur-

[8] Illinois Central R. R. Co. v. McCullough, 59 Ill. 166. In Grimstone v. Carter, 3 Paige, 421, 439, 24 Am. Dec. 230, the Chancellor says: "This is undoubtedly a hard case for the purchasers who supposed they were getting a good title. But as the complainant was not aware of the negotiation for the purchase of the property, and therefore had no opportunity to apprise them of his equitable claim to a reconveyance of the north half of the lot, it would be equally hard to deprive him of his property without consideration. Seymour and Welles were informed he was in possession, which, by the settled law of the land, was sufficient to put them on inquiry, and to deprive them of the defense of *bona fide* purchasers without notice of his rights. And they, in the language of Lord Eldon, having neglected to take the obvious precaution of inquiring as to the nature and extent of a tenant's interest in the property, must suffer the consequences of their neglect."

ports to convey."[4] In a case in Michigan, Mr. Justice Christiancy, in delivering the opinion of the court, after adverting to the fact that open and peaceable possession is notice to the world of the claim under which the party in possession holds, thus continues: "But the object of the law in holding such possession constructive notice, where it has been so held, is to protect the possessor from the acts of others who do not derive their title from him; not to protect him against *his own acts,* and especially against his own deed. If a party executes and delivers to another a solemn deed of conveyance of the land itself, and suffers that deed to go upon record, he says to all the world, 'whatever right I have, or may have claimed to have in this land, I have conveyed to my grantee; and though I am yet in possession, it is for a temporary purpose, without claim of right, and merely as a tenant at sufferance to my grantee.' This is the natural inference to be drawn from the recorded deed, and in the minds of all men, would be calculated to dispense with the necessity of further inquiry upon the point. All presumption of right or claim of right is rebutted by his own act and deed. One of the main objects of the registry law would be defeated by any other rule."[5] It was said by the Supreme Court of Kansas that the

[4] Van Keuren v. Central R. R. Co. of New Jersey, 38 N. J. L. (9 Vroom) 165, 167, per Van Syckel, J.

[5] Bloomer v. Henderson, 8 Mich. 395, 405, 77 Am. Dec. 453, and cases cited. See, also, Woods v. Farmer, 7 Watts, 382, 32 Am. Dec. 772; Scott v. Gallagher, 14 Serg. & R. 333, 16 Am. Dec. 508; Newhall v. Pierce, 5 Pick. 450; Rice v. Rice, 2 Drew. 1; White v. Wakefield, 7 Sim. 401; Muir v. Jolly, 26 Beav. 143; Groton Sav. Bank v. Beatty, 30 N. J. Eq. 133; Quick v. Milligan, 108 Ind. 419, 58 Am. Rep. 49; Eylar v. Eylar, 60 Tex. 319; Hoffman v. Blume, 64 Tex. 334; Koon v. Trammel, 71 Iowa, 132; Abbott v. Gregory, 39 Mich. 68; Humphrey v. Hurd, 29 Mich. 44; May v. Sturdivant, 75 Iowa, 116, 39 Mo. Rep. 221, 9 Am. St. Rep. 463; Crassen v. Swoveland, 22 Ind. 427; Sprague v. White, 73 Iowa, 670, 35 N. W. Rep. 751; Dodge v. Davis, 85 Iowa, 77, 52 N. W. Rep. 2; Tuttle v. Churchman, 74 Ind. 311; Bell v. Twilight, 18 N. H. 159, 45 Am. Dec. 367; Mateskey v. Feldman, 75 Wis. 103, 43 N. W. Rep. 703; Schwallback

rule sustained by the great weight of authority is that where the grantor remains in possession he will not be permitted to assert secret equities in his favor as his deed is a declaration that he has no right to possession. A purchaser from the grantee of the party in possession is not obligated, said the court, "to inquire whether such party has reserved any interest in the land conveyed. So far as the purchaser is concerned, the actual occupant's deed is conclusive upon that point. The object of the law in holding possession constructive notice is to protect the possessor from the acts of others who do not derive their title from him, not to protect him against his own acts, nor to protect him against his own deed. Therefore, when a grantor executes and delivers a deed of conveyance to go upon record, he says to the world: 'Though I am yet in the possession of the premises conveyed, it is for a temporary purpose, without claim of right, and merely as a tenant at sufferance of my grantee.' " [6]

§ 764. **Comments.**—It is perhaps to be regretted that courts should hold parties bound by any other notice than that

v. Milwaukee etc. Ry. Co., 69 Wis. 292, 2 Am. St. Rep. 740; Denton v. White, 26 Wis. 769; Hurt v. Cooper, 63 Tex. 362; Love v. Breedlove, 75 Tex. 649, 13 S. W. Rep. 222; Hafter v. Strange, 65 Miss. 323, 7 Am. St. Rep. 659; Seymour v. McKinstrey, 106 N. Y. 230; Burt v. Baldwin, 8 Neb. 487; Van Keuren v. Central R. R. Co., 38 N. J. L. 165. And see New York Life Ins. Co. v. Cutler, 3 Sand. Ch. 176; Cook v. Travis, 20 N. Y. 400; Reed v. Gannon, 50 N. Y. 345; Dawson v. Danbury Bank, 15 Mich. 489; Dodge v. Davis, 85 Ia. 77, 52 N. W. 2; Crooks v. Jenkins, 124 Ia. 317, 100 N. W. 82, 104 Am. St. Rep. 326; Hockman v. Thuma, 68 Kan. 519, 75 Pac. 486; Red River etc. Co. v. Smith, 7 N. D. 236, 74 N. W. 194; Smith v. Phillips, 9 Okl. 297, 60 Pac. 117; Ramirez v. Smith, (Tex.) 56 S. W. 254; Randall v. Luigwall, 43 Or. 383, 73 Pac. 1. See, also, Harris v. Harris, 109 La. 914, 33 So. 918; Eastham v. Hunter, 98 Tex. 560, 86 S. W. 323.

[6] Hockman v. Thuma, 68 Kan. 519, 75 Pac. 486. See, also, Koon v. Tramel, 71 Iowa, 132, 32 N. W. 243; Malette v. Wright, 120 Ga. 735, 48 S. E. 229; Exon v. Dancke, 24 Or. 110, 32 Pac. 1045; Watkins v. Sproul, 8 Tex. Civ. App. 427, 28 S. W. 356; Eylar v. Eylar, 60 Tex. 315.

furnished by the record. Land is sold in many instances that the party purchasing has never seen. The purchaser relies upon the records for the purpose of ascertaining his vendor's title, and generally considers himself safe in purchasing when the records show that his vendor's title is indefeasible. But it may happen that the one apparently possessing the title has no title whatever, or has a title subject to liens and encumbrances not disclosed by the record, but manifested by a possession sufficient to affect subsequent purchasers with notice. Inasmuch as our law allows possession to have the effect of notice, there seems to us no good reason for drawing a distinction between cases where a stranger to the title has possession, and where the grantor remains in possession after the execution of his deed, under some title or claim not shown by the records. The possession in either case is the same. In either case, it is a fact in conflict with the record title. If possession by a stranger is sufficient to make it obligatory upon purchasers to ascertain his rights, a possession by the grantor himself, after the execution of his deed, is a circumstance as much entitled to consideration, and as apt to cause inquiry. This much may be admitted. But it is said that the grantor is estopped by the execution of his deed. We cannot see why the doctrine of estoppel does not apply with as much force to one case as to the other. A stranger who neglects to have recorded the instrument under which he claims title or right is as guilty of negligence as a grantor who fails to record the instrument by which his rights are conferred or secured. The grantor is not seeking to *defeat* his deed. He, of course, is estopped from assailing his own deed. But, when he remains in possession, he claims some right *dehors* his deed. It is true that, in many instances, that right could have been reserved in his deed. But it is true in all instances that his rights either could have been conferred, if they are not, by a separate instrument. In a case where an owner of land conveys it by deed which is recorded, and takes a mortgage as se-

curity for the payment of the purchase money, or takes an absolute deed intended as a mortgage, which, by the agreement of the parties or the grantor's neglect, is not recorded, and it is agreed that the grantor is to remain in possession until the purchase money is paid, the question of the grantor's estoppel by his deed, it seems to us, is not involved. The grantor admits the execution of his deed, and concedes that it is as operative in all respects as it purports to be. But he has the same right as anyone else to acquire, subsequently, either a legal or an equitable title from his grantee. If he does so, and does not put the instrument giving such title on record, he occupies exactly the same position as a purchaser who acquires a title by deed which he fails to record. The negligence in one case is as great as in the other. Neither is attempting to defeat any recorded deed. There is no question of estoppel, because the full effect of the recorded conveyances is conceded. It seems to us that, in these cases, the effect of a possession by a stranger and by a grantor ought to be similar. In either case, the record shows that the title is vested in one other than the party in possession. In either case, the possession is visible; is of a character of which one viewing the premises must be cognizant. In either case, the possession may be under permission of the owner as he appears of record, without any right being held by the party in possession, or, in either case, the party in possession may claim under an adverse title. If possession is protection to one, it should be to the other. Whatever can be said as to the danger of allowing a grantor, who remains in possession after the execution of his deed, to claim a title in conflict with the record title, can be said with equal force against allowing possession by anyone, under any circumstances, to affect subsequent purchasers and encumbrancers with notice.[7]

[7] In Groff v. State Bank, 50 Minn. 234, 36 Am. St. Rep. 640, §§ 761–765, were cited as authority for the views expressed by the court.

§ 765. **Absolute deed and grantor's possession under unrecorded defeasance.**—It is held in accordance with the view that a grantor's possession affords notice of his rights, that where a person conveys land by a deed absolute in form, which is recorded, taking back a defeasance which is not recorded, constituting the transaction a mortgage, the possession and actual occupation of the land by the mortgagor are notice of his title to a purchaser from the mortgagee.[8] But in Indiana, it is held on the other hand that such possession is not notice of an unrecorded defeasance,[9] and decisions in Massachusetts are to the same effect.[1] As already stated, we are of opinion that the grantor should be as much entitled to claim the benefit of notice arising from his open possession as anyone else. It has been held in New York, that where a judgment debtor continues in possession of the land which has been sold under execution against him, his possession, it may be presumed, is under the title of the purchaser.[2] "It is quite true, generally," said Comstock, J., "that the law regards the actual occupancy of land as equivalent to notice to all persons dealing with the title, of the claims of the occupant. But this is not an absolute proposition which is to be taken as true in all possible relations. The circumstances known may be such that the occupancy will not suggest to a purchaser an inquiry into the title or claim under which it may be held; and when the inquiry may be omitted in good faith, and the exercise of ordinary prudence, no one is bound to make it. Possession out

[8] Daubenspeck v. Platt, 22 Cal. 330; Pell v. McElroy, 36 Cal. 668; New v. Wheaton, 24 Minn. 406.

[9] Crassen v. Swoveland, 22 Ind. 427.

[1] Hennessy v. Andrews, 6 Cush. 170; Newhall v. Pierce, 5 Pick. 450; Newhall v. Burt, 7 Pick. 156. And see Kunkle v. Wolfersberger, 6 Watts, 126; Corpman v. Baccastow, 84 Pa. St. 363; Brophy Mining Co. v. Brophy & Dale G. & S. Co., 15 Nev. 101; Parker v. Osgood, 3 Allen, 487; Lamb v. Pierce, 113 Mass. 73; Pomroy v. Stevens, 11 Met. 244; Mara v. Pierce, 9 Gray, 306; Dooley v. Wolcott, 4 Allen, 407; Groton Savings Bank v. Batty, 20 N. J. Eq. (3 Stewt.) 126.

[2] Cook v. Travis, 20 N. Y. 400.

of the vendor and actually in another person, only suggests an inquiry into the claim of the latter. Ordinarily, that inquiry should be made, because it evinces bad faith or gross neglect not to make it. But the question in such cases is one of actual notice, and such notice will be imputed to a purchaser only where it is a reasonable and just inference from the visible facts. He cannot wilfully close his eyes and then allege good faith; nor can he pause in the examination where the facts made known to him plainly suggest a further inquiry to be pursued. The adjudged cases which have been the most carefully considered do not carry the doctrine of notice as implied or inferred from circumstances further than is here indicated." [3] Possession of mortgaged premises is notice of the equities of the occupant to a person who purchases the same at a trustee's sale under a power of sale. Under these circumstances, the purchaser at the trustee's sale will acquire a title subject to any equitable rights of the party in possession to avoid the sale.[4] Where a mortgagor continues in possession after a foreclosure sale, it is held in Michigan that his possession is not constructive notice of any title or interest subsequently acquired by him not appearing of record.[5] If two persons buy a tract of land, each being equally interested and each taking his part of the land, a decree, if no unfairness in the division is shown may be entered after the death of one of the parties confirming such partition.[6]

§ 766. **Parol evidence to show grantor's right to possession.**—Notwithstanding the general proposition that a reservation of an interest in real estate can be made only by deed, yet in an action for use and occupation, parol evidence is admissible to show an agreement between the parties, that the

[3] Cook v. Travis, 20 N. Y. 402, 403.

[4] Clevinger v. Ross, 109 Ill. 349.

[5] Dawson v. Danbury Bank, 15 Mich. 489.

[6] Irwin v. Dyke, 109 Ill. 528.

grantor might continue to use the premises.[7] The effect of such evidence is not to contradict the deed, but to explain what was the actual consideration, and parol evidence for this purpose is admissible.[8]

§ 767. **Absolute deed with mortgage for support.**— A husband and wife who had been for several years in the occupation of a farm, conveyed it to their son and took back from him a mortgage conditioned for their support. They omitted, however, to have the mortgage recorded. The mortgagees continued in the possession of the farm, they and the son forming one family, and all aiding in and contributing to its support. The son, some years after the execution of this mortgage, executed another to a third person. The latter instrument was properly recorded. Under these circumstances, the court held that the second mortgagee must be considered as having the rights of the first mortgagees.[9] Where an aged woman executed a deed to her daughter, reciting as the consideration "five dollars and the faithful performance of a certain agreement," the agreement being by parol that the daughter should support the mother for her life, and the daughter subsequently married, and on the same consideration conveyed the land to her husband, to whom the mother afterward executed a quitclaim deed for the purpose, as the deed expressed, of correcting a misnomer, and the husband then mortgaged the land to a person who had knowledge of the quitclaim deed, it was held that the mortgagee was affected with notice of the agreement, which might have been ascertained by inquiry.[1] But it is said that possession by husband and wife together will impart notice of her equities as against all persons not

[7] The Aull Savings Bank v. Aull, 80 Mo. 199.

[8] The Aull Savings Bank v. Aull, 80 Mo. 199.

[9] Boggs v. Anderson, 50 Me. 161. See Harrison v. New Jersey etc. Transportation Co., 19 N. J. Eq. (4 Green, C. E.) 488.

[1] Dailey v. Kastell, 56 Wis. 444.

claiming under the husband.[2] The presumption arises where there is a joint occupancy of land by husband and wife, that the possession is that of the husband and he, therefore, is a proper person of whom to inquire as to the state of the title.[3] Possession of real property by husband and wife together, however, will, it is said, impart notice of the wife's equity, against all persons other than those who claim under the husband.[4] A purchaser is not put upon inquiry, it is held, to ascertain the rights of a third person, from whom the husband to cover his own fraud took a lease of land to which his wife held the record title, when the existence of such lease is unknown to the purchaser.[5]

§ 769. **Character of possession.**—The possession to have the effect of notice must be of that character that the attention of a purchaser is at once called to it. It must be open, distinct, exclusive, and unequivocal. If the land is used by the grantee and others for pasture, and there are no build-

[2] Iowa Loan & Trust Co. v. King, 58 Iowa, 598.

[3] Austin v. So. etc. Ass'n, 122 Ga. 440, 50 S. E. 382.

[4] See Walker v. Neil, 117 Ga. 733, 45 S. E. 387; Kirby v. Talmadge, 160 U. S. 379, 40 L. ed. 463, And see Brunson v. Brooks, 68 Ala. 248. But see Neal v. Parkerson, 61 Ga. 345 (distinguished in Walker v. Neil *supra*); Garrad v. Hull, 92 Ga. 787, 20 S. E. 357. See in this connection: Reagle v. Reagle, 179 Pa. 89, 36 Atl. 191. Where husband and wife have separated, the wife's possession of land is sufficient to put a purchaser from the husband upon inquiry as to her rights: Allen v. Moore, 30 Colo. 307, 70 Pac. 682. See, also, Fall v. Fall, 75 Neb. 104, 106 N. W. 412.

A person in Utah occupied certain premises with his wife and A, a polygamous wife, who remained with him under a secret agreement that she should have a half interest in the property, and he received a deed for the land, without making known his agreement with A. Subsequently third parties acquired his interest, paying a valuable consideration and having no notice of A's equities. As against these parties it was held that A had no claim. The occupation of the premises by her in the manner stated gave no constructive notice of her rights: Townsend v. Little, 109 U. S. 504, 27 L. ed. 1012.

[5] Fassett v. Smith, 23 N. Y. 252.

ings upon it, such possession is not of that visible, notorious, and exclusive character as amounts to constructive notice of ownership.[6] If wood is occasionally cut under circumstances which might be regarded as so many trespasses with as much probability as acts of ownership, such fact does not make the possession notice.[7] "The character of the possession which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of rights or equities in persons other than those who have a title upon record, is very well established by an unbroken current of authority. The possession and occupation must be actual, open, and visible; it must not be equivocal, occasional, or for a special or temporary purpose; neither must it be consistent with the title of the apparent owner by the record." [8] It must be such as to be inconsistent with

[6] Coleman v. Barklew, 3 Dutch. 357, and cases cited; Taylor v. Central Pac. R. R. Co., 8 West C. Rep. 22, 67 Cal. 615.

[7] Holmes v. Stout, 2 Stockt. Ch. (10 N. J.) 419.

[8] Brown v. Volkening, 64 N. Y. 76, 82, per Allen, J.; Elliott v. Lane, 82 Iowa, 484, 31 Am. St. Rep. 504; Thomas v. Kennedy, 24 Iowa, 397, 95 Am. Dec. 740; Iowa Loan and Trust Co. v. King, 58 Iowa, 598; Lindley v. Martindale, 78 Iowa, 380; Kendall v. Lawrence, 22 Pick. 540; McMechan v. Griffing, 3 Pick. 149, 15 Am. Dec. 198; Webster v. Van Steenbergh, 46 Barb. 211; Pope v. Allen, 90 N. Y. 298; Tuttle v. Jackson, 6 Wend. 213, 21 Am. Dec. 306; Page v. Waring, 76 N. Y. 463; Ely v. Wilcox, 20 Wis. 523, 91 Am. Dec. 436; Betts v. Letcher, 1 S. D. 182, 46 N. W. Rep. 193; Beaubrien v. Henderson, 38 Kan. 471, 16 Pac. Rep. 796; Trezise v. Lacy, 22 Kan. 472; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 35 L. ed. 1063; Noyes v. Hall, 97 U. S. 34, 24 L. ed. 909; Townsend v. Little, 109 U. S. 504, 27 L. ed. 1012; Gum v. Equitable Trust Co., 1 McCrary, 51; McLean v. Clapp, 141 U. S. 429, 35 L. ed. 804; Webber v. Taylor, 2 Jones Eq. 9; Tankard v. Tankard, 79 N. C. 54; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Fair v. Stevenot, 29 Cal. 486; Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167; Blankenship v. Douglas, 26 Tex. 225, 82 Am. Dec. 608; Satterwhite v. Rosser, 61 Tex. 166; Bernstein v. Humes, 71 Ala. 260; Truesdale v. Ford, 37 Ill. 210; Bogue v. Williams, 48 Ill. 371; Smith v. Jackson, 76 Ill. 254; Partridge v. Chapman, 81 Ill. 137; Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169; Rock Island & P. Ry. Co. v. Dimick, 144 Ill. 628, 19 L.R.A. 105, 32 N. E. Rep. 291; Davis v. Hopkins, 15 Ill. 519; Mason v. Mullahy, 145 Ill. 383, 34 N. E. Rep. 36; Western Min. Co. v. Peytona Coal Co., 8 W. Va. 406; Core v.

the title upon which the subsequent purchaser or incumbrancer relies.[9] An owner of the equitable title to sixty acres of land, of which three-quarters of an acre had been cleared and fenced, placed a person upon the tract who resided on an adjoining tract. The land was situated in a densely timbered and thinly inhabited country. The person left in charge of the land chopped wood upon and cultivated the part which had been cleared. Among the neighbors the general understanding was that the land belonged to the person having the equitable title to it. It was held by a majority of the court that one who took a mortgage from the holder of the legal title, took by reason of this possession with notice of the rights of

Faupel, 24 W. Va. 238; Martin v. Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Boyce v. McCulloch, 3 W. & S. 429, 39 Am. Dec. 35; Meehan v. Williams, 48 Pa. St. 238; Jeffersonville M. & T. R. Co. v. Oyler, 82 Ind. 394; Hawes v. Wiswell, 8 Me. 94; Butler v. Stevens, 26 Me. 484; Bell v. Twilight, 22 N. H. 500; Patten v. Moore, 32 N. H. 382; Ellis v. Young, 31 S. C. 322, 9 S. E. Rep. 955; Williams v. Sprigg, 6 Ohio St. 585; Ranney v. Hardy, 43 Ohio St. 157, 1 N. E. Rep. 523; Brophy Min. Co. v. Brophy and Dale G. & S. Min Co., 15 Nev. 101; McKee v. Wilcox, 11 Mich. 358, 83 Am. Dec. 743; Smith v. Greenop, 60 Mich. 61, 26 N. W. Rep. 832. See, also, Holland v. Brown, 140 N. Y. 344, 34 N. E. 577; Wells v. American etc. Co., 109 Ala. 430, 20 So. 136; Munn v. Achey, 110 Ala. 628, 18 So. 299; Scotch etc. Co. v. Sage, 132 Ala. 598, 32 So. 607, 90 Am. St. Rep. 932; Rankin etc. Co. v. Bishop, 137 Ala. 271, 34 So. 991; O'Neal v. Prestwood 153 Ala. 443, 45 So. 25; Schumacher v. Truman, 134 Cal. 430, 66 Pac. 591; Mason v. Mullahy, 145 Ill. 383, 34 N E. 36; Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870; Gray v. Lamb, 207 Ill. 258, 69 N. E. 794; Lindley v. Martindale, 78 Ia. 379, 43 N. W. 233; Patterson v. Mills, 121 N. C. 258, 28 S. E. 368; Ramirez v. Smith, (Tex.) 56 S. W. 254.

[9] Pope v. Allen, 90 N. Y. 298; Holland v. Brown, 140 N. Y. 344, 35 N. E. 577; Munn v. Achey, 110 Ala. 628, 18 So. 299; Ramirez v. Smith, (Tex.) 56 S. W. 254; Martin v. Thomas, 56 W. Va. 220, 49 S. E. 118. To operate as notice the possession must be actual, visible, open and notorious: Norton v. Metropolitan L. Ins. Co., 74 Minn. 484, 77 N. W. 298; Ellis v. Young, 31 S. C. 322, 9 S. E. 955; Hellman v. Levy, 55 Cal. 117. A claim of title to an entire tract may be shown by a possession of a part: Waters v. Connelly, 59 Iowa, 217, 13 N. W. 82. See, also, Millard v. Wegner, 68 Neb. 574, 94 N. W. 802.

the equitable owner.[1] Ordinarily it is said that there must be such a visible change of possession as to indicate that there has been a sale.[2] But it has been held however, that a change in possession is not necessarily absolutely essential to put a

[1] Wickes v. Lake, 25 Wis. 71. A very able dissenting opinion was filed by Dixon, C. J. In the opinion of the court, delivered by Cole, J., it was said: "For what more notorious, open, visible, and unambiguous acts of possession and ownership can be manifested over real estate, than by chopping, clearing up, fencing, and actually cultivating between two and three acres of heavily timbered land? True, the number of acres is not large, yet it will cost as much time, labor, and money to chop and clear up three acres of heavily timbered land, and make it fit for cultivation, as it will to make large improvements on the prairie. The possession and cultivation of a large inclosed field on the prairie, by raising wheat upon it, would not naturally be more observed by the public, or create a stronger presumption of notice, than such an improvement in the woods. And it is very plain that such unambiguous acts of ownership over land will never be confounded with mere acts of trespass. They are not liable to any such misconstruction. Considering the condition of the country, that it was sparsely settled and but a little cleared up, the clearing, fencing, and cultivating one, two, or three acres are such decided acts of ownership as will not fail to attract the notice of the public, as it seems they did in this case, and are of such a character as to be notice to a purchaser. Such improvements under the circumstances, are open, visible, notorious, and unambiguous, and are as striking evidence of the continued and complete possession of the land by the party who makes them, as can well be imagined. For we do not understand the rule to be, that a person must actually reside upon the land to make his possession notice. He may actually improve and cultivate it, and perform decided acts of ownership over it, without residing upon it. He may cultivate and improve it by a tenant; for the possession of the tenant is his possession. But here there were actual, visible, and substantial improvements made, which would cost considerable labor and money to make them; land was cleared up, fenced, and cultivated, and the occupation and possession were as notorious and exclusive as could have existed, unless Lake and Palmer had actually resided upon their several tracts." See, also, Krider v. Lafferty, 1 Whart. 303, where planting ground with willows to obtain materials to carry on the trade of basket making was held sufficient possession. And see, also, Banner v. Ward, 12 Fed. Rep. 820.

[2] Stockton v. Nat'l Bank, 45 Fla. 590, 34 So. 897; Rankin Mfg. Co. v. Bishop, 137 Ala. 271, 34 So. 991; Griffin v. Hall, 111 Ala. 601, 20 So. 685; 115 Ala. 647, 22 So. 156.

person on inquiry as to the rights of a former purchaser.[3] While there may be some difference of opinion upon the question of fact as to whether possession in any given case has been open, visible, notorious, and exclusive, yet that a possession of this kind, as a matter of law, is required, cannot be questioned.[4]

[3] Janvrin v. Janvrin, 60 N. H. 169. And see in this connection: Carr v. Brennan, 166 Ill. 108, 47 N. E. 721, 57 Am. St. Rep. 119; Scheuer v. Kelly, 121 Ala. 323, 26 So. 4.

[4] Pope v. Allen, 90 N. Y. 298; Webber v. Taylor, 2 Jones Eq. 9; Williams v. Sprigg, 6 Ohio St. 585; Butler v. Stevens, 26 Me. 484; Tankard v. Tankard, 79 N. C. 54; Patten v. Moore, 32 N. H. 382; Ely v. Wilcox, 20 Wis. 523, 91 Am. Dec. 436; Cabeen v. Breckenridge, 48 Ill. 91; Holmes v. Powell, 8 De Gex, M. & G. 572; Jefferson etc. R. R. Co. v. Oyler, 82 Ind. 394; Gum v. Equitable Trust Co., 1 McCrary, 51; Trezise v. Lacy, 22 Kan. 742; Truesdale v. Ford, 37 Ill. 210; Noyes v. Hall, 7 Otto, 34, 24 L. ed. 909; Taylor v. Kelly, 3 Jones Eq. 240; Dunlap v. Wilson, 32 Ill. 517; Bradley v. Snyder, 14 Ill. 263, 58 Am. Dec. 564; Bogue v. Williams, 48 Ill. 371; Troy City Bank v. Wilcox, 24 Wis. 671; Martin v. Jackson, 3 Casey, 504, 67 Am. Dec. 489; Bell v. Twilight, 22 N. H. 500; Wright v. Wood, 11 Harris, 120; Meehan v. Williams, 12 Wright, 238; Webster v. Van Steenbergh, 46 Barb. 211; Brophy Mining Co. v. Brophy, G. & S. M. Co. 15 Nev. 101; Tuttle v. Jackson, 6 Wend. 213, 21 Am. Dec. 306. See, also, Evans v. Templeton, 69 Tex. 375, 5 Am. St. Rep. 71; Worcester v. Lord, 56 Me. 265, 96 Am. Dec. 456; Schwallback v. Chicago etc. Ry. Co., 69 Wis. 292, 2 Am. St. Rep. 740; White v. White, 105 Ill. 313; Pope v. Allen, 90 N. Y. 298; Beaubrien v. Henderson, 38 Kan. 471; Parker v. Baines, 65 Tex. 605. Possession must be unambiguous: Atlanta etc. Ass'n v. Gilmer, 128 Fed. 293; Wells v. American etc. Co., 109 Ala. 430, 20 So. 136; Scotch Lumber Co. v. Sage, 132 Ala. 598, 32 So. 607, 90 Am. St. Rep. 932; Rankin etc. Co. v. Bishop, 137 Ala. 271, 34 So. 991; Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870; Gray v. Lamb, 207 Ill. 258, 69 N. E. 794; Lindley v. Martindale, 78 Ia. 379, 43 N. W. 233; Derrett v. Britton, 32 Tex. Civ. App. 485, 80 S. W. 562; Mack v. McIntosh, 181 Ill. 633, 54 N. E. 1019; Taggart v. Warner, 83 Wis. 1, 53 N. W. 33; Roussain v. Norton, 53 Minn. 560, 55 N. W. 747; Clark v. Greene, 73 Minn. 467, 76 N. W. 263; Jobbing v. Tuttle, 75 Kan. 351, 9 L.R.A. (N.S.) 960, 89 Pac. 699. As to particular acts sufficient to effect notice: see Kimmell v. Scott, 34 Neb. 493, 52 N. W. 371; Pride v. Whitfield (Tex.) 51 S. W. 1100; Truth Lodge v. Barton, 119 Ia. 230, 93 N. W. 106, 97 Am. St. Rep. 303; Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846; Peery v. Elliott, 101 Va. 709,

§ 770. Possession under one kind of right as notice of other rights.—It is declared by one class of cases that where possession of land is acquired under one kind of right, such possession is not notice of another interest which the occupant has acquired subsequently, in the absence of peculiar circumstances of sufficient consequence to attract attention to the change of the former title or interest.[5] In one of these cases, although the decision was based on another point, Mr. Justice Wilde said: "I admit that generally the open and notorious possession of the first purchaser under his deed would be sufficient to raise a legal presumption of notice. But suppose that a lessor should grant the fee of the land to the lessee, he being in possession under the lease, and the next day should make a second grant to a third person who well knew that the lessee the day before was in possession under the lease, how does his continued possession furnish evidence of notice of his purchase? To imply notice in such case is to presume a fact, without proof and against probability."[6] Where an owner of a vacant, unimproved town lot, uses in common with his tenants of adjoining premises, such lot as a yard in which to hang out and dry clothes, such use and possession will not prevail as constructive notice against an interest acquired by a purchaser or mortgagee in good faith without actual notice.[7] But the proper rule seems to be that

44 S. E. 919; Miner v. Wilson, 107 Mich. 57, 64 N. W. 874; Rogers v. Turpin, 105 Ia. 183, 74 N. W. 925; Adams v. Betz, 167 Ind. 161, 78 N. E. 649; Bolland v. O'Neal, 81 Minn. 15, 83 N. W. 471, 83 Am. St. Rep. 362; Valentine v. R. Co., 187 N. Y. 121, 79 N. E. 849; Ex parte Alexander, 122 N. C. 727, 30 S. E. 336. As to particular acts insufficient to effect notice see Kendrick v. Colyar, 143 Ala. 597, 42 So. 110; Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870; Phoenix Ins. Co. v. Neal, 23 Tex. Civ. App. 427, 56 S. W. 91.

[5] Williams v. Sprigg, 6 Ohio St. 585; McMechan v. Griffing, 3 Pick. 149, 154, 15 Am. Dec. 198; Lincoln v. Thompson, 75 Mo. 613; Bush v. Golden, 17 Conn. 594; Kendall v. Lawrence, 22 Pick. 540. See Matthews v. Demerritt, 22 Me. 312.

[6] In McMechan v. Griffing, 3 Pick. 149, 155, 15 Am. Dec. 198.

[7] Williams v. Sprigg, 6 Ohio St. 585. In delivering the opinion of the Court, Bowen, J., said (p. 594):

possession should be held to be notice of all the rights of the party in possession, where that possession is open, visible, exclusive, distinct, and unequivocal.[8]

"The complainant owned the hotel which occupied the front of two lots. Lot No. 311 adjoined them. It was vacant, and had during the construction of the hotel become a sort of lumberyard, on which building and other materials had accumulated. In the spring of 1837, the complainant buys the lot in order to enhance the comfort and convenience of his hotel. He removes some of the lumber and rubbish therefrom, but does nothing more. He does not build upon it; he does not fence it; but his tenant of the other lots and hotel hangs out clothes there to dry after being washed. This is the extent to the possession held and exercised by complainant during the season of 1837. No lease was made to Segur, the tenant of the hotel, for it, no rent paid for it, no acts of ownership by him exercised over it. Complainant was seen once, as witness thinks, removing some of the materials from it. Should such acts of possession and control be held to give notice to purchasers of equities and equitable titles not otherwise communicated or made known to them? We think the rule has never been, and should never be carried so far. There must be something in the acts which accompany possession of property, in order to give constructive notice, which can be seen and understood, something that will induce inquiry, that will naturally raise the question as to who may have rights there. Living on the premises, raising crops on them, the employment of persons there in the making of improvements, accompanied by frequent acts and expressions of ownership, would produce such notoriety, undoubtedly, as should put purchasers upon their guard, and induce investigation to acquire knowledge sufficient to enable them to deal safely. This may not be the only means of conveying notice to strangers, and without intending to define exactly what, in all cases, will constitute constructive notice, we feel no hesitation in saying that the stretching of a clothesline over a vacant, adjoining town lot, by the tenant of other premises, on which to hang clothes to dry, or a casual act of removing stone, brick, or lumber therefrom, belonging to an owner who had placed them there while constructing a house on the next lot, would not charge a *bona fide* purchaser or mortgagee with notice of equities in the landlord of such tenant, or the owner who removed such materials. Something more is required."

[8] See Rogers v. Jones, 8 N. H. 264; Kerr v. Day, 14 Pa. St. 112, 53 Am. Dec. 526; McKechnie v. Hoskins, 23 Me. 230; Woods v. Farmere, 7 Watts, 382, 32 Am. Dec. 772; Bailey v. Richardson, 9 Hare, 734; Allen v. Anthony, 1 Mer. 282; Powell v. Dillon, 2 Ball. & B. 416; Barnhart v. Greenshields, 9 Moore C. P. 33; Hanbury v. Litchfield, 2 Mylne & K. 629; Taylor v. Stibbert,

§ 771. **Sign of real estate agent.**—Where the agent of a party claiming title to real estate put upon the premises a board on which was printed a notice that the land was for sale by the agent, and giving the agent's address, it was held that this was sufficient notice of the owner's rights as upon inquiry of the agent, any one could ascertain the extent and character of title.[9] Constructive notice is generally given of the occupant's rights, where he occupies or possesses a house.[1] If the owner of a tenement house occupies rooms in it and collects the rents his possession will give constructive notice of his rights on the property.[2]

§ 772. **Possession by church.**—A possession of a church or a meetinghouse by its officers for the ordinary purposes of worship is a sufficient possession to put a purchaser upon inquiry. A possession of this character is just as effectual for giving notice as if a dwelling-house had been erected upon the land, and it was actually inhabited.[3] So the possession of rooms by a lodge under a lease is sufficient to charge a purchaser with notice, nor is he relieved from the duty of inquiry by the fact that the doors of the rooms were locked when he looked at the house and he was not aware of their occupation.[4] If a school district erects a school house on

2 Ves. 437; Daniels v. Davidson, 16 Ves. 249; Crofton v. Ormsby, 2 Schoales & L. 583; Moreland v. Richardson, 24 Beav. 33; Wilbraham v. Livesey, 18 Beav. 206; Lewis v. Bond, 18 Beav. 85; Jones v. Smith, 1 Hare, 43. See, also, Murphy v. Green, 120 Ala. 112, 22 So. 112, 29 So. 149.

[9] Hatch v. Bigelow, 39 Ill. 546. On this point the court said: "The board erected was placed on the lot by Kerfoot, as the agent of Lushbaugh, after the purchase by the latter. It is, therefore, to be regarded as placed there by Lushbaugh, and as if it had referred persons desiring to purchase to himself."

[1] Phelan v. Brady, 119 N. Y. 587, 8 L.R.A. 211, 23 N. E. 1109; Best v. Stoneback, 39 Kan. 170, 17 Pac. 821.

[2] Phelan v. Brady, 119 N. Y. 587, 8 L.R.A. 211, 23 N. E. 1109. As to the possession of rooms in a building: see Devrett v. Britton, 35 Tex. Civ. App. 485, 80 S. W. 562.

[3] Randolph v. Meeks, Mart. & Y. 58; Macon v. Sheppard, 2 Humph. 335.

[4] Scheerer v. Cuddy, 85 Cal. 270.

a lot conveyed to it and uses the building for school purposes a subsequent mortgagee of the grantor, although the deed to the school district is not recorded, is required to inquire as to the rights of the district.[5]

§ 773. **Possession distinct.**—The possession must be distinct and unequivocal. Where the grantee bought by parol a corner of the grantor's tract, went into possession and erected buildings, but did not reduce the part purchased by him by survey or other means to certainty, and on the part of the tract retained by the grantor a forge, dwelling house, grist and saw mill, and buildings for the workmen were situated, so that the buildings of the grantee, with those of the grantor, might appear to an observer as one establishment, it was held that the grantee's possession was not sufficient to charge persons with notice.[6] "At best," said Yeates, J., "the possession of the defendant was of a mixed nature. His pretensions were not defined by marked boundaries or an actual survey. If one inclining to purchase had previously viewed the premises, he would have seen nothing but what usually occurs where forges, grist, and saw mills are carried on, outhouses and cabins for the accommodation of colliers and other workmen. Without such conveniences, those manufactories could not be carried on. The defendant's holding under such circumstances could not convey the same information, nor put a purchaser upon inquiry in the same manner, as an exclusive, unmixed possession in common cases might reasonably seem to give."[7] A third person is not chargeable with constructive notice of an unrecorded deed, where the grantor and grantee were in joint possession of the land at the time of the execution of the deed, and there was no change in possession after-

[5] School District v. Taylor, 19 Kan. 287; Everts v. District Township of Rose Grove, 77 Iowa, 37, 41 N. W. 478, 14 Am. St. Rep. 264.

[6] Billington v. Welsh, 5 Binn. 129, 6 Am. Dec. 406; Pope v. Allen, 90 N. Y. 298.

[7] In Billington v. Welsh, 5 Binn. 135, 6 Am. Dec. 406. See, also, Hanrick v. Thompson, 9 Ala. 409.

ward.[8] In a word, the possession must be actual, visible, and open. It must not be equivocal or consistent with the title shown by the record.[9]

§ 774. **Possession continuous.**—The party who claims that his possession was notice to a subsequent purchaser, must show that the possession was continuous. A purchaser is not compelled to inquire of a late occupier of land as to the nature of his title.[1] Where a purchaser at a foreclosure sale ousts the tenant of a purchaser from the premises under an unrecorded deed and takes possession himself, the prior possession is not notice of title to subsequent purchasers from the grantee in the sheriff's deed on the foreclosure sale.[2] "It must be occupancy, something more than successive and occasional entries on the land. All the authorities agree that possession is not notice, except during its continuance, and that even when his vendor is out of possession, a vendee is not bound to take notice of the antecedent possession of third persons. A purchaser is bound to inquire only of those on the land at the time of his purchase. The authorities are equally clear that to be effective, as notice, possession even at the time of the sale must be distinct and unequivocal. It is even said in some of the cases, that it must be actual, and of such a nature as would suffice to constitute a disseisin or adverse

[8] McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418. Where a deed not recorded was executed by a person to his mother in law, both residing on the farm after the execution of the deed as before, the grantor exercising authority to some extent over the farm and the business of farming, and the grantee residing with him as a member of his family, the possession of the grantee is not sufficient to impart notice, notwithstanding she may have managed the business of the farm, it not being shown, however, that she had exclusive control: Elliott v. Lane, 82 Iowa, 484, 31 Am. St. Rep. 504.

[9] Pope v. Allen, 90 N. Y. 298.

[1] Campbell v. Brackenridge, 8 Blackf. 471; Ehle v. Brown, 31 Wis. 405. See Brown v. Volkening, 64 N. Y. 76; Hewes v. Wiswell, 8 Me. 94.

[2] Ehle v. Brown, 31 Wis. 405. See, also, Hewes v. Wiswell, 8 Me. 94; Hiller v. Jones, 66 Miss. 636, 6 So. Rep. 645.

possession." [3] Likewise it is clear that the possession must be one existing at the time of purchase.[4] But a temporary absence of a person in the open, peaceable and exclusive possession of the property does not affect the possession as notice of claim of title unless the conduct affords evidence of an intentional abandonment.[5]

§ 775. Tenant's Possession as notice of landlord's title.—On the question of whether a possession by a tenant is notice of the title of the landlord, the authorities are divided. It is held, by what we consider the weight of authority, that the possession of a party makes it obligatory upon a purchaser to inquire as to the rights under which such possession is taken and held, and charges such purchaser with notice of all the facts which he might ascertain by prosecuting such inquiry, and hence such possession by a tenant is notice of the lessor's title.[6] "A person who purchases an estate in the possession of another than his vendor, is, in equity, that

[3] Meehan v. Williams, 48 Pa. St. 238, 240, per Strong, J., and cases cited. And see as to rule in England, Knight v. Bowyer, 2 De Gex & J. 421, 23 Beav. 609; Jones v. Smith, 1 Hare, 43; Miles v. Langley, 1 Russ. & M. 39; Holmes v. Powell, 8 De Gex, M. & G. 572; Feilden v. Slater, Law R. 7 Eq. 523; Wilson v. Hart, Law R. 1 Ch. 463; Parker v. Whyte, 1 Hem. & M. 167; Clements v. Welles, Law R. 1 Eq. 200, 35 Beav. 513.

[4] Roussain v. Norton, 53 Minn. 560, 55 N. W. 747; Patterson v. Mills, 121 N. C. 258, 28 S. E. 368. And see O'Neal v. Prestwood, 153 Ala. 443, 45 So. 251; Froman v. Manned, 13 Ida. 138, 88 Pac. 894; Lusk v. Reel, 36 Fla. 418, 18 So. 582, 51 Am. St. Rep. 32.

[5] Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846.

[6] Cunningham v. Pattee, 99 Mass. 248; Conlee v. McDowell, 15 Neb. 184; Edwards v. Thompson, 71 N. C. 177; Kerr v. Day, 14 Pa. St. 112, 53 Am. Dec. 526; O'Rourke v. O'Connor, 39 Cal. 442; Dickey v. Lyon, 19 Iowa, 544; Sailor v. Hertzog, 4 Whart. 259; Thompson v. Pioche, 44 Cal. 508; Pittman v. Gaty, 5 Gilm. 186; Nelson v. Wade, 21 Iowa, 49; Sergeant v. Ingersoll, 15 Pa. St. 343; Morrison v. March, 4 Minn. 422; The Bank v. Flagg, 3 Barb. Ch. 316; Hood v. Fahnestock, 1 Barr. 470, 44 Am. Dec. 147; The Bank v. Godfrey, 23 Ill. 579; Kerr v. Day, 14 Pa. St. 112, 53 Am. Dec. 526; Wright v. Wood, 23 Pa.

is, in good faith, bound to inquire of such possessor what right he has in the estate. If he fails to make such inquiry, which ordinary good faith requires of him, equity charges him with notice of all the facts that such inquiry would disclose. Suppose the possessor is a tenant holding under a lease, an inquiry of such tenant would advise the purchaser, not only of the length of time and terms of tenancy, but also of the landlord, and hence that some other person than his proposed vendor claimed a right to the estate, and was holding possession thereof by his tenant. Being thus advised, equity in vindication of ordinary good faith, requires him to ascertain the extent of right of such landlord in the estate." [7] While this is the rule that prevails in the majority of the States, it is in conflict with the English decisions, and several in our own country.[8]

St. 120; Bowman v. Anderson, 82 Iowa, 210, 31 Am. St. Rep. 473; Phillips v. Blair, 38 Iowa, 649; Glendenning v. Bell, 70 Tex. 633; Woodson v. Collins, 56 Tex. 175; Taylor v. Moseley, 57 Miss. 544; Liebrick v. Stahle, 68 Iowa, 515; Peaseley v. McFadden, 68 Cal. 611. See, also, Mallett v. Kaehler, 141 Ill. 70, 30 N. E. 549; O'Neill v. Wilcox, 115 Ia. 15, 87 N. W. 742; Townsend v. Blanchard, 117 Ia. 36, 90 N. W. 519; Wolf v. Zabel, 44 Minn. 90, 46 N. W. 81; Collum v. Sanger Bros., 98 Tex. 162, 82 S. W. 459, 83 S. W. 184; Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846; Randall v. Lingwall, 43 Ore. 383, 73 Pac. 1; Huntington v. Mattfield (Tex.) 55 S. W. 361; Hannan v. Seidentopf, 113 Ia. 659, 86 N. W. 44.

[7] Dickey v. Lyon, 19 Iowa, 544, 549, per Cole, J., and cases cited. Where a lessor having title of record in his name when a judgment is docketed against him has conveyed the land to another who has informed the tenant of the execution of the deed, a judgment creditor will not be charged with notice. He is charged with notice of such facts only as by inquiry he might naturally be informed of and not of such facts as the inquiry might possibly lead to: Wilkins v. Bevier, 43 Minn. 213, 19 Am. St. Rep. 238. A tenant's possession affords notice of an unrecorded lease: Dreyfus v. Hirt, 82 Cal. 621; and of the unrecorded deed of his lessor: Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169; Levy v. Holberg, 67 Miss. 526.

[8] Hanbury v. Litchfield, 2 Mylne & K. 629; Jones v. Smith, 1 Hare, 43; Barnhart v. Greenshields, 9 Moore P. C. C. 36; Beatie v. Butler, 21 Mo. 313, 64 Am. Dec. 234; Flagg v. Mann, 2 Sum. 486. See,

§ 775a. **Notice from clause of option to purchase in lease.**—A clause in a lease by which the tenant has the option to purchase the demised premises, is not a part of the lease, although it may be incorporated in it. It is a distinct, independent agreement, and not necessarily connected with the lease, and is not usually a part of it. A person who has knowledge of a lease cannot object, if he purchases the property without examining the lease, that he did not have notice of a particular covenant, and, even in some cases, notice may be imputed to him of unusual covenants, and even of a collateral agreement to purchase. But where notice arises from the fact of possession and the duty to inquire, the purchaser is charged not only when it may be presumed that he actually knew, but also when there are reasons for believing that by reasonable diligence he would have discovered the truth. The tenant's possession imposes upon an intending purchaser the duty of inquiry as to the tenant's title, but as between the vendor and himself, the purchaser will be charged with notice of the covenants of a lease of which he had knowledge, but had not examined, and as to whose contents he has been in no manner misled, but he will not be charged with notice of a distinct collateral agreement. If the agreement to sell has been separate and distinct from the lease, it would not, as between the vendor and vendee, have been notice of the equity of the tenant. Hence, if the tenant exercises his option to purchase during the existence of the tenancy, the vendee may purchase from the tenant and recover the difference in price from the lessor.[9]

§ 776. **Comments.**—The underlying principle on which the notice arising from possession is based, is that a

also, Veazie v. Parker, 23 Mo. 170; Roll v. Rea, 50 N. J. L. 266. And see Smith v. Miller, 63 Tex. 72; Steel v. De May, 102 Mich. 274, 60 N. W. 684.

[9] Wertheimer v. Thomas, 168 Pa. St. 168, 47 Am. St. Rep. 882.

fact is presented to the purchaser's attention, which, if he is acting in good faith, is sufficient to cause him to pause, and ascertain to what title that fact is attributable. He should satisfy himself as to the extent of the claim made by the party in possession. If he finds that the latter is holding under an unrecorded deed, he knows that he cannot secure a valid title. If the person in possession is holding as a tenant of one who has an unrecorded deed, this fact is as easily learned as if the tenant was himself the grantee in the unrecorded deed. The landlord's title can be ascertained. The purchaser should at least make an effort to ascertain the character of the title of the party in possession. If he does not make the attempt, he must suffer the consequences of his negligence. He is chargeable with notice of all that a proper inquiry would have disclosed. We think that when the doctrine of notice from possession is once admitted, the possession of a tenant should be notice of the title of the landlord.

§ 777. **An inference of fact.**—While in many cases expressions are found to the effect that possession is notice itself, yet these seem to be incorrect statements of the true rule. In such cases certain facts have existed which the court considered sufficient to put a party upon inquiry, and, having failed to prosecute it, he is chargeable with all he might have learned if he had commenced an investigation and diligently prosecuted it. There can be little or no doubt that if such inquiry had been properly prosecuted, and the party had not obtained information as to the true title, he would not be held charged with notice. That is, the notice given by possession is an inference of fact. The correct rule, it seems to us, is stated by Mr. Justice Selden: "Possession by a third person, under some previous title, has frequently but inaccurately been said to amount to constructive notice to a purchaser of the nature and extent of such prior right. Such a possession puts the purchaser upon inquiry, and makes it his duty to pursue his

inquiries with diligence, but is not absolutely conclusive upon him;" and further, "the true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part." [1] Where a person has paid the full consideration, taken possession and erected permanent and valuable improvements, he has a perfect equitable title, and in a suit by a subsequent purchaser for possession, the prior purchaser may set up his equitable title by way of cross-complaint, and obtain a decree to quiet his title.[2]

[1] In Williamson v. Brown, 15 N. Y. 354. In Rogers v. Jones, 8 N. H. 264, 270, Mr. Justice Parker, in delivering the opinion of the court, said: "Possession is by no means conclusive evidence of the existence of a title in the party in possession. It may be *prima facie* evidence of title, and is, in general, a sufficient notice to put a third person on inquiry (Colby v. Kenniston, 4 N. H. 266; Daniels v. Davison, 16 Ves. 254; Allen v. Anthony, 1 Mer. 283); and to charge him constructively with notice of an existing title under which the tenant entered if he neglects it. But being a notice which puts a party on inquiry merely, it is not, as we have seen, necessarily constructive notice. If the demandant had inquired of the tenant whether he held a deed, and been told he had none, it would be very preposterous to say that he was, notwithstanding, to be charged with constructive notice of the deed to the wife, because she also lived on the land, and he had not inquired of her. Were this otherwise, an owner who was in possession would have an absolute exemption from the provisions of the registry act, his possession amounting to constructive notice, or, in other words, to conclusive evidence of notice of his title." See, also, Fair v. Stevenot, 29 Cal. 486; Kerr v. Day, 14 Pa. St. 112, 53 Am. Dec. 526; Whitbread v. Jordan, 1 Younge & C. 303; Thompson v. Pioche, 44 Cal. 508; Flagg v. Mann, 2 Sum. 486.

[2] Barnes v. Union School Township, 91 Ind. 301.

PART III.

Agency.

§ 778. **Notice to an agent.**—The law implies to the principal such notice as the agent acquires as to the state of the title, when engaged in negotiations for the purchase of the property.[3] The notice to bind the principal must be given in the same transaction in which the agent is employed by

[3] Meier v. Blume, 80 Mo. 179; Bank of United States v. Davis, 2 Hill, 451; Williamson v. Brown, 15 N. Y. 354, 359; Josepthal v. Heyman, 2 Abb. N. C. 22; Hovey v. Blanchard, 13 N. H. 145; Walker v. Schreiber, 47 Iowa, 529; Ames v. New York Ins. Co., 14 N. Y. 253; First Nat. Bank of Milford v. Town of Milford, 36 Conn. 93; Farrington v. Woodward, 82 Pa. St. 259; Westervelt v. Haff, 2 Sand. Ch. 98; Holden v. New York etc. Bank, 72 N. Y. 86; Allen v. Poole, 54 Miss. 323; Fuller v. Bennett, 2 Hare, 394; Boursot v. Savage, Law R. 2 Eq. 134; Rickards v. Gledstanes, 3 Giff. 298. See, also, Owens v. Roberts, 36 Wis. 258; Ward v. Warren, 82 N. Y. 265; Suit v. Woodhall, 113 Mass. 391; Jones v. Bamford, 21 Iowa, 217; Smith v. Denton, 42 Iowa, 48; Tagg v. Tennessee National Bank, 9 Heisk. 479; Jackson v. Leek, 19 Wend. 339; Myers v. Ross, 3 Head, 59; Saffron etc. Soc. v. Rayner, Law R. 14 Ch. D. 406; Atterbury v. Wallis, 8 De Gex, M. & G. 454; Dryden v. Frost, 3 Mylne & C. 670; Sheldon v. Cox, 2 Eden, 224; Tunstall v. Trappes, 3 Sim. 301; Dickerson v. Bowers, 42 N. J. Eq. 295; Stokes v. Riley, 121 Ill. 166; Bigley v. Jones, 114 Pa. St. 510; Young v. Shauer, 73 Iowa, 555, 5 Am. St. Rep. 701; Matthews v. Riggs, 80 Me. 107; Donald v. Beals, 57 Cal. 399; Coggswell v. Griffith, 23 Neb. 334, 36 N. W. Rep. 538; Cowan v. Withrow, 111 N. C. 306, 16 S. E. Rep. 397; Hickman v. Green, 123 Mo. 165, 29 L.R.A. 39, 27 S. W. Rep. 440; Merchants' Nat. Bank v. Lovett, 114 Mo. 519, 35 Am. St. Rep. 770; Slattery v. Schwannecke, 118 N. Y. 543, 23 N. E. Rep. 922; Morrison v. Bausemer, 32 Gratt. 225; Bigley v. Jones, 114 Pa. St. 510, 7 Atl. Rep. 54; Smith v. Ayer, 101 U. S. 320; Yerger v. Barz, 56 Iowa, 77, 8 N. W. Rep. 769; Stanley v. Chamberlin, 39 N. J. L. 565. See, also, Blair v. Whitaker, 31 Ind. App. 664, 69 N. E. 182; Schreckhise v. Wiseman, 102 Va. 9, 45 S. E. 745; La Dow v. Trust Co., 113 Fed. 13; In re Wagner, 110 Fed. 931; Russell v. Peavy, 131 Ala. 563, 32 So. 492; Chapman v. Hughes, 134 Cal. 641; Noyes v. Tootle, 2 Ind. T. 144, 48 S. W. 103; Comey v. Harris, 118 N. Y. S. 244, 133 App. Div. 686; Connolley's Ex'r v. Beckett, (Ky.) 105 S. W. 446; Miller v. Jones, (Ky.) 107 S. W. 783.

the principal.[4] If a person, while a director of a corporation, executes a deed of land which he owns, and subsequently makes a mortgage to the corporation, the latter is not charged with constructive notice of such prior deed. In the proceedings connected with the mortgage, the director deals with the corporation as a third party. His acts in this matter are against the corporation, and for himself alone.[5] If before the commence-

[4] New York Central Ins. Co. v. National Ins. Co., 20 Barb. 468; Warrick v. Warrick, 3 Atk. 291; Fuller v. Bennett, 2 Hare, 404. See, also, McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 Am. Dec. 478; Houseman v. Girard etc. Assn., 81 Pa. St. 256; Weisser v. Dennison, 10 N. Y. 68, 61 Am. Dec. 731; North River Bank v. Aymar, 3 Hill, 262; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 350; Roach v. Karr, 18 Kan. 539, 26 Am. Rep. 788; Finch v. Shaw, 19 Beav. 500; Wyllie v. Pollen, 3 De Gex, J. & S. 596; Banco de Lima v. Anglo-Peruvian Bank, Law R. 8 Ch. D. 160; Lloyd v. Attwood, 3 De Gex & J. 614; Worsley v. Earl of Scarborough, 3 Atk. 392; Barbour v. Wiehle, 116 Pa. St. 308, 9 Atl. Rep. 520; Hood v. Fahnesock, 8 Watts, 489, 34 Am. Dec. 489; Fry v. Shebee, 55 Ga. 208; Pepper v. George, 51 Ala. 190; Johnson v. Tribbey, 27 App. D. C. 281; Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. Rep. 763; May v. Borel, 12 Cal. 91; Whitney v. Burr, 115 Ill. 289, 3 N. E. Rep. 434; Rogers v. Palmer, 102 U. S. 263, 26 L. ed. 164; Satterfield v. Malone, 35 Fed. Rep. 445; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Clark v. Fuller, 39 Conn. 238; Wood v. Rayburn, 18 Or. 3, 22 Pac. Rep. 521; Haywood v. Shaw, 16 How. Pr. 119; Weisser v. Dennison, 10 N. Y. 68, 61 Am. Dec. 731; Hodgkins v. Montgomery Co. Ins. Co., 34 Barb. 213; Morrison v. Bausemer, 32 Gratt. 225; Tucker v. Tilton, 55 N. H. 223; Willis v. Vallette, 4 Met. (Ky.) 186; Kaufman v. Robey, 60 Tex. 308, 48 Am. Rep. 264; Roach v. Karr, 18 Kan. 529, 26 Am. Rep. 788; Harrington v. McFarland, 1 Tex. Civ. App. 289, 21 S. W. Rep. 116; Smith v. Sublett, 28 Tex. 163; Irvine v. Grady, 85 Tex. 120, 19 S. W. Rep. 116.

[5] La Farge Fire Ins. Co. v. Bell, 22 Barb. 54. See, also, Winchester v. Susquehanna R. R., 4 Md. 231; Barnes v. Trenton Gas Light Co., 27 N. J. Eq. 33. In the latter case the court said: "His interest is opposed to theirs, and the presumption is, not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it. Where an officer of a corporation is thus dealing with them, in his own interest opposed to theirs, he must be held not to represent them in the transaction so as to charge them with the knowledge he may possess, but which he has not communicated to them, and which they do not otherwise possess, of facts derogatory to the title he conveys."

ment of the agency the agent had notice of an unrecorded lien on a piece of real property, and his principal afterward takes a deed of it, it requires very strong evidence to show that at the time of the execution of the deed, or of the purchase, the agent remembered the reception of such notice to charge the principal with the notice of the agent.[6] It is said by Judge Story that "unless notice of the fact come to the agent while he is concerned for the principal and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the principal. For otherwise the agent might have forgotten it, and then the principal would be affected by his want of memory at the time of undertaking the agency. Notice, therefore, to the agent before the agency is begun, or after it has terminated, will not ordinarily affect the principal."[7]

§ 779. **Matter material to the transaction.**—To affect the principal with the notice received by the agent, the notice must be of some fact material to the transaction. If the authority of the agent is confined to obtaining the execution of the deed, the notice of the agent is not imputable to the principal.[8] A grantor took a mortgage from his grantee to secure the payment of the purchase money, and intrusted it to the grantee to have it recorded. Before depositing the mortgage for record, the grantee and mortgagor sold the land to a *bona fide* puchaser, by a written executory contract. Such purchaser paid the grantee a full and valuable consideration, and had no notice whatever of the rights of the mortgagee. The mortgage was recorded before the mortgagee had any notice of the rights of the contract purchaser, and before the latter had acquired the legal title or had taken actual notorious

[6] Morrison v. Bausemer, 32 Gratt. 225.

[7] Story, Agency, § 140.

[8] Wyllie v. Pollen, 32 Law J. N. S. 782. See, also, Storms v. Mundy, 46 Tex. Civ. App. 88, 101 S. W. 258.

possession. The mortgagee was held to have the priority of right.[9] The notice must be received by the agent, while acting as such, during the course of his actual employment.[1] The rule that the principal is bound by notice to his agent is not altered by the fact that the agent is unable to read or write.[2]

§ 780. Agent for both parties.—When both the grantor and grantee employ the same agent or attorney, the knowledge that he acquires during the continuance of his agency is the knowledge of both parties.[3] A solicitor induced a client to take a mortgage upon certain lands, and afterward induced another client to take a mortgage also on the same land. The solicitor did not inform the second mortgagee of the first mortgage. The second mortgage was first registered. But it was held that the second mortgagee must be considered as having had, through the solicitor, notice of the first mortgage, and did not obtain precedence by priority of registration.[4]

§ 781. Fraud of agent.—The law presumes that the agent will acquaint his principal with such information as he

[9] Anketel v. Converse, 17 Ohio St. 11, 91 Am. Dec. 115. See Hoppock v. Johnson, 14 Wis. 303.

[1] McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Smith v. Denton, 42 Iowa, 48; May v. Borel, 12 Cal. 91; Clark v. Fuller, 39 Conn. 238; Weisser v. Dennison, 10 N. Y. 68, 61 Am. Dec. 731; Russell v. Sweezey, 22 Mich. 235; Fry v. Shebee, 55 Ga. 208; Jones v. Bamford, 21 Iowa, 217; Hodgkins v. Montgomery Co. Ins. Co., 34 Barb. 213; Pepper v. George, 51 Ala. 190; Spadone v. Manvel, 2 Daly, 263; New York Cent. Ins. Co. v. National Protection Ins. Co., 20 Barb. 468; Saffron etc. Soc. v. Rayner, Law R. 14 Ch. D. 406; Dryden v. Frost, 3 Mylne & C. 670; Wilde v. Gibson, 1 H. L. Cas. 605; Roach v. Karr, 18 Kan. 529, 26 Am. Rep. 788; Tucker v. Tilton, 55 N. H. 223.

[2] Meier v. Blume, 80 Mo. 179.

[3] Losey v. Simpson, 11 N. J. Eq. 346; Fuller v. Bennett, 2 Hare, 403; Brotherton v. Hatt, 2 Vern. 574; Hargreaves v. Rothwell, 1 Keen, 154. See, also, Dryden v. Frost, 3 Mylne & C. 670; Majoribanks v. Hovenden, Dru. 11; Tucker v. Henzill, 4 Irish Ch. Rep. 513; Sheldon v. Cox, 2 Eden, 224; Tweedale v. Tweedale, 23 Beav. 341.

[4] Rolland v. Hart, Law R. 6 Ch. 678. See, also, Boursot v. Savage, Law R. 2 Eq. 134.

acquires in the course of the transaction in which he is employed. But where the agent intends to commit a fraud for his own benefit, this presumption, of course, can no longer prevail. In such a case it is essential in order that the agent may carry out his fraudulent design that he should conceal the real facts from his principal. A contrary presumption, where the agent has been guilty of fraud, naturally arises, that no communication has been made to the principal by the agent of the facts which he has learned during his agency. Therefore, in case of the agent's fraud the principal is not affected with notice to the agent.[5]

§ 782. **Notice to a partner.**—Where a person has actual notice of a prior deed, and, with his partners, purchases the same land, his partners in the purchase are affected with the same notice, although at the time they knew nothing of

[5] Cave v. Cave, Law R. 15 Ch. 639; Frail v. Ellis, 16 Beav. 350; Kennedy v. Green, 3 Mylne & K. 699; In re European Bank, Law R. 5 Ch. 358; Waldy v. Gray, Law R. 20 Eq. 238, 251; Hiorns v. Holtom, 16 Beav. 259; Ogilvie v. Jeaffreson, 2 Giff. 353; Winchester v. Susquehanna R. R., 4 Md. 231; Fulton Bank v. New York and Sharon C. Co., 4 Paige, 127; Hope Fire Ins. Co. v. Cambrelling, 1 Hun, 493; Barnes v. Trenton Gas Co., 27 N. J. Eq. (12 Green, C. E.) 33; McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Rolland v. Hart, Law R. 6 Ch. 678; Thompson v. Cartwright, 2 De Gex, J. & S. 10; Greenslade v. Dare, 20 Beav. 284; Spencer v. Topham, 2 Jur. N. S. 865; Hewitt v. Loosemoore, 9 Hare, 449; Robinson v. Briggs, 1 Smale & G. 188; National Life Ins. Co. v. Minch, 53 N. Y. 144; Allen v. South Boston R. Co., 150 Mass. 200, 5 L.R.A. 716, 15 Am. St. Rep. 175, 22 N. E. Rep. 917; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 52 Am. Rep. 710; Frenkel v. Hudson, 82 Ala. 158; 60 Am. Rep. 736, 2 So. Rep. 758; Dillaway v. Butler, 135 Mass. 479; Atlantic Nat. Bank v. Harris, 118 Mass. 147. See, also, La Brie v. Cartwright (Tex.) 118 S. W. 785. But the fraud must be independent in its character, so that concealment was essential to its success. Every concealment is not a fraud: Atterbury v. Walles, 8 De Gex, M. & G. 454; Rolland v. Hart, Law R. 6 Ch. 678; Boursot v. Savage, Law R. 2 Eq. 134. The signing of a deed by a person assuming to act as an agent of another may give notice of the interest of his principal in the land: Solari v. Snow, 101 Cal. 387.

such purchase. The purchaser, by taking a deed in the name of his associates, is regarded as having acted as their agent. Notice to him, therefore, is equivalent to notice to them. "It would indeed be singular if the legal effect of notice could be obviated by so easy a subterfuge as the insertion of the names of other parties in the conveyance." [6]

§ 783. **Consulting attorney.**—If a person, before making a purchase of a piece of land, consults with an attorney for the purpose of having him examine the records to see what conveyances were of record, he is not chargeable with all the knowledge which the attorney may possess concerning the matter about which such purchaser has consulted him.[7] The notice to the agent is not notice to the principal, unless it is present in his mind when acting as agent, and he may convey his information without a violation of professional confidence. Where, by mistake, one of a firm of attorneys executes a total instead of a partial release of a mortgage, and this release is recorded, and afterward, on the negotiation of another loan, the borrower employs the same firm to examine the title for him, but the examination is made by another member of the firm, who possessed no knowledge of the prior transaction, and knew nothing of the title except what the abstract disclosed, notice of the mistake in making a total release of the mortgage cannot be charged to the borrower.[8] A principal is not charged with notice because his attorney while acting for another in a different transaction, obtained knowledge of a fact unless it be shown that at the time of the transaction, such knowledge was present in the mind of the attorney, and the person who seeks to charge another with notice

[6] Stanley v. Green, 12 Cal. 148. See Wise v. Tripp, 13 Me. 9; Stevens v. Goodenough, 26 Vt. 676; Cunningham v. Woodbridge, 76 Ga. 302; Littleton v. Giddings, 47 Tex. 109.

[7] Meuley v. Zeigler, 23 Tex. 88.

[8] Wittenbrock v. Parker, 102 Cal. 93, 24 L.R.A. 197, 41 Am. St. Rep. 172. See, also, Arrington v. Arrington, 114 N. C. 151, 19 S. E. Rep. 351.

by this means, has the burden of proving that such knowledge was present in the mind of the attorney at such time.[9]

§ 784. **Notice to trustee.**—Where a person is to act as trustee by an agreement between the grantor and *cestui que trust,* and the trustee has notice of the fraudulent intent with which the grantor executed the deed of conveyance wherein he is named as trustee, the *cestui que trust* is affected with the notice in this respect possessed by the trustee.[1]

§ 785. **Agent to examine title.**—One person relied upon another to take a mortgage, and to see that the title was perfect. It was held that the former to this extent made the latter his agent, and that he was chargeable with the agent's knowledge of a pre-existing mortgage.[2]

[9] Constant v. University of Rochester, 111 N. Y. 604, 2 L.R.A. 734, 7 Am. St. Rep. 769, 19 N. E. 631. In this case the authorities are reviewed and Mr. Justice Peckham in delivering the opinion of the court says. "From all these various cases it will be seen that the furthest that has been gone in the way of holding a principal chargeable with knowledge of facts communicated to his agent, where the notice was not received or the knowledge obtained in the very transaction in question, has been to hold the principal chargeable upon clear proof that the knowledge which the agent once had, and which he had obtained in another transaction, at another time and for another principal, was present to his mind at the very time of the transaction in question." See, also, to same effect: Slattery v. Schwannecke, 118 N. Y. 543, 23 N. E. 922; Hoppock v. Johnson, 14 Wis. 303; Connell v. Connell, 32 W. Va. 319, 9 S. E. 252. The employment of the attorney should have begun: Caughman v. Smith, 28 S. C. 605, 5 S. E. 362; Yerger v. Barz, 56 Iowa, 77, 8 N. W. 769; Bunker v. Gordon, 81 Me. 66, 16 Atl. 341; Shoemaker v. Smith, 80 Iowa, 655, 45 N. W. 744.

[1] Pope v. Pope, 40 Miss. 516. Notice to the trustee is generally notice to the beneficiary: Pope v. Pope, 40 Miss. 516; Meyers v. Ross, 3 Head, 59; Stevens v. Goodenough, 26 Vt. 676. But where the trustee is appointed by the grantor to secure a debt, see Fargason v. Edrington, 49 Ark. 207.

[2] Sowler v. Day, 58 Iowa, 252. Notice to the attorney is notice to the client. See Edwards v. Hillier, 70 Miss. 803, 13 So. Rep. 692; Smith v. Ayer, 101 U. S. 320; Bunker v. Gordon, 81 Me. 66, 16 Atl. Rep. 341; Shoemake v. Smith,

§ 786. **Advertisement of sale.**—A notice stating that certain property is for sale may be as effectual for the purpose of giving notice as a statement from the owner himself. The agent of a person claiming title to a piece of property put upon the premises a board on which was printed: "For sale by S. H. Kerfoot & Co., 48 Clark St." A creditor whose judgment lien accrued while this notice remained posted, was held to be notified of the interest of the party claiming title. The extent and character of the title could have been ascertained upon inquiry of the agents, and the judgment creditor therefore could not be regarded a *bona fide* puchaser.[3]

§ 787. **Resale by vendor.**—Where a contract for the sale of real estate is made, and the vendor, professing to act as the agent of the original vendee under verbal authority, and that of letters subsequently written, resells the premises, and executes a deed therefor to a second purchaser, the letters must be looked to as the only proper and valid source of authority. If these letters do not in fact authorize such resale and conveyance, and the purchaser is aware of the contents of such letters, and of the terms of the original contract, he is not a *bona fide* purchaser without notice. "In such case, he is to be treated as a trustee of the first vendee; he stands upon the same

80 Iowa, 655, 12 N. W. Rep. 297; Jones v. Bamford, 21 Iowa, 217; Jackson v. Van Valkenburgh, 8 Cow. 260; May v. Le Claire, 11 Wall. 217, 20 L. ed. 50; Maxfield v. Burton, 17 L. R. Eq. 15.

[3] Hatch v. Bigelow, 39 Ill. 546. The court, per Mr. Justice Breese, said: "A purchaser is held affected with notice of all that is patent on an examination of the premises he is about to buy. Is not, then, this advertising board to be regarded in precisely the same light as if a subsequent purchaser had been informed in writing that Kerfoot claimed the right to sell the lot, and therefore claimed some title or interest in it? And does not such notice put the purchaser upon inquiry as to that interest, whatever it may be, and whether held by Kerfoot, in his own right, or as agent of another? A prudent man would have gone to Kerfoot, whose place of business is given, and ascertained the nature of his claim before completing a purchase."

equity as his vendor, and will be decreed to convey in the same manner as the original vendor under whom he claims."[4]

PART IV.

LIS PENDENS.

§ 788. **Doctrine of lis pendens.**—"It is the manifest policy of the law that there should be an end to litigation, but this manifest policy would be easily thwarted if, during the pendency of suit, a stranger to the suit could, by purchase from one of the suitors, acquire new and independent rights—rights unaffected by and not subject to the litigation then in progress."[5] Hence arises the doctrine of *lis pendens*. During the pendency of a suit neither party should be permitted to convey the property in controversy so as injuriously to affect the rights of his adversary. It is sometimes said that the rules as to the effect of a pending suit are founded upon the doctrine of constructive notice, but the better view seems to be that these rules rest rather on grounds of public policy. "It is obvious that there must be cases to which the doctrine should apply; otherwise the ends of justice might be defeated; the decrees of the court would be evaded, and the party having the strongest inducement to prolong litigation would not unfrequently find it in his power to do so to an unlimited extent. It is a rule founded upon a great public policy."[6] The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a court of equity as to implied or constructive notice. It is, as I think, a doctrine common to the courts, both of law and of equity, and rests, as I apprehend, upon this foundation —that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations

[4] Smoot v. Rea, 19 Md. 398, 412.
[5] Real Estate Savings Inst. v. Collonious, 63 Mo. 290, 294.
[6] Norton v. Birge, 35 Conn. 250, 258, per Carpenter, J.

pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings *de novo,* subject again to be defeated by the same course of proceeding."[7] Aside from any statutory provision, the doctrine of *lis pendens* is everywhere recognized.[8] The operation of a *lis pendens* extends also to the

[7] Bellamy v. Sabine, 1 De Gex & J. 566, 584, per Lord Justice Turner.

[8] Murray v. Finster, 2 Johns. Ch. 155; Murray v. Ballou, 1 Johns. Ch. 566; Murray v. Lylburn, 2 Johns. Ch. 441; Hopkins v. McLaren, 4 Cowen, 667; Gossom v. Donaldson, 18 Mon. B. 230, 68 Am. Dec. 723; Green v. White, 7 Blackf. 242; Kern v. Hazlerigg, 11 Ind. 443, 71 Am. Dec. 360; Ashley v. Cunningham, 16 Ark. 168; Jackson v. Andrews, 7 Wend. 152, 22 Am. Dec. 574; Seabrook v. Brady, 47 Ga. 650; Sedgwick v. Cleveland, 7 Paige, 287; Cook v. Mancius, 5 Johns. Ch. 89; Turner v. Babb, 60 Mo. 342; Van Hook v. Throckmorton, 8 Paige, 33; Harrington v. Slade, 22 Barb. 161; McGregor v. McGregor, 21 Iowa, 441; Cooley v. Brayton, 16 Iowa, 10; Loomis v. Riley, 24 Ill. 307; Whiting v. Beebe, 7 Eng. 421; White v. Carpenter, 2 Paige, 217; Griffith v. Griffith, 1 Hoff. Ch. 153; Chapman v. West, 17 N. Y. 125; Pratt v. Hoag, 5 Duer, 631; Borrowscale v. Tuttle, 5 Allen, 377; Hersey v. Turbett, 27 Pa. St. 418; Tredway v. McDonald, 51 Iowa, 663; Culpepper v. Aston, 2 Ch. Cas. 115; Garth v. Ward, 2 Atk. 174; Roberts v. Fleming, 53 Ill. 196; Gilman v. Hamilton, 16 Ill. 225; Jackson v. Warren, 32 Ill. 331; Truitt v. Truitt, 38 Ind. 16; Preston v. Tubbin, 1 Vern. 286; Higgins v. Shaw, 2 Dru. & War. 356; Patterson v. Brown, 32 N. Y. 81; Mitchell v. Smith, 53 N. Y. 413; O'Reilly v. Nicholson, 45 Mo. 160; Tharpe v. Dunlap, 4 Heisk. 674; Blanchard v. Ware, 43 Iowa, 530; Holman v. Patterson's Heirs, 29 Ark. 357; Sorrell v. Carpenter, 2 P. Wms. 482; Worsley v. Earl of Scarborough, 3 Atk. 392; Brundage v. Biggs, 25 Ohio St. 652; Hayden v. Bucklin, 9 Paige, 512; Haven v. Adams, 8 Allen, 363; McPherson v. Housel, 2 Beas. 299; Tongue v. Morton, 6 Har. & J. 21; Ashley v. Cunningham, 16 Ark. 168; Edwards v. Banksmith, 35 Ga. 213; Choudron v. Magee, 8 Ala. 570; Knowles v. Rablin, 20 Iowa, 101; Leitch v. Wells, 48 N. Y. 585; Ayrault v. Murphy, 54 N. Y. 202; Salisbury v. Morss, 7 Lans. 359; Jackson v. Losee, 4 Sand. Ch. 381; Long v. Neville, 29 Cal. 135; Parks v. Jackson, 11 Wend. 442, 25 Am. Dec. 656; Jackson v. Andrews, 7 Wend. 152, 22 Am. Dec. 574; Wattson v. Dowling, 26 Cal. 124; Tyler v. Thomas, 25 Beav. 47; Young v. Guy, 23 Hun, 1; Newman v. Chapman, 2 Rand. 93, 14 Am. Dec. 766; Lawrence v. Conklin, 17 Hun, 228; Allen v. Poole, 54 Miss. 323; Cen-

grantee of a grantee.[9]

§ 789. **Alienation void as against judgment.**—If a defendant were allowed to execute an effectual and operative deed of the land in controversy during the pendency of a suit affecting its title, a judgment in favor of the plaintiff would be of little or no value. A deed under these circumstances, though good between the parties themselves, can have no effect as against a judgment or decree that may be ultimately rendered in such suit.[1] "The principle that the purchaser of the subject-matter of a suit *pendente lite* acquires no interest as against the plaintiff's title, whether legal or equitable, is too well established to be now questioned. Such sale as against

ter v. Planters' and Merchants' Bank, 22 Ala. 743; Arrington v. Arrington, 114 N. C. 151, 19 S. E. Rep. 351; Collingwood v. Brown, 106 N. C. 362, 10 S. E. Rep. 868; Spencer v. Credle, 102 N. C. 68, 8 S. E. Rep. 901; Hart v. Steedman, 98 Mo. 452; Dwyer v. Rippetoe, 72 Tex. 520; Cassidy v. Kluge, 73 Tex. 154.

[9] Norton v. Birge, 35 Conn. 250. But see French v. Loyal Co., 5 Leigh, 627.

[1] Calderwood v. Tevis, 23 Cal. 335; Sharp v. Lumley, 34 Cal. 611; Montgomery v. Byers, 21 Cal. 107; Horn v. Jones, 28 Cal. 194; Whiteside v. Haselton, 110 U. S. 296, 28 L. ed. 152; Snowman v. Harford, 62 Me. 434; Lee v. Salinas, 15 Tex. 495; Bayer v. Cockerill, 3 Kan. 282; Copenheaver v. Huffaker, 6 Mon. B. 18; Galbreath v. Estes, 38 Ark. 599; Holly Realty Co. v. Wortman, 121 N. Y. S. 572; Jackson v. Andrews, 7 Wend. 152, 22 Am. Dec. 574; Shotwell v. Lawson, 30 Miss. 27, 64 Am. Dec. 145; Hurlbutt v. Butenop, 27 Cal. 50; Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858; Jackson v. Warren, 32 Ill. 331; Meux v. Anthony, 6 Eng. 411, 52 Am. Dec. 274; Walden v. Bodley's Heirs, 9 How. 34, 13 L. ed. 36; Inloe's Lessee v. Harvey, 11 Md. 519; Gregory v. Haynes, 13 Cal. 594; Haynes v. Calderwood, 23 Cal. 409; Curtis v. Sutter, 15 Cal. 263. See, also, Di Nola v. Allison, 143 Cal. 106, 65 L.R.A. 419, 76 Pac. 976, 101 Am. St. Rep. 84; Matteson v. Wagoner, 147 Cal. 739, 82 Pac. 436; Schartz v. Moyers, 99 Va. 519, 39 S. E. 166; Long v. Richards, 170 Mass. 120, 48 N. E. 1083; 64 Am. St. Rep. 281; Tice v. Hamilton, 188 Mo. 298, 87 S. W. 497; Parrotte v. Dryden, 73 Neb. 291, 102 N. W. 610; Lockhart v. Leeds, 12 N. M. 156, 76 Pac. 312; Wille v. Ellis, 22 Tex. Civ. App. 462, 54 S. W. 922; Latta v. Wiley, (Tex.) 92 S. W. 433; McDonald v. Rankin, 92 Ark. 173, 122 S. W. 88.

the plaintiff is considered a nullity, and he is not bound to take any notice of it. The decree of the court binds the property in the hands of such purchaser, although he is no party to the suit, and paid a full price for it, and had in fact no notice of the pendency of the suit, or the claim of the plaintiff. He is chargeable with constructive notice of the pendency of such suit, so as to render his interest in the subject of it liable to its event. This rule may sometimes produce individual hardship in its application to a purchaser, for a full consideration, and without actual notice; but if it were not adopted and adhered to, there would be no end to any suit. The justice of the court would be wholly evaded by aliening the lands after subpœna served and the suitor subjected to great delay, expense, and inconvenience, without any certainty of at last securing his interest. It is for these reasons—reasons founded on public utility and general convenience—that the courts of equity of England, and of the United States, whenever the question has been made, have uniformly held that he who purchases during the pendency of a suit is chargeable with constructive notice of the rights of the parties litigant, and bound by the decision that may be made against the person from whom he derives title." [2]

§ 790. **Subject continued.**—If, while an action for the foreclosure of a mortgage is pending, a person with notice of the suit takes a deed of a portion or of the whole of the mortgaged premises, a purchaser under the decree has the same right to the issuance of a writ of assistance against such grant as he has against the grantor.[3] Where a person purchases a piece of land at a sale under a decree of foreclosure, he is

[2] Heirs of Ludlow v. Kidd's Executors, 3 Ohio, 541, 542, per Sherman, J.

[3] Montgomery v. Byers, 21 Cal. 107; Montgomery v. Middlemiss, 21 Cal. 103, 81 Am. Dec. 146. See, also, Walker v. Douglas, 89 Ill. 425; Barelli v. Delassus, 16 La. Ann. 280; Boulden v. Lanahan, 29 Md. 200; Masson v. Saloy, 12 La. Ann. 776; Youngman v. Elmira R. R. Co., 65 Pa. St. 278.

chargeable with notice of the rights of the plaintiff in another suit for the foreclosure of another mortgage on the same premises, and is bound by the decree rendered subsequently in the second suit, although he is not made a party to it.[4] One who puchases the land pending the litigation from one of the parties to the suit, and claiming under his deed alone, is as much bound as his grantor.[5]

§ 791. **Grantee of party to partition suit.**—Where a suit for partition is pending, a person who takes a deed from one of the parties to such suit for his interest in the land, acquires a title or interest in the premises, subject to such decree as may be finally rendered. The grantee by such purchase *pendente lite* becomes a party to the suit, whether he is a party to the record or not. It follows that whatever portion of the common property may be set off in severalty to his grantor, inures to the grantee's benefit. So, if during the pendency of such a suit for partition, a mortgage be made on an undivided interest of a tenant in common, the mortgage, after partition is made, is confined to the interest awarded to the tenant in common who executed the mortgage.[6] An action was brought against a purchaser at a partition sale to set aside the sale on account of fraud. The decision of the lower court was in favor of the defendant, but, on appeal, the decision was reversed, and after the reversal, the defendant executed a deed

[4] Cooley v. Brayton, 16 Iowa, 10. And that purchasers at execution sales are affected by the notice of a *lis pendens*, see, also, Hart v. Marshall, 4 Minn. 294; Hall v. Jack, 32 Md. 253; Fish v. Ravesies, 32 Ala. 451; Crooker v. Crooker, 57 Me. 395; Hersey v. Turbett, 27 Pa. St. 418; McPherson v. Housel, 2 Beasl. 299; Steele v. Taylor, 1 Minn. 274; Berry v. Whitaker, 58 Me. 422.

[5] Welton v. Cook, 61 Cal. 481.

[6] Loomis v. Riley, 24 Ill. 307. Party obtaining interest in property is bound by the decree: Stein v. McGrath, 128 Ala. 175, 30 So. 792; Harms v. Jacobs, 160 Ill. 589, 43 N. E. 745; Becker v. Stroeher, 167 Mo. 306, 66 S. W. 1083; Clark v. Charles, 55 Neb. 202, 75 N. W. 563.

of trust upon the land involved in the suit. A few days after the time the deed bore date, the cause was remanded, the prior sale canceled, and the property resold. It was held that one who derived title under the deed of trust took with notice of the *lis pendens*, and could not maintain ejectment against the person purchasing at the second judicial sale.[7] A purchaser at a tax sale obtained a decree by default quieting his title against one who had, in fact, previously conveyed the land, but the deed of the grantee had not been recorded and the grantee was not made a party. The decree was held not to bind the grantee, and his neglect to record the deed could not affect him.[8]

§ 792. **Purchaser from person not a party to the suit.** —A person who purchases a tract of land from one who is not a party to the suit affecting it, or a privy to such party, is not charged with constructive notice of the *lis pendens*.[9] A held a mortgage upon a tract of land, and subsequently B acquired a lien on the same land, of which A had knowledge. B began proceedings to subject the land to his lien, and the tract, which had been divided into fifty-six building lots, was sold by a master to C. Some of the lots were mortgaged to B by C, and the remaining lots were discharged by the sale from B's lien. A had no notice of the suit or of any of the of the subsequent proceedings, but the deeds and mortgages in pursuance of the sale were duly recorded. Subsequently, B foreclosed the mortgage executed by C, and at the begin-

[7] Real Estate Saving Inst. v. Collonious, 63 Mo. 290.

[8] Smith v. Williams, 44 Mich. 240.

[9] Scarlett v. Gorham, 28 Ill. 319; Miller v. Sherry, 2 Wall. 237; Parks v. Jackson, 11 Wend. 442, 25 Am. Dec. 656; Allen v. Morris, 34 N. J. L. 159; Stuyvesant v. Hone, 1 Sand. Ch. 419; Herrington v. Herrington, 27 Mo. 560; French v. The Royal Co., 5 Leigh, 627; Parsons v. Hoyt, 24 Iowa, 154; Clarkson v. Morgan, 6 B. Mon. 441. See, also, Noyes v. Crawford, 118 Ia. 15, 91 N. W. 799, 96 Am. St. Rep. 363; Graham v. Kitchen, 118 Ky. 18, 80 S. W. 464; Merrill v. Wright, 65 Neb. 794, 91 N. W. 697, 101 Am. St. Rep. 645; Buxton v. Sargent, 7 N. D. 503, 75 N. W. 811.

ning of the suit filed a statutory notice of *lis pendens*. A, who had no actual notice of this suit, released to C, while the suit was pending, forty-two of the fifty-six lots. The fourteen lots still left subject to A's mortgage were a part of those which C had mortgaged to B, and all of C's lots not mortgaged to B were released by A. The court held that A was not affected with constructive notice of the first suit of B or of the sale under his decree; that the registration of the deeds to C and C's mortgages was not notice to A, and A, when he released, was not obliged to search the records for deeds and encumbrances later than his mortgage; and that neither the foreclosure suit of B, nor the notice of *lis pendens* filed, could charge A with notice of B's proceedings, or of his rights under C's mortgages.[1] So it is held that the doctrine of *lis pendens* has no application to independent titles not derived from any of the parties to the suit nor in succession to them even though the statute provides that "no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title."[2]

§ 792a. **Unrecorded deed.**—As has been said in other sections, unless some statutory provision controls the matter, an unrecorded deed is valid between the parties and those who are affected with notice, and is void only against subsequent purchasers in good faith and for value. But what rights has a grantee under an unrecorded deed as against a prior record of a *lis pendens* filed in a suit to determine a trust or the interests of the respective parties to the suit in the land? Is he bound by the judgment to which he is not a party, or are his rights unaffected? In many States this question is determined by statute, but where the statutes are silent the rule is that notice of a *lis pendens* is not a conveyance, and that it is not

[1] Stuyvesant v. Hone, 1 Sand. Ch. 419.

[2] Merrill v. Wright, 65 Neb. 794, 91 N. W. 697, 101 Am. St. Rep. 645. See, also, Harrod v. Burke, 76 Kan. 909, 92 Pac. 1128.

intended to confer new rights on the plaintiff, but to limit those which he had before, and hence whether a deed is or is not recorded is immaterial. A grantee under an unrecorded deed is not affected by the *lis pendens*.[3]

§ 793. **Cross-complaint.**—A person may be charged with notice of a *lis pendens* affecting land by the averments of a cross-complaint as well as by the complaint itself. A plaintiff filed a petition for the settlement of a partnership theretofore existing between him and the defendant. The defendant in his answer, among other things, set up by way of cross-petition a misapplication of partnership funds by the plaintiff, which he had fraudulently caused to be conveyed to his wife. The defendant asked in his answer that the plaintiff's wife and the person from whom the property was purchased be made parties, and that the property to which she held the legal title be subjected to the purposes of the partnership. The court ordered her and her grantor to be made parties, and she, by her attorney, applied for leave to answer, which was granted. It was held that by obtaining permission to answer, the wife entered her appearance as a party, and that a purchaser who subsequently obtained title to the land from the husband and wife was affected with notice of the suit.[4]

§ 794. **Principle applies also to actions at law.**—It has sometimes been asserted that the doctrine of *lis pendens* applies exclusively to equitable suits.[5] But it is now established that the principle applies to actions at law as well. "This principle is not peculiar to courts of chancery; but the maxim

[3] Warnock v. Harlow, 96 Cal. 298, 31 Am. St. Rep. 209; Hammond v. Paxton, 58 Mich. 393; Vose v. Martin, 4 Cush. 27, 50 Am. Dec. 750; Smith v. Williams, 44 Mich. 240; Hall v. Nelson, 23 Barb. 88; Freeman on Judgments, § 201. But see *contra:* Smith v. Hodson, 78 Me. 180; Norton v. Birge, 35 Conn. 250.

[4] Brundage v. Biggs, 25 Ohio St. 652.

[5] King v. Bill, 23 Conn. 593.

that *pendente lite nihil innovetur,* is applied in real and mixed actions by the common law." [6] A executed a deed to B, B executed a deed to C, and C executed a deed to D. All these were fraudulent. E, who possessed no actual knowledge of any defect or infirmity in the title, took a mortgage from C. The records showed at the time he took the mortgage that the creditors of A had levied attachments on the property. The law provided that such attachments might be made the basis of proceedings in insolvency in the probate court, the institution of which would dissolve the attachments. As a matter of fact insolvency proceedings had been instituted, but E took his mortgage with the knowledge that such attachments had been levied, and had subsequently been discontinued; but he made no inquiry to ascertain whether insolvency proceedings had been commenced. The trustee in insolvency had brought a bill in equity against B to set aside the fraudulent deed to him, which suit was pending when E took his mortgage. The deed of B to C was executed and delivered before the commencement of the suit, but was not recorded or known to the trustee until a long time after the institution of the suit. The doctrine of notice of *lis pendens* was applied to the title acquired by E, and it was said that if he was not fully chargeable with notice of the rights of the trustee in insolvency, the applicaton of the doctrine produced no hardship.[7]

[6] Secombe v. Steele, 20 How. 94, 106, 15 L. ed. 833, 837, per Campbell, J.; Bellamy v. Sabine, 1 De Gex & J. 584.

[7] Norton v. Birge, 35 Conn. 250. The court distinguish this case from King v. Bill, 28 Conn. 593. See, also, Sheridian v. Andrews, 49 N. Y. 478. Speaking of the effect of *lis pendens,* Green, J., in Newman v. Chapman, 2 Rand. 93, 100, 14 Am. Dec. 766, said: "Lord Hardwicke, in the leading case of Le Neve v. Le Neve, 3 Atk. 646, declared that the statutes of registry in England (which, as to the matter under consideration, are the same in effect as our statute), only vested the legal title in the subsequent purchaser, and left the case 'open to all equity'; and in that case, he relieved against a subsequent purchaser, upon *constructive,* and not upon *actual* notice, the notice being to an agent of the purchaser. A *lis pendens* has always been spoken of in the English court of chancery as a constructive no-

§ 795. Actions of ejectment.—Where an action of ejectment has been commenced against the person in possession of the property, one who acquires possession from the

tice to all the world, as all men are bound and presumed to take notice of the proceedings of a court of justice. If these propositions were universally true, it would seem to follow that a *lite pendente* purchaser was a purchaser with notice, and would take the property subject to the claims of the plaintiff in the suit as the defendant held it. In all questions of fact, the existence of the matter in question may be proved by direct evidence, or by proof of the other facts, from which it may justly be inferred that the fact in question does exist. A fact thus proved by circumstantial evidence, is taken to exist for all purposes as if it were proved by direct evidence. I cannot, therefore, feel the force of the observation frequently thrown out in modern cases, that a notice to affect a subsequent purchaser after an unregistered deed must be *actual*, and such as to affect his conscience, and not *constructive*. A notice proved by circumstances to exist, affects the conscience of the party as much as if proved by direct evidence. In all other cases, a purchaser of a legal estate with notice of a subsisting equity, is bound by *constructive*, as well as by *actual*, notice; and *that* because his conscience is affected, and he is guilty of a fraud. Without fraud on his part, his legal title ought to prevail. I see no reason why a difference should be made between the case of a purchaser after an unregistered deed, and a purchaser of a legal title, subject to any other equity as to the proof of the notice which ought to be held to bind them. This distinction between an *actual* and *constructive* notice, in the case of a purchaser after an unregistered deed, seems to have proceeded from a doubt whether the relief given in the early cases upon that subject, had not been in opposition to the spirit and the policy as well as the letter of the statutes of registry. The rule, as to the effect of a *lis pendens*, is founded upon the necessity of such a rule to give effect to the proceedings of courts of justice. Without it, the administration of justice might, in all cases, be frustrated by successive alienations of the property, which was the object of litigation pending the suit, so that every judgment and decree would be rendered abortive where the recovery of specific property was the object. This necessity is so obvious, that there was no occasion to resort to the presumption that the purchaser really had, or by inquiry might have had, notice of the pendency of the suit to justify the existence of the rule. In fact, it applied in cases in which there was a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit, unless all contracts were made in the office from which the writ issued, and on the last moment of

defendant *pendente lite* will be bound by the judgment that may be recovered in the ejectment suit, to the same extent as the defendant. Although such grantee or assignee may not

the day. For at common law the writ was pending from the first moment of the day on which it was issued and bore *teste;* and a purchaser on or after that day, held the property subject to the execution upon the judgment in that suit as the defendant would have held it if no alienation had been made. The court of chancery adopted the rule in analogy to the common law; but relaxed in some degree the severity of the common law. For no *lis pendens* existed until the service of the subpœna and bill filed; but it existed from the service of the subpœna, although the bill was not filed until long after; so that a purchaser after service of the subpœna, and before the bill was filed would, after the filing of the bill, be deemed to be a *lite pendente* purchaser, and as such be bound by the proceedings in the suit, although the subpœna gave him no information as to the subject of the suit. A subpœna might be served the very day on which it was sued out, and there is an instance in the English books of a purchaser who purchased on the day that the subpœna was served without actual notice, and who lost his purchase by force of this rule of law. This principle, however necessary, was harsh in its effects upon *bona fide* purchasers, and was confined in its operation to the extent of the policy on which it was founded; that is, to the giving full effect to the judgment or decree which might be rendered in the suit pending at the time of the purchase. As a proof of this, if the suit was not prosecuted with effect, as if a suit at law was discontinued, or the plaintiff suffered a nonsuit, or if a suit in chancery was dismissed for want of prosecution, or for any other cause not upon the merits, or if at law or in chancery a suit abated, although in all these cases the plaintiff or his proper representative might bring a new suit for the same cause, he must make the one who purchased pending the former suit a party; and in this new suit such purchaser would not be at all affected by the pendency of the former suit at the time of his purchase. In the case of an abatement, however, the original suit might be continued in chancery by revivor, or at law, in real actions, abated by the death of a party, by *journies accounts,* and the purchaser still be bound by the final judgment or decree. If a suit be brought against the heir upon the obligation of his ancestor binding his heirs, and he alienates the land descended pending the writ upon a judgment in that suit, the lands in the hands of the purchaser would be liable to be extended in satisfaction of the debt. But if that suit were discontinued, abated, or the plaintiff suffered a nonsuit in a new action for the same cause, the purchaser would not be affected by the

be made a party to the suit, he may be ejected under the judgment rendered against his grantor or assignor. If this were not the law, the defendant could compel the plaintiff to commence a new action as often as he made an assignment.[8] But the judgment binds only the parties and their privies. One whose possession is distinct from that for which the action is brought, cannot be ousted by an execution in such action.[9] The assignee, when subject to the judgment, is liable for

pendency of the former suit at the time of his purchase; and if he could be reached at law, in equity it could only be upon proof of actual notice and fraud. If a *lis pendens* was notice *then*, as a notice at or before the purchase would, in other cases, bind the purchaser in any suit in equity prosecuted at any time thereafter to assert the right of which he had notice, so ought the *lis pendens* to bind him in any subsequent suit prosecuted for the same cause; but it does not. Again, a bill of discovery, or to perpetuate the testimony of witnesses, ought, if all persons were bound to take notice of what is going on in courts of justice, to be a notice to all the world as much as a bill for relief. But these are decided to be no notice to any purpose; a proof that the rule as to the effect of a *lis pendens* is one of mere policy, confined in its operation strictly to the purposes for which it was adopted; that is, to give effect to the judgment and decrees of courts of justice, and that it is not *properly* a notice to any purpose whatsoever. The English judges and elementary writers have carelessly called it a notice, because, in one single case, that of a suit prosecuted to decree or judgment, it had the same effect upon the interests of the purchaser as a notice had, though for a different reason. But the courts have not in any case given it the real force and effect of a notice."

[8] Howard v. Kennedy, 4 Ala. 592, 39 Am. Dec. 307; Wallen v. Huff, 3 Sneed, 82, 65 Am. Dec. 49; Jackson v. Tuttle, 9 Cowen, 233; Hickman v. Dale, 7 Yerg. 149; Jones v. Chiles, 2 Dana, 25; Smith v. Trabue, 1 McLean, 87. A person entering or acquiring rights in property from a party pending litigation holds the same subject to the judgment: Elizabethport Cordage Co. v. Whitlock, 37 Fla. 190, 20 So. 255; Equitable Securities Co. v. Green, 113 Ga. 1013, 39 S. E. 434; Hicks v. Porter, (Tex.) 85 S. W. 437; Hargrave v. Cherokee Nation, 129 Fed. 186, 63 C. C. A. 276; Henderson v. Wanamaker, 79 Fed. 736, 25 C. C. A. 181.

[9] Howard v. Kennedy, 4 Ala. 592, 39 Am. Dec. 307; Fogarty v. Sparks, 22 Cal. 142. See, also, Chiles v. Stephens, 1 Marsh. 333.

mesne profits.[1] Parties who have acquired their rights before the commencement of a suit are not affected by a *lis pendens*.[2]

§ 796. **Diligence in prosecution of suit.**—The suit in order to affect a grantee with notice, must be prosecuted without unnecessary delay. There must be reasonable diligence used in endeavoring to obtain a final judgment.[3] Where for a period of nearly two years no step was taken in a case or motion made indicating an intention to prosecute the suit, and no excuse was offered, or explanation given for the delay, the court considered that there had been such gross and culpable negligence in the prosecution of the suit as to take away from the plaintiff the privilege of claiming the benefit of a notice of

[1] Jackson v. Stone, 13 Johns. 447; Bradley v. McDaniel, 3 Jones, 128.

[2] Houghwout v. Murphy, 22 N. J. Eq. 545; Chapman v. West, 17 N. Y. 125; Hunt v. Haven, 52 N. H. 162; Ensworth v. Lambert, 4 Johns. Ch. 605; People v. Connelly, 8 Abb. Pr. 128; Hopkins v. McLaren, 4 Cowen, 677; Hall v. Nelson, 23 Barb. 88; Curtis v. Hitchcock, 10 Paige, 399; Parks v. Jackson, 11 Wend. 442, 25 Am. Dec. 656. But see Norton v. Birge, 35 Conn. 250.

[3] Herrington v. McCollum, 73 Ill. 476; Gibler v. Trimble, 14 Ohio, 323; Edmeston v. Lyde, 1 Paige, 637, 19 Am. Dec. 454; Murray v. Ballou, 1 Johns. Ch. 566; Trimble v. Boothby, 14 Ohio, 109, 45 Am. Dec. 526; Petree v. Bell, 2 Bush, 58; Watson v. Wilson, 2 Dana, 406, 26 Am. Dec. 459; Erhman v. Kendrick, 1 Met. (Ky.) 146; Clarkson v. Morgan, 6 B. Mon. 441, 448; Price v. McDonald, 1 Md. 403, 54 Am. Dec. 657; Myrick v. Selden, 36 Barb. 15, 22; Preston v. Tubbin, 1 Vern. 286; Bridger v. Exchange Bank, 126 Ga. 821, 56 S. E. 97. And see Ashley v. Cunningham, 16 Ark. 168; Debell v. Foxworthy, 9 B. Mon. 228; Mann v. Roberts, 11 Lea, (Tenn.) 57; Tinsley v. Rice, 105 Ga. 285, 31 S. E. 174; Kelley v. Culver, 116 Ky. 241, 75 S. W. 272; Woodward v. Johnson, 122 Ky. 160, 90 S. W. 1076; Boice v. Conover, (1905), 69 N. J. Eq. 580, 61 Atl. 159. Laches of thirty years held fatal: Woodward v. Johnson, 122 Ky. 160, 90 S. W. 1076. Conduct showing abandonment is fatal: Wells v. Goss, 110 La. 347, 34 So. 470. Likewise dismissal: Allison v. Drake, 145 Ill. 500, 52 N. E. 537; Bristow v. Thackston, 187 Mo. 332, 86 S. W. 94, 106 Am. St. Rep. 472; McVay v. Lousley, 20 S. D. 258, 105 N. W. 932.

lis pendens.[4] "To entitle him to enforce it against *bona fide* purchasers, he has been held to reasonable diligence in the prosecution of his suit, and should be guilty of no palpable slips or gross irregularities in the management of the same, by which injury may accrue to the rights of others who are not parties."[5] And where a suit has been commenced in the name of persons who have no interest, for which reason the suit might properly have been dismissed, and afterward the names of those who have an interest are introduced, there has been such a slip, it is held in Kentucky, that the principle of *lis pendens* cannot be applied to intermediate purchasers.[6]

§ 797. **Continued.**—But in Iowa, where a suit was brought to enforce the specific performance of a contract for the conveyance of land, and a person bought the land during the pendency of the suit, and subsequently the bill on appeal being ordered to be dismissed with leave to the plaintiff to file a bill *de novo*, the plaintiff filed a new bill, making the purchaser a party, it was held that the purchaser took with notice of the *lis pendens*. The court said that if the grantee had purchased between the time the first suit terminated and the second commenced, it might be doubted whether he would be a purchaser with notice, but that under the circumstances, he could occupy no better position than if the first decree had been affirmed, instead of reversed on appeal.[7] And in Illinois, the point is directly decided that where a suit is dismissed and afterward reinstated, the doctrine of *lis pendens* has no application to a person purchasing after the dismissal, and before the revival of the suit.[8] It is held, however, in one case, that it is not necessary that the suit should be prosecuted with even ordinary diligence to enable a party to maintain the benefit

[4] Petree v. Bell, 2 Bush, 58.

[5] Clarkson v. Morgan, 6 B. Mon. 441, 448.

[6] Clarkson v. Morgan, *supra*.

[7] Ferrier v. Buzick, 6 Iowa, 258. See, also, Bishop of Winchester v. Paine, 11 Ves. Jr. 200.

[8] Herrington v. McCollum, 73 Ill. 477.

of a *lis pendens;* that such benefit can be terminated only by unreasonable and unusual negligence in the prosecution of the suit.[9]

§ 798. Reasonable excuse.—Whether there has been unreasonable delay in any particular case must of necessity depend upon the circumstances of that case. As will be more particularly noticed in the following section the law of *lis pendens,* binding purchasers who have no actual knowledge of the suit, is considered a rigorous one, and in order that the plaintiff may retain the benefit he has secured, he must prosecute his suit with diligence or explain the cause for the delay. But while the delay may of itself be long, and apparently unpardonable, still, if the plaintiff can present a reasonable excuse for it, the court must enforce the rule that the notice of *lis pendens* has continued during the whole of the time.[1] So it has been held that failure to prosecute a suit between the years 1866 and 1870 is, in view of the disturbed condition then existing in the country, not such negligence as to destroy the force of a pending suit.[2]

§ 799. Rule of lis pendens not favored.—It is said that the doctrine of *lis pendens* "has ever been regarded as a harsh and rigorous rule in its operation upon the rights of *bona fide* purchasers. The rule was dictated by necessity as indispensable to the rights of litigants, and as the means of terminating litigation about the matter in contest. But being a hard rule and operating with great severity in many instances upon the rights of innocent purchasers, it should never be carried in favor of a complainant asking its enforcement beyond the purpose and reason of its creation." [3] And again it is said:

[9] Gossom v. Donaldson, 18 Mon. B. 230, 68 Am. Dec. 723.

[1] Wickliffe v. Breckenridge, 1 Bush, 443. See, also, Norris v. Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233; Jones v. Robb, (Tex.) 80 S. W. 395.

[2] Jones v. Robb, (Tex.) 80 S. W. 395.

[3] Clarkson v. Morgan, 6 Mon. B.

"This rule adopted by courts of equity from necessity, and in imitation of the common law, that when the defendant in a real action aliens after suit brought, the judgment in such real action will overreach such alienation, is yet considered as against a real and fair purchaser without actual notice as a hard rule, and courts gladly avail themselves of any defect in the pleadings or proofs of the plaintiff to prevent its operation upon such a purchaser." [4]

§ 800. **Effect of lis pendens on attorney's lien for fees.** —Where attorneys have a lien upon property recovered or protected by their services, which the court may declare to be such in the cause in which such services are rendered, the client has no power, during the pendency of the suit, to make such a disposition of the subject matter of the suit as will deprive the attorney of his lien, nor to transfer the property subsequently to any purchaser with notice.[5] In the case cited, Nelson, J., speaking for the court, said that "while it is the duty of the courts to protect clients against all unfair advantages on the part of their counsel, it is a duty of equal obligation to shield the attorney, so far as practicable, against the bad faith and ingratitude of clients. The lien of a vendor of land is enforced in equity against the vendee, although no reservation of a lien is contained in a deed. His equity grows out of the transaction, and we hold that an attorney is entitled to an equitable lien on the property or thing in litigation for his just and reasonable fees, and that the client cannot, while the suit is pending, so dispose of the subject-matter in suit as to deprive the attorney of his lien, nor afterward to any purchaser with notice. The pendency of the suit is of itself notice

441, 448, per Ewing, C. J. See, also, Arrington v. Arrington, 114 N. C. 151, 19 S. E. 351; Clarkson v. Morgan, (Ky.) 6 B. Mon. 441; Leitch v. Wells, 48 N. Y. 585.

[4] Ludlow's Heirs v. Kidd, 3 Ohio, 541, 543, per Sherman, J. See, also, Hayden v. Bucklin, 9 Paige, 511.

[5] Hunt v. McClanahan, 1 Heisk. 503.

to all persons, and the lien may be preserved and the notice extended, by stating its existence in the judgment or decree."

§ 801. Suit must affect specific property.—It is not sufficient to create a *lis pendens* as the term is understood when speaking of its effect as notice, that the suit may ultimately affect all or some particular portion of the real estate of the defendant. The property must be specified in the proceedings and as to this property all persons are charged with notice of the pending litigation affecting it. The doctrine of *lis pendens* has no application to a suit for a divorce and alimony, as such a suit does not relate to any particular piece of property.[6] In one case the court, while deciding that the law of *lis pendens* did not apply in a suit for divorce, intimated, however, that if the prayer of the petition had been to have alimony assigned out of a particular tract of land, the case would have had some resemblance to those in which the rule of *lis pendens* had been applied.[7] So a suit for a sum of money which may be satis-

[6] Feigley v. Feigley, 7 Md. 537, 563, 61 Am. Dec. 375; Hamlin v. Bevans, 7 Ohio, 161, 28 Am. Dec. 625; Brightman v. Brightman, 1 R. I. 112. In the case first cited, the court said: "As well might a pending action at law to recover an ordinary debt be a *lis pendens* as to the property of a debtor, as a proceeding like the present, the purpose of each being to subject the property of the debtor to the payment of debts. *Lis pendens* is a proceeding relating to *the thing or property in question.*" The doctrine of *lis pendens* has no application where the object of the action is merely to recover a money judgment: Carson v. Fears, 91 Ga. 482, 17 S. E. 342; Armstrong v. Carwile, 56 S. C. 463, 35 S. E. 196.

[7] Brightman v. Brightman, 1 R. I. 112. And see Daniel v. Hodges, 87 N. C. 95. In the former case, the court said: "But the rule only relates to suits involving the title to property, and is not to be extended beyond the property involved in the suit: 1 McCord Ch. 264. The suit must relate to the estate, and not to anything collateral, such as money secured on it: 3 Atk. 392. The rule applies where a third person attempts to intrude into a controversy by acquiring an interest in the matter in dispute pending suit: 4 Cowen, 667, 2 Johns. Ch. 445. We do not apprehend that the rule of *lis pendens* is applicable to this case. The prayer of the complainant's petition was for divorce and for alimony out

fied by a sale of real estate, if not satisfied in some other mode, cannot be regarded as *lis pendens* so as to affect the title to the real estate of the defendant.[8]

§ 802. **When lis pendens commences.**—The commencement of a *lis pendens* dates from the service of the subpœna or other process giving the court jurisdiction.[9] If a

of her husband's estate. It did not affect the title to his real estate, or necessarily seek to put any encumbrance on it. Alimony is to be granted out of the personal or real estate, and is not necessarily a charge on either. Had the prayer in this case been for alimony to be assigned her out of this particular farm, the case would have somewhat resembled some of the cases in the books where the rule has been applied. But it is not so; it is general for alimony out of his estate. If such a prayer locks up the real, it equally does the personal, estate of a respondent to such a petition, and each and every part of it. The instant such a petition is filed, the respondent's business, however extensive it may be, must stop. Purchasers and dealers with him, by the policy of the law, are bound by the decree for alimony that may be passed, although they do not even know that they are dealing with a married man. Alimony will be claimed, and must be allowed to attach to any and every part of the personal property that the husband had at the filing of the petition. We do not think this case falls within the rule of *lis pendens*, nor within the reason of that rule." And see, also, Gardner v. Peckham, 13 R. I. 102.

[8] St. Joseph Mfg. Co. v. Daggett, 84 Ill. 556. See, also, White v. Perry, 14 W. Va. 66; Ray v. Roe, 2 Blackf. 258, 18 Am. Dec. 159; Low v. Pratt, 53 Ill. 438; Lewis v. Mew, 1 Strob. Eq. 180; Miller v. Sherry, 2 Wall. 237, 17 L. ed. 827; Jones v. McNarrin, 68 Me. 334, 28 Am. Rep. 66; Green v. Slayter, 4 Johns. Ch. 39; Worsley v. Earl of Scarborough, 3 Atk. 392. And see Lockwood v. Bates, 1 Del. Ch. 435, 12 Am. Dec. 121; Center v. P. & M. Bank, 22 Ala. 743. See, also in this connection: Greenwood v. Warren, 120 Ala. 71, 23 So. 686; Zoeller v. Riley, 100 N. Y. 102, 2 N. E. 388, 53 Am. Rep. 157; Moragne v. Doe, 143 Ala. 459, 39 So. 161, 111 Am. St. Rep. 52.

[9] Williamson v. Williams, 11 Lea (Tenn.) 355; Haughwout v. Murphy, 22 N. J. Eq. 545; Allen v. Poole, 54 Miss. 323; Murray v. Blatchford, 1 Wend. 583, 19 Am. Dec. 537; Majors v. Cowell, 51 Cal. 478; Leitch v. Wells, 48 N. Y. 585; Allen v. Mandaville, 26 Miss. 397; Edwards v. Banksmith, 35 Ga. 213; Hayden v. Bucklin, 9 Paige, 512; Butler v. Tomlinson, 38 Barb. 641; Jackson v. Dickenson, 15 Johns. 309, 8 Am. Dec. 236; Center v. The Bank, 22 Ala. 743; Farmers' Nat. Bank v. Fletcher, 44 Iowa, 252; Herrington v. Herrington, 27 Mo.

defective subpœna is served after the filing of a bill to foreclose a mortgage, and, by stipulation, the service of the subpœna and all subsequent proceedings are set aside, the complainant being permitted to amend the subpœna so as to date it of the day the stipulation was made, the commencement of the suit is deemed to be at the time of the service of such amended subpœna.[1] Where a service is made by publication, the service is complete after regular publication.[2] "It is necessary to adopt some analogous rule in those cases, where the law provides a different manner of notice. Whenever the act is done, by which the defendant is submitted to the jurisdiction of the court, it is a service of process, and the suit is commenced."[3] A *lis pendens* does not exist where service of a subpœna is accepted as of a prior date so as to bind a person purchasing before the time of such acceptance.[4] The *lis pendens* is notice of all pertinent facts stated in the pleadings.[5] But where an amendment is made, the notice dates from the time of the amendment.[6] A *lis pendens* does not exist as to facts not within the purpose of the suit.[7]

560; Powell v. Wright, 7 Beav. 444; Scott v. McMillan, 1 Litt. 302, 13 Am. Dec. 239; Campbell's case, 2 Bland, 209, 20 Am. Dec. 360; Murray v. Ballou, 1 Johns. Ch. 566, 576. And see Miller v. Sherry, 2 Wall. 237, 17 L. ed. 827; Wickliffe v. Breckenridge, 1 Bush, 443; New man v. Chapman, 2 Rand. 93, 14 Am. Dec. 766; Goodwin v. McGehee, 15 Ala. 232; Waring v. Waring, 7 Abb. Pr. 472.

[1] Allen v. Case, 13 Wis. 621.

[2] Chaudron v. Magee, 8 Ala. 570; Hayden v. Bucklin, 9 Paige, 511.

[3] Bennet's Lessee v. Williams, 5 Ohio, 461, 463. See Carter v. Mills, 30 Mo. 432; Clevinger v. Hill, 4 Bibb, 498.

[4] Miller v. Kershaw, 1 Bail. Eq. 479, 23 Am. Dec. 183.

[5] Jones v. McNarrin, 68 Me. 334, 28 Am. Rep. 66; Center v. P. & M. Bank, 22 Ala. 743; Lockwood v. Bates, 1 Del. Ch. 435, 12 Am. Dec. 121.

[6] Jones v. Lusk, 2 Met. (Ky.) 356; Stone v. Connelly, 1 Met. (Ky.) 654, 71 Am. Dec. 499; Clarkson v. Morgan, 6 Mon. B. 441. But see Stoddard v. Myers, 8 Ohio, 203, 10 Ohio St. 365 .

[7] Bellamy v. Sabine, 1 De Gex & J. 566; Tyler v. Thomas, 25 Beav. 47. See Stuyvesant v. Hall, 2 Barb. Ch. 151. See, also, Taylor v. Boyd, 3 Ohio, 338, 17 Am. Dec. 603; McCormick v. McClure, 6 Blackf. 466, 39 Am. Dec. 441; Lud-

§ 803. Statutory lis pendens.—In England, and in most if not all of the several States, statutes have been passed requiring notices to be filed so as to affect purchasers with notice. These statutes differ in their details, some requiring more particulars to be stated than others but the common object of all is to abate the rigor of the technical rule of *lis pendens* and provide a safe and effective mode of giving notice.[8] The effect of a *lis pendens* cannot be nullified by the fact that it has been lost from the files or has not been properly entered, through no fault of the party.[9] And this is true, although the party whom it is sought to bind may never have actually seen it.[1]

§ 804. Effect of the statutes.—Under these statutes, a purchaser is not affected by a *lis pendens* unless notice has been given in the manner directed by statute. "The general rule is, that one not a party to a suit is not affected by the judgment; the exception at common law is, that a *pendente*

low v. Kidd, 3 Ohio, 541; Clarey v. Marshall, 4 Dana, 95; Debell v. Foxworthy, 9 Mon. B. 228; Gore v. Stakpole, 1 Dow, 31; Earle v. Couch, 3 Met. (Ky.) 450.

[8] See in England, 2 Vict. C. 1157. It is not deemed necessary to append an abstract or refer to the statutes of the different States, as the subject is connected with practice with which each attorney is familiar. But reference may be made to the following cases relating to the statutory *lis pendens:* Abadie v. Lobero, 36 Cal. 390; Richardson v. White, 18 Cal. 102; Ault v. Gassaway, 18 Cal. 205; Farmers' Nat. Bank v. Fletcher, 44 Iowa, 252; Drake v. Crowell, 40 N. J. L. 58; Mills v. Bliss, 55 N. Y. 139; Todd v. Outlaw, 79 N. C. 235; Sheridan v. Andrews, 49 N. Y. 478; Mitchell v. Smith, 53 N. Y. 413; Brown v. Goodwin, 75 N. Y. 409; Ayrault v. Murphy, 54 N. Y. 203; Page v. Waring, 76 N. Y. 463; Fuller v. Scribner, 76 N. Y. 190; Majors v. Cowell, 51 Cal. 478; Dresser v. Wood, 15 Kan. 344; Leitch v. Wells, 48 Barb. 637; White v. Perry, 14 W. Va. 66; Jaffray v. Brown, 17 Hun, 575; Mayberry v. Morris, 62 Ala. 113; Tredway v. McDonald, 51 Iowa, 663. The statutes of a State relating to *lis pendens,* it is held, does not apply to suitors except in the State courts: Majors v. Cowell, 51 Cal. 478.

[9] Heim v. Ellis, 49 Mich. 241.

[1] Heim v. Ellis, *supra.*

lite purchaser, though not a party was so affected; the qualification of the doctrine made by our statute is, that such purchaser is not affected unless notice of such *lis pendens* be filed with the recorder. . . . The common-law doctrine of *lis pendens* rests upon the fiction of notice to all persons of the pendency of suits, and to remedy the evils which might grow out of the transfer of apparent legal titles or rights of action to persons ignorant of litigation respecting them, this provision was inserted in our statute. . . . We consider our statute, not as giving new rights to the plaintiff, but as a limitation upon the rights which he had before. If no *lis pendens* be filed, the party acquiring an interest or claim *pendente lite* stands wholly unaffected by the suit. If he has any rights which but for the suit, he could set up, he may still maintain those rights. But he would not be foreclosed by a judgment against the party to the suit from whom he obtained his assignment. The object of the statute evidently was to add to the common-law rule a single term, to wit, to require for constructive notice not only a suit, but filing a notice of it, so that this rule is as if it read: 'The commencement of a suit and the filing of a notice of it are constructive notice to all the world of the action, and purchasers or assignees, afterward becoming such, are mere volunteers and bound by the judgment.'" [2] It is held in one case that a notice of *lis pendens* is not affected by the fact that it was filed several days before the commencement of the suit.[3] But this is denied; and it is also held that where no bill has been filed, a *lis pendens* filed is a nullity as constructive notice,[4] or is inoperative.[5]

§ 805. **Actual notice.**—As the object of these statutes is to provide a mode for giving the constructive notice which

[2] Richardson v. White, 18 Cal. 102, 106, per Baldwin, J. See Head v. Fordyce, 17 Cal. 149.

[3] Houghton v. Mariner, 7 Wis. 244.

[4] Walker v. Hill's Executors, 22 N. J. Eq. 514. See Weeks v. Tomes, 16 Hun, 349.

[5] Sherman v. Bemis, 58 Wis. 343.

formerly was given by the commencement of the suit itself, and to prevent a party from claiming that a subsequent purchaser is affected with constructive notice unless the requirements of the statute have been complied with, it is evident that a subsequent purchaser who has *actual* notice cannot object if the statutory notice has not been filed, the filing of which was intended only to give him the notice which he already had or afterward acquired. In other words, a purchaser having actual notice of the pendency of the suit is not protected by the statute.[6]

[6] Baker v. Pierson, 5 Mich. 456; Sampson v. Ohleyer, 22 Cal. 200; Abadie v. Lobero, 36 Cal. 390. See, also, Daggs v. Wilson, 6 Ariz. 388, 59 Pac. 150; Hibernia etc. Soc. v. Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Powell v. Nat. Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536; Richards v. Cline, 176 Ill. 431, 52 N. E. 907; Parrotte v. Dryden, 73 Neb. 291, 102 N. W. 610; Varnum v. Bolton Shoe Co., 171 N. Y. 658, 63 N. E. 1123; King v. Davis, 137 Fed. 222.

CHAPTER XXIV.

CONSIDERATION.

§ 806. Kinds of consideration.
807. Support.
807a. Grantor's right of rescission passing to heirs or personal representatives.
808. Marriage.
808a. Estoppel from representations in marriage negotiations.
808b. Parol evidence showing marriage to be consideration.
808c. Grantor's intention to defraud creditors where deed is made in consideration of marriage.
809. Other valuable considerations.
810. Deeds of bargain and sale and covenants to stand seised.
811. Consideration of paying grantor's debts.
812. Trust to distribute estate according to will.
813. Valuable consideration as protection to *bona fide* purchasers.
814. Adequacy of consideration and failure of consideration.
815. Antecedent debts as consideration.
§ 816. The other view.
817. Presumption that deed states true consideration.
818. Presumption as against strangers—Conflict in the decisions—Comments.
819. Decisions that the rule applies to strangers.
820. Decisions that the rule does not apply to strangers.
821. Comments.
822. Proof of real consideration.
823. Action for purchase price.
824. Quantity of land conveyed.
825. Parol promise of grantee to convey other land.
826. Verbal promise.
827. Vesting of title.
828. Retention of purchase money by grantee.
829. Whether a gift or an advancement.
830. Reason for the rule admitting parol evidence as to consideration.
831. Parol agreement to execute devise.
832. Community property.
833. In North Carolina, acknowledgment is release.
834. Showing absence of consideration to defeat deed.

§ 806. **Kinds of consideration.**—By the elementary writers, considerations are divided into two kinds, good and

valuable. "Good considerations are those of blood, natural love, and affection, and the like." "Valuable considerations those which confer some benefit upon the party by whom the promise is made, or upon a third party at his instance or request; or some detriment sustained at the instance of the party promising, by the party in whose favor the promise is made." [1] The natural affection arising from the relationship existing between a grandfather and a grandchild is held to be a good consideration for a deed.[2] So natural love and affection is regarded as good consideration for a deed.[3] And a volun-

[1] Bouv. Law Dict., tit. Consideration.

[2] Hanson v. Buckner's Executor, 4 Dana, 251, 29 Am. Dec. 401; Stovall v. Barnett, 4 Litt. 207. But it is held otherwise in Borum v. King's Administrator, 37 Ala. 606. See for other examples of good considerations, Stafford v. Stafford, 41 Tex. 111; Wallis v. Wallis, 4 Mass. 135, 3 Am. Dec. 210; Bell v. Scammon, 15 N. H. 381, 41 Am. Dec. 706. But a covenant to stand seised to uses on the part of a father, cannot be supported by the consideration of love and affection to an illegitimate child: Blount v. Blount, 2 Law Repos. (N. C.) 587; Repos. & Taylor's Term, Law & Eq. (N. C.), 389. And see Ivey v. Granberry, 66 N. C. 224. A deed executed by a father to his daughter, in consideration of one dollar, actually paid, and natural love and affection, is not a voluntary conveyance, so as to prevent the grantee from enforcing her rights under it in equity against the grantor and his heirs, when she has taken possession and made large and expensive improvements: Appeal of Ferguson, 117 Pa. St. 426. Between the parties, consideration is not necessary to support a deed: See Brown v. Brown, 44 S. C. 378, 22 S. E. 412; Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Bernardy v. Mortgage Co., 17 S. D. 637, 98 N. W. 166. But the rule does not apply as to creditors or prior grantees. See Howard v. Turner, 125 N. C. 107, 34 S. E. 229; Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258.

[3] Springer v. Springer, (Cal.) 64 Pac. 470; St. Clair v. Marquell, 161 Ind. 56, 67 N. E. 693; McKee v. West, 141 Ala. 531, 37 So. 740, 109 Am. St. Rep. 54; Pierce v. Bemis, 120 Ga. 536, 48 S. E. 128; Doan v. Hostetler, 215 Ill. 635, 74 N. E. 767; Burrow v. Hicks, (Ia.) 120 N. Y. 727; Rittenhouse v. Swango, (Ky.) 97 S. W. 743; Couch v. Schwalbe, 51 Tex. Civ. App. 94, 111 S. W. 1047; Robertson v. Hefley, (Tex.) 118 S. W. 1159; Marsh v. Marsh, 32 Wash. 623, 73 Pac. 676; Paulus v. Reed, 121 Ia. 224, 96 N. W. 757; Parker v. Stephens, (Tex.) 39 S. W. 164. And see Mullins v. Mullins, 120 Ky. 643, 87 S. W. 764; Studybaker v. Cofield, 159 Mo. 596, 61 S. W.

tary conveyance of property, completely executed, is valid as between the parties. The rights of creditors in such case, however, are protected by the courts.[4]

§ 807. **Support.**—It was held in one case that where the only consideration expressed in a deed of bargain and sale was, that the grantee should support the grantor for his natural life, the deed was without consideration and void, be-

246. In McKee v. West, *supra*, the court says: "It is not to be questioned that a voluntary conveyance—that is, one founded upon the consideration of love and affection—is valid between the parties. When the grantor, at the time of its execution is indebted, the law stamps such conveyance *per se* fraudulent as against his existing creditors, and subject to be set aside when assailed by them. It is not the voluntary nature of the conveyance alone which renders it in law fraudulent, but that fact, when accompanied with the additional fact of indebtedness on the part of the grantor at the time of its execution. Where no actual fraud exists with reference to future or subsequent creditors in the execution of the conveyance, and no existing or present indebtedness on the part of the grantor, no one would for a moment question the validity of a conveyance having and expressing on its face the consideration of love and affection. The law sanctions such a conveyance, and there is no room for any presumption of fraud solely from the fact that a good, as contradistinguished from a valuable, consideration is expressed in the deed." And see in this connection: Brown v. Brown, 44 S. C. 378, 22 S. E. 412; Nicholas v. Shiplett, (Ky.) 43 S. W. 248; Oliphant v. Liversidge, 142 Ill. 160, 30 N. E. 334; Hester v. Sample, 95 Ia. 86, 63 N. W. 463; Bauer v. Bauer, 82 Md. 241, 33 Atl. 643; Pickett v. Garrard, 131 N. C. 195, 42 S. E. 579; Schneitter v. Carman, 98 Ia. 276, 67 N. W. 249; Beith v. Beith, 76 Ia. 601, 41 N. W. 371; Russ v. Maxwell, 87 N. Y. Supp. 1077, 94 App. Div. 107; Hutsell v. Crewse, 138 Mo. 1, 39 S. W. 449.

[4] See Neurenberger v. Lehenbauer, 23 Ky. L. Rep. 1753, 66 S. W. 15. And see, also, Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471 (C. C. § 1040); Hiles v. Hiles, (Ky.) 82 S. W. 580; Sibley v. Somers, 62 N. J. Eq. 595, 50 Atl. 321; Howard v. Turner, 125 N. C. 107, 34 S. E. 229; Carnagie v. Diven, 31 Or. 366, 49 Pac. 891; Bernardy v. Colonial etc. Co., 17 S. D. 637, 98 N. W. 166, 106 Am. St. Rep. 791. That a seal imports consideration, see Bond v. Wilson, 129 N. C. 325, 40 S. E. 179. See, also, Cook v. Cooper, 59 S. C. 560, 38 S. E. 218; Golle v. Bank, 52 Wash. 437, 100 Pac. 984.

cause, as the deed was not executed by the grantee, there was no agreement on his part, in the opinion of the court, to support the grantor, and the deed was thus merely conditional, giving an option to the grantee to support the grantor, or to suffer it to become void by withdrawing his support.[5] But support of the grantor by the grantee, it may be said, is now regarded everywhere as a sufficient consideration for a deed. The grantee, by accepting the deed and entering into possession under it, becomes bound by the agreement providing for the support of the grantor, and the provision for support thus becomes equivalent to a life annuity.[6] A deed will not be vacated because the consideration is unlawful. The court will leave the parties in the position in which it finds them.[7]

[5] Jackson v. Florence, 16 Johns. 47.

[6] Hutchinson v. Hutchinson, 46 Me. 154; Shontz v. Brown, 27 Pa. St. 123; Spalding v. Hallenbeck, 30 Barb. 292; Exum v. Canty, 34 Miss. 533. Support and maintenance are a sufficient consideration: Barnes v. Multnomah County, 145 Fed. 695; Norris v. Lilly, 147 Cal. 754, 82 Pac. 425, 109 Am. St. Rep. 188; Walker v. Walker, 104 Ia. 505, 73 N. W. 1073; Furnish's Admr. v. Lilly, (Ky.) 84 S. W. 734; Cutts v. Young, 147 Mo. 587, 49 S. W. 548; Anderson v. Gaines, 156 Mo. 664, 57 S. W. 726; Kime v. Addlesperger, 24 Ohio Cir. Ct. R. 397; Kleckner v. Kleckner, 212 Pac. 515, 61 Atl. 1019; Chase v. Chase, 20 R. I. 202, 37 Atl. 804; Freeman v. Jones, 43 Tex. Civ. App. 332, 94 S. W. 1072; Carney v. Carney, 196 Pa. St. 34, 46 Atl. 264. In Spalding v. Hallenbeck, *supra*, the court refer to Jackson v. Florence, 16 Johns. 47, and say that the cases are distinguishable, because, in the latter case, the provision for support was expressed in such language that it placed no obligation upon the grantee, while in the case of Spalding v. Hallenbeck there was a present agreement for support, which became binding upon the grantee by his acceptance of the deed. And see Henderson v. Hunton, 26 Gratt. 926; Keener v. Keener, 34 W. Va. 121. A promise to pay taxes and contribute to the grantor's support is a sufficient consideration for a deed: Taylor v. Crockett, 123 Mo. 300. See, also, Brown v. Brown, 44 S. C. 378; Alvey v. Alvey, (Ky.) 97 S. W. 1106; Webster v. Cadwallader, 133 Ky. 500, 118 S. W. 327; Hoag v. Allen, 152 Mich. 528, 116 N. W. 453; Storms v. Peter, (N. J.) 52 Atl. 705.

[7] Moore v. Adams, 8 Ohio, 372, 32 Am. Dec. 723. It was held in one case in California, that where the consideration for a deed made by an aged woman of feeble health was her support and maintenance

§ 807a. **Grantor's right of rescission passing to heirs or personal representatives.**—The general rule is, that where a deed provides for the support and maintenance of the grantor, and reserves a lien for this purpose, and contains a clause, that on failure of the grantee to perform the covenant, the grantor may re-enter, the covenant survives the death of the grantor.[8] Mere delay for a long time to assert a cause of action where no injury has been done to the defendant can operate to deny relief only on the theory of abandonment, and evidence may be introduced to overcome any such presumption.[9] If a deed contains a condition that the grantee and his heirs shall support an imbecile son of the grantor, and if upon the death of the grantor, this condition is not fulfilled, the heirs of the grantor may re-enter for a breach of the covenants. This right, however, belongs to the heirs of the grantor and a creditor of the imbecile, who is a stranger to the deed,

for the remainder of her life by the grantee, the consideration could not be specifically enforced, and hence, being insufficient in law, the deed will be canceled by a court of equity, if requested by the grantor: Grimmer v. Carlton, 93 Cal. 187, 27 Am. St. Rep. 171. This case is opposed by the current of authority and was subsequently overruled by the case of Norris v. Lilly, 147 Cal. 754, 82 Pac. 425, 109 Am. St. Rep. 188 in which the court held that a conveyance based upon a promise of support, though such promise cannot be specifically enforced, is valid. The court says, overruling Grimmer v. Carlton, *supra:* "The mere fact that a contract is not specifically enforceable does not render it either void or voidable. An agreement to do any act or series of acts which the promisor but for his agreement was under no obligation to perform, has always been deemed an ample consideration of any contract, transfer or conveyance, whether the doing of such act or acts should be specifically enforced or not." The court points out the criticism of Grimmer v. Carlton, *supra,* as made by the second edition of the text and adopts the views of the text and disapproves the rule enunciated in Grimmer v. Carlton.

[8] White v. Bailey, 65 W. Va. 573, 23 L.R.A.(N.S.) 232, 64 S. E. 1019; Cross v. Carson, 8 Blatchf. 138, 44 Am. Dec. 742; Parker v. Nichols, 7 Pick. 111; Thomas v. Record, 47 Me. 500, 74 Am. Dec. 500; Fluharty v. Fluharty, 54 W. Va. 407, 46 S. E. 199; Jackson ex dem. Reeves v. Topping, 1 Wend. 388, 19 Am. Dec. 515.

[9] White v. Bailey, 65 W. Va. 573, 23 L.R.A.(N.S.) 232, 64 S. E. 1019.

cannot avail himself of this privilege.[1] A court of equity has jurisdiction at the suit of the grantor's heirs to set aside the deed for a failure on the part of the grantee to perform the condition.[2] But if the heirs of the grantor prevent the grantee from performing the condition, they cannot maintain an action for a cancellation of the deed, for breach of the condition.[3]

§ 808. Marriage.—Marriage is, of course, a valuable consideration for a deed. Where the grantee, under a voluntary conveyance, gains credit by the conveyance, and a third person, on account of the provisions made for her in the deed, is induced to marry her, the deed on the marriage loses its voluntary character, and is effective as against a subsequent *bona fide* purchaser for a valuable consideration.[4] And although the marriage may be prevented by death, a legal contract and promise of marriage made in good faith by a woman to one who has executed a deed of land to her for the purpose of inducing her to marry him, are a valuable considerations for

[1] Cross v. Carson, 8 Blatchf. 138, 44 Am. Dec. 742.

[2] Fluharty v. Fluharty, 54 W. Va. 407, 46 S. E. 199. See, also, Booth v. Fuller, 35 App. Div. 117, 54 N. Y. Supp. 670.

[3] Harwood v. Shoe, 141 N. C. 161, 53 S. E. 616. In some cases it is said that the party to be supported is the only party in interest who can maintain the action: Hensley v. Hensley, 17 Ky. L. Rep. 122, 30 S. W. 613. And see Arnett v. McGuire, 23 Ky. L. Rep. 2319, 67 S. W. 60, where it was held that the right to rescind was personal.

[4] Verplank v. Sterry, 12 Johns. 536, 7 Am. Dec. 348. See, also, Nowack v. Berger, 133 Mo. 24, 31 L.R.A. 810, 54 Am. St. Rep. 663; Prignon v. Daussat, 4 Wash. 199, 31 Am. St. Rep. 914; Tolman v. Ward, 86 Me. 303, 41 Am. St. Rep. 556; Snyder v. Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863 (but holding under Virginia statutes conveyances upon consideration of marriage void as to existing creditors, but not as to persons claiming to be paramount purchasers under will): Jackson v. Jackson, 222 Ill. 46, 6 L.R.A.(N.S.) 785, 78 N. E. 19. If the grantee is innocent, the fact that the grantor may have intended a fraud upon his creditors will not avoid the deed: Prewit v. Wilson, 103 U. S. 22, 26 L. ed. 360; Gibson v. Bennett, 79 Me. 302; Tolman v. Ward, 86 Me. 303, 41 Am. St. Rep. 556.

the deed, and she can hold the land embraced in the deed against his creditors.[5] In this interesting case, Merrick, J., after stating that if the marriage had taken place she would have been deemed to have been a purchaser for a valuable consideration, and would have taken a clear and indefeasible title, free and purged of any fraud against his creditors, further remarked: "And in reference to the question of the sufficiency and value of the consideration, and consequently of the validity of the title acquired by the conveyance, there does not appear to be any real and substantial distinction between a marriage formally solemnized, and a binding and obligatory agreement, which has been fairly and truly and above all suspicion of collusion made to form such connection and enter into that relation. All the consequences of a legal obligation accompany such an agreement. The law enforces its performance by affording an effectual remedy against the party who shall, without legal excuse, fail to fulfill it. But a contract of this kind is not to be regarded as a valuable consideration, merely because damages commensurate with the injury may be recovered of the party who inexcusably refuses to fulfill it. It is peculiar in its character, and has other effects and consequences attending it. It essentially changes the rights, duties, and privileges of the parties. They cannot, while it exists, without a violation of good faith, as well as of the material legal obligations to which it subjects them, negotiate a contract for such alliance with any other person. A woman who has voluntarily made such an agreement cannot, without indelicacy, and so not without exposing herself to unfavorable observation, and to some loss of public favor and respect, seek elsewhere, except for good and substantial reasons for withdrawing from an engagement by which she has bound herself, for preferment in marriage; and thus her promise and agreement to marry a particular person essentially changes her condition in life. They materially affect not only her opportuni-

[5] Smith v. Allen, 5 Allen, 454, 81 Am. Dec. 758.

ties, but her right to attempt in that way to improve it. A legal contract and promise made in good faith to marry another must, therefore, like an actual marriage, be deemed to be a valuable consideration for the conveyance of an estate, and will justly entitle the grantee to hold it against subsequent purchasers, or the creditors of the grantor." [6]

§ 808a. **Estoppel from representations in marriage negotiations.**—A party who makes representations as to title to effect a marriage may be held estopped by these representations. A curious case in support of this principle occurred in New York. A father died, leaving by will a farm to two sons, James and Frederick, and subject to the limitation in the case of Frederick, that if he should die without issue,

[6] Smith v. Allen, *supra*. In a case in California, Connor v. Stanley, 65 Cal. 183, a man, William Jarvis, and a woman, Mrs. J. L. Connor, had executed a contract, each promising to marry the other, and the contract further provided that "in consideration thereof, and of the mutual affection existing between them, the party of the first part grants and gives to the said party of the second part ten thousand ($10,000) dollars' worth of the bonds of the Natoma Water and Mining Company, a corporation duly organized under the laws of the State of California, being twenty bonds of five hundred ($500) dollars each, made payable to bearer, now in the possession of the party of the first part, all of which he promises to deliver to her, the party of the second part, on or before the day of their said marriage, to be and become her own absolute property in her own name as her separate estate." Mrs. Connor was always ready to fulfill her part of the agreement, but Jarvis refused to marry, and continued his refusal down to the time of his death. After Jarvis' death, Mrs. Connor presented a verified claim to the administrator of his estate, and this being rejected, brought suit for the value of the bonds. The court below took the view that the contract of Jarvis was a mere promise to deliver the bonds upon the marriage of the parties within a reasonable time. But the supreme court held this to be error. The court held that the agreement was an antenuptial settlement, the consequences of which Jarvis could not avoid by refusing to consummate the marriage. Upon his refusal, after a reasonable time, to marry her, she was entitled to the bonds. It became his duty to seek her in marriage, not hers to seek him. And see, also, Whelan v. Whelan, 3 Cowen, 537; Ellinger v. Crowl, 17 Md. 361.

the portion of the estate devised to him should vest in James and his heirs. Frederick conveyed his interest in the land to one Hoard, and the latter, subsequently, sought one Catharine Hogel for the purpose of bringing about a marriage between her and Frederick. For the purpose of persuading her to marry Frederick, Hoard falsely and fraudulently represented to her that Frederick had a piece of fine property, and that if she married and had an heir the land would go to the heir. Induced by these representations Catharine did marry Frederick, and the result of the marriage was a daughter. Shortly after the birth of this daughter, the farm was partitioned between James and Hoard, the grantee of Frederick. The object of Hoard in bringing about the marriage was to fulfill the condition in the will and if Frederick had issue, he should obtain the fee; otherwise he would possess only a life estate, and the birth of a child, vesting the fee in Frederick, would make Hoard's title perfect. The daughter commenced an action praying that she be declared the owner of the farm set off in partition to Hoard. The latter, while admitting that he procured the fee of the farm through the marriage, claimed that the daughter had no right of action against him because of a lack of privity, and that she was not induced to any action by reason of his fraud and sustained no legal damage from it. The court held, however, that Hoard held the land in trust for her. Mr. Justice Peckham who delivered the opinion of the court observed: "It is true, her own action was in nowise influenced by these representations, for she was not then born. But where, in the peculiar and anomalous rules, obtaining in that branch of the law, regarding marriage, marriage settlements, and frauds in relation thereto, a marriage is induced under circumstances such as exist in this case, we think there is no trouble in holding the defendant bound by his representations, and that in the character of a trustee *ex maleficio,* he shall be held to make good the thing to the person who would have the property if the fact were as he repre-

sented it, assuming such person to be the fruit of the marriage brought about by those very representations.[7]

§ 808b. **Parol evidence showing marriage to be consideration.**—Although the deed may recite that it is based upon a pecuniary consideration, it may be shown by parol evidence that marriage was the true consideration.[8] Where it is recited in a deed that the consideration is the promise of the grantee to marry the grantor, and the deed is drafted by the grantee and transmitted to the grantor for execution, a written memorandum of the contract of marriage signed by the grantee is not necessary.[9]

§ 808c. **Grantor's intention to defraud creditors where deed is made in consideration of marriage.**—If the grantee is unaware at the time that the grantor intends to defraud his creditors, her knowledge of this fact before she complies with her contract of marriage will not be sufficient to avoid the deed. The consideration for the deed is not the actual consummation of the marriage, but the agreement to marry.[1] If the grantee is innocent, the deed is valid, and it is immaterial whether or not the grantor intended a fraud upon his creditors. The fact that he did intend such a fraud will not avoid the deed.[2] Marriage is regarded in law as the highest and most valuable of considerations, and the grantee, when free from fraud, in as secure a position as though she had paid in money the full value of the property. Hence, where a father conveys land to his daughter upon the express consideration of her marriage, which was an inducement for the conveyance, and she accepts the deed without knowing or suspecting any

[7] Piper v. Hoard, 107 N. Y. 73, 1 Am. St. Rep. 789.

[8] Tolman v. Ward, 86 Me. 303, 41 Am. St. Rep. 556.

[9] Prignon v. Daussat, 4 Wash. 199, 31 Am. St. Rep. 914.

[1] Prignon v. Daussat, 4 Wash. 199, 31 Am. St. Rep. 914.

[2] Prewit v. Wilson, 103 U. S. 22, 26 L. ed. 360; Gibson v. Bennett, 79 Me. 302; Tolman v. Ward, 86 Me. 303, 41 Am. St. Rep. 556.

fraud, and the deed is made by the grantor without any intent to defraud his creditors, believing he is fully able to pay them, the deed is valid against the grantor's creditors, although, at the time when he executed the deed, he was, in fact, insolvent.[3]

§ 809. **Other valuable considerations.**—Valuable considerations are of numerous kinds, though most frequently they are either money or marriage. It is not intended to refer to every consideration that the courts have declared to be valuable, but it may be worth while to call attention to a few as illustrations. A sufficient consideration to support a deed may consist of an agreement to do a thing, even though, as a matter of fact, the agreement is never performed. If a purchaser from the grantee under such a deed believes that the agreement will not support a deed and that it will not be performed, this does not make his purchase fraudulent or invalidate his title.[4] So a *bona fide* release of a debt previously incurred may be sufficient consideration for a deed,[5] as may also be

[3] Cohen v. Knox, 90 Cal. 266, 13 L.R.A. 711. Generally, to avoid a deed on the ground of fraud, it must be shown that the grantee was aware of the fraud: Cooke v. Cooke, 43 Md. 522; Mehlhop v. Pettibone, 54 Wis. 652; Hopkins v. Langton, 30 Wis. 379; Curtis v. Valliton, 3 Mont. 187; Preston v. Turner, 36 Iowa, 671; Clements v. Moore, 6 Wall. 312, 18 L. ed. 789; Rea v. Missouri, 17 Wall. 543, 21 L. ed. 709; Miller v. Bryan, 3 Iowa, 58; Hall v. Arnold, 15 Barb. 600; Steele v. Ward, 25 Iowa, 535; Partelo v. Harris, 26 Conn. 480; Bancroft v. Blizzard, 13 Ohio, 30; Chase v. Walters, 28 Iowa, 460; Violett v. Violett, 2 Dana, 323; Howe Machine Co. v. Claybourn, 6 Fed. Rep. 441; Kittredge v. Sumner, 11 Pick. 50; Fifield v. Gaston, 12 Iowa, 218; Byrne v. Becker, 42 Mo. 464; McCormick v. Hyatt, 33 Ind. 546; Kellogg v. Aherin, 48 Iowa, 299; Leach v. Francis, 41 Vt. 670; Drummond v. Couse, 39 Iowa, 442; Ewing v. Runkle, 20 Ill. 448; Foster v. Hall, 12 Pick. 89, 22 Am. Dec. 400; Jaeger v. Kelley, 52 N. Y. 274; Ruhl v. Phillips, 48 N. Y. 125, 8 Am. Rep. 522. But the statute may make the conveyance void as to existing creditors. See Snyder v. Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863.

[4] Gray v. Lake, 48 Iowa, 505; Lake v. Gray, 35 Iowa, 459.

[5] Reinach v. New Orleans etc.

the extinguishment of a mortgage.[6] If a person having a wife seduces an innocent woman by a pretended marriage, the injured party is entitled to compensation in money, and such right to compensation is a valuable consideration for a deed.[7] Where a deed made on the consideration of future illicit intercourse between the grantor and grantee is fully executed and delivered, the title is vested in the grantee.[8] A covenant to render personal services to the grantor is a valuable consideration, and is sufficient to support a bargain and sale deed.[9] The benefit to other lands of the grantor to result from the use to be made of those conveyed to the grantee, is a valuable consideration.[1] An assignment of a part interst in a bond for title is a sufficient consideration.[2] A deed was held to be a good bargain and sale deed where no amount was mentioned, but it was recited that the deed was made for "a certain sum

Co., 50 La. Ann. 497, 23 So. 455; McElwee v. Kennedy, 56 S. C. 154, 34 S. E. 86.

[6] Brown v. Sumter Bank, 55 S. C. 51, 32 S. E. 816.

[7] Doe v. Horn, 1 Ind. 363, 50 Am. Dec. 470. And in such case the title of the grantee will be valid, although the grantor may thereby intend to defraud his creditors, if the grantee has no knowledge of such intention: Doe v. Horn, *supra*.

[8] Hill v. Freeman, 73 Ala. 200, 49 Am. Rep. 48.

[9] Young v. Ringo, 1 Mon. 30. See, also, Busey v. Reese, 38 Md. 266; McMahan v. Morrison, 16 Ind. 172, 79 Am. Dec. 418; Gale v. Coburn, 18 Pick. 397; McWhorter v. Wright, 5 Ga. 555; Cheney v. Watkins, 1 Har. & J. 527, 2 Am. Dec. 530. A deed being lost, a quitclaim to replace it, executed by the grantors after the death of the grantees to heirs of the latter, is not without consideration: Hill v. Jackson, (Tex.) 51 S. W. 357. That the moral obligation arising from an antecedent legal obligation, the enforcement of which has been suspended by law, is sufficient consideration to support a deed, see Strayer v. Dickerson, 205 Ill. 257, 68 N. E. 767.

[1] Jackson v. Pike, 9 Cowen, 69. The reservation of rent in a lease is a sufficient consideration for a stipulation that the lessor will convey at a fixed price upon the expiration of the term: Gastin v. Union School District of Bay City, 94 Mich. 502, 34 Am. St. Rep. 361. See, also, Kerr v. Day, 14 Pa. St. 112, 53 Am. Dec. 526; Harding v. Gibbs, 125 Ill. 85, 8 Am. St. Rep. 345.

[2] Cannon v. Young, 89 N. C. 264.

in hand paid";[3] so where the deed recites that it is made "for value received."[4] Likewise a deed based upon a settlement of a claim has a sufficient consideration.[5] The interest of the grantor passes *prima facie* by a *bona fide* conveyance, whether made for a consideration or not.[6] A voluntary deed from son to father is valid.[7] Although a voluntary deed may convey all the property of the grantor, yet if he was capable of making a deed, and it was his deliberate act, not procured by fraud or undue influence, a court of equity will not rescind it because the grantor's action was improvident.[8] No pecuniary consideration is necessary in a deed from a father to his children.[9] While a want of consideration may be shown as indicating fraud on the part of the grantee this will not be sufficient to warrant a court in annulling it unless the rights of third persons intervene.[1]

§ 810. **Deeds of bargain and sale and covenants to stand seised.**—To give effect to a deed under the statute of uses as a deed of bargain and sale or a covenant to stand seised to uses, it is essential that there should be a consideration. A valuable consideration is necessary for the operation of a deed of bargain and sale.[2] And however small the

[3] Jackson v. Schoonmaker, 2 Johns. 230. To the same effect see Jewell v. Walker, 109 Ga. 241, 34 S. E. 337 quoting text in support of proposition that deed reciting "for and in consideration of ——— dollars" is not inadmissible in evidence for the reason that the consideration need not be expressed in the writing.

[4] Jackson v. Alexander, 3 Johns. 484, 3 Am. Dec. 517. The erection and maintenance of a railway station is a valuable consideration for a deed: Louisville, New Orleans etc. Ry. Co. v. Blythe, 69 Miss. 939, 30 Am. St. Rep. 599.

[5] Jones v. Gatliff, (Ky.) 113 S. W. 436; Burgson v. Jacobson, 124 Wis. 295, 102 N. W. 563.

[6] Doe ex dem. Abbott v. Hurd, 7 Blackf. 510.

[7] Hiles v. Hiles, 82 S. W. 580, 83 S. W. 615.

[8] Appeal of Kelly, 108 Pa. 29.

[9] Russ v. Maxwell, 87 N. Y. Supp. 1077, 94 App. Div. 107.

[1] Howard v. Turner, 125 N. C. 107, 34 S. E. 229.

[2] Boardman v. Dean, 34 Pa. St. 252; Jackson v. Sebring, 16 Johns.

pecuniary consideration may be, it is sufficient to support a deed of bargain and sale.[3] A covenant to stand seised is supported by a good consideration.[4] It is not essential, however, that such consideration should be expressed in the deed. If it actually exists, a deed will be supported as a covenant to stand seised.[5] A deed recited that in consideration of three thousand dollars paid by the grantee, the grantor gave, granted, sold, and conveyed to him certain land, the grantor reserving the right to use and occupy during his natural life, free of rent, the property so granted. The grantee had married the daughter of the grantor, but she had died before the execution of the deed. But she had left children who were alive at the time of the execution of the deed. It was held that under the technical rule forbidding the creation of a freehold estate to commence *in futuro,* the deed, if regarded as a feoffment or bargain and sale, was void; but that the consanguinity existing between the grantor and his grandchildren, was a sufficient consideration for a covenant to stand seised to uses, and that such consideration might be averred and proved although one entirely different was set forth in the deed, and the deed did not allude to such consanguinity. The deed as a covenant to stand seised was consequently held to vest the title in the grantee, subject to the life estate of the grantor.[6] So in regard to a deed of bargain and sale, it may be operative, notwithstanding no pecuniary consideration is

515, 8 Am. Dec. 357; Jackson v. Florence, 16 Johns. 46; Gault v. Hall, 26 Me. 561; Jackson v. Delancey, 4 Cowen, 427; Chiles v. Coleman, 2 Marsh. A. K. 296, 12 Am. Dec. 396.

[3] Bell v. Scammon, 15 N. H. 381, 41 Am. Dec. 706. See Corwin v. Corwin, 6 N. Y. 342, 57 Am. Dec. 453.

[4] Green v. Thomas, 11 Me. 321; Rollins v. Riley, 44 N. H. 11; Wallis v. Wallis, 4 Mass. 135, 3 Am. Dec. 210. But see Trafton v. Hawes, 102 Mass. 533, 3 Am. Rep. 494; Jackson v. Cadwell, 1 Cowen, 639.

[5] Wallis v. Wallis, 4 Mass. 135, 3 Am. Dec. 210; Brewer v. Hardy, 22 Pick. 380, 33 Am. Dec. 747.

[6] Gale v. Coburn, 18 Pick. 397. But see Jackson v. Delancey, 4 Cowen, 427; Jackson v. Cadwell, 1 Cowen, 639.

expressed in the deed, as it may be proved *aliunde*.[7] The recital in the deed that a pecuniary consideration has been paid, so far as the legal effect of the conveyance as a deed of bargain and sale is concerned, is conclusive. By this is meant simply the effect of the deed aside from any question of fraud.[8]

§ 811. **Consideration of paying grantor's debts.**—If an owner of land execute a deed on the consideration that the grantee shall pay all the debts of the grantor, the grantee, although he does not execute the deed, yet if he accepts the deed and takes possession of the lands, is bound personally for the payment of the debts of the grantor, and a court of equity will subject the land to the payment of such debts.[9] Though a part of the consideration fail, there will be no apportionment where a part of it is good.[1]

§ 812. **Trust to distribute estate according to will.**—A deed reciting that the grantor was aged and infirm, and at

[7] Jackson v. Dillon, 2 Over. 261; Perry v. Price, 1 Mo. 553; Den v. Hanks, 5 Ired. 30. See Ruth v. Ford, 9 Kan. 17; Jackson v. Alexander, 3 Johns. 484, 3 Am. Dec. 517.

[8] Rockwell v. Brown, 54 N. Y. 210; Hatch v. Bates, 54 Me. 136; Jones v. Dougherty, 10 Ga. 273; Trafton v. Hawes, 102 Mass. 541, 3 Am. Rep. 494; Jones v. Dougherty, 10 Ga. 273; Hartshorn v. Day, 19 How. 211, 15 L. ed. 605. And see Winans v. Peebles, 31 Barb. 371; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Hallocher v. Hallocher, 62 Mo. 267; Kerr v. Birnie, 25 Ark. 225; Lake v. Gray, 35 Iowa, 461; Randall v. Ghent, 19 Ind. 271; Barker v. Koneman, 13 Cal. 9.

[9] Vanmeter's Executors v. Vanmeters, 3 Gratt. 148. See Buffum v. Green, 5 N. H. 71, 20 Am. Dec. 562.

[1] Wilson v. Webster, Morris, 312, 41 Am. Dec. 230. See as to declarations of grantor as part of the *res gestæ* to prove consideration, Sutton v. Reagan, 5 Blackf. 217, 33 Am. Dec. 466. Signing a note as a surety is a valid consideration: Grigsby v. Schwartz, 82 Cal. 278. A deed is supported by a valuable consideration where the grantee discharges a debt due to him by a third person to whom his grantor is indebted in an equal amount, and the claim against the grantor is canceled: Smith v. Westall, 76 Tex. 509.

times unable to give attention to his business, and that in anticipation of his incapacity and of a sum of money, he conveyed his estate in trust for the use of himself for life, and at his death to be distributed according to the provisions of his will before made, is supported by a sufficient consideration. It passes the legal title to the trustees, and cannot be revoked.[2]

§ 813. **Valuable consideration as protection to bona fide purchasers.**—In order that a person may claim that he occupies the position of a *bona fide* purchaser, when questions arise as to the priority of two or more titles or claims to the same property, it is essential as one of the facts giving him this character that he has acquired his right for a valuable consideration. A person who is a mere volunteer, having acquired title by gift, inheritance or some kindred mode, cannot come within the scope of the term *"bona fide* purchaser."[3] To enable the grantee to claim protection as a *bona fide* purchaser he must have parted with something possessing an actual value, capable of being estimated in money, or he must on the faith of the purchase have changed, to his detriment, some legal position that he before had occupied.[4]

[2] Turner v. Turner, 1 Mon. 243. A deed reserving a life estate in the grantor is not void for want of consideration where land is conveyed pursuant to a request by a person desirous of devising to the grantor only a life estate with remainder to the grantee without changing his will: Jenkins v. Adcock, 5 Tex. Civ. App. 466.

[3] Swan v. Legan, 1 McCord Eq. 227; Morse v. Wright, 60 Cal. 260; Upshaw v. Hargrove, 6 Smedes & M. 286; Roseman v. Miller, 84 Ill. 297; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Aubuchon v. Bender, 44 Mo. 560; Bowen v. Prout, 52 Ill. 354; Boon v. Barnes, 23 Miss. 136; Frost v. Beekman, 1 Johns. Ch. 288; Patten v. Moore, 32 N. H. 382; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314; Evans v. Templeton, 69 Tex. 375, 5 Am. St. Rep. 71. And see Howard v. Turner, 125 N. C. 107, 34 S. E. 229. See, also, cases cited end of § 806, *ante*.

[4] Union Canal Co. v. Young, 1 Whart. 410, 30 Am. Dec. 212; Spurlock v. Sullivan, 36 Tex. 511; Webster v. Van Steenbergh, 46 Barb. 211; Haughwout v. Murphy, 21 N. J. Eq. (6 Green, C. E.) 118; Reed v. Gannon, 3 Daly, 414; Pickett v.

§ 814. **Adequacy of consideration and failure of consideration.**—Where the deed is taken in good faith, the amount of the consideration paid is immaterial.[5] Inadequacy of consideration, of itself alone, is no ground for setting aside the conveyance.[6] A deed will not be set aside simply because

Barron, 29 Barb. 505; Penfield v. Dunbar, 64 Barb. 239; Roxborough v. Messick, 6 Ohio St. 448, 67 Am. Dec. 346; McLeod v. Nat. Bank, 42 Miss. 99; Dickerson v. Tillinghast, 4 Paige, 215, 25 Am. Dec. 528; Williams v. Shelly, 37 N. Y. 375; Delancey v. Stearns, 66 N. Y. 157; Lawrence v. Clark, 36 N. Y. 128; Weaver v. Barden, 49 N. Y. 286; Brown v. Welch, 18 Ill. 343, 68 Am. Dec. 549; Keys v. Test, 33 Ill. 316; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Westbrook v. Gleason, 79 N. Y. 23, 36; Cary v. White, 52 N. Y. 138; Palmer v. Williams, 24 Mich. 328; Seward v. Jackson, 8 Cowen, 406, 430; Story v. Lord Windsor, 2 Atk. 630; Hardingham v. Nicholls, 3 Atk. 304; Tourville v. Naish, 3 P. Wms. 306; Baggarly v. Gaither, 2 Jones Eq. 80; Bowen v. Prout, 52 Ill. 354; Gerson v. Pool, 31 Ark. 85; Keirsted v. Avery, 4 Paige, 9; Glidden v. Hunt, 24 Pick. 221; Conard v. Atlantic Ins. Co., 1 Peters, 386; Curtis v. Leavitt, 15 N. Y. 11.

[5] See Seward v. Jackson, 8 Cowen, 406, 430; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Pickett v. Barron, 29 Barb. 505; Cary v. White, 52 N. Y. 138. And see Aden v. Vallejo, 139 Cal. 165, 72 Pac. 905; Hennesey v. Corneille, 69 N. Y. Supp. 1126, 61 App. Div. 620.

[6] Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Powers v. Powers, 46 Or. 479, 80 Pac. 1058; Newman v. Newman, (Tex.) 86 S. W. 635; McLeod v. McLeod, 145 Ala. 269, 40 So. 414, 117 Am. St. Rep. 41; Jacobsen v. Nealand, 122 Ia. 372, 98 N. W. 158; McKinley v. McKinley, 23 Ky. L. Rep. 2314, 66 S. W. 831. And see Dunaway v. Dunaway, (Ky.) 105 S. W. 137; Parrish v. Bagley, 138 N. C. 384, 70 L.R.A. 160, 50 S. E. 841; Brockway v. Harrington, 82 Ia. 23, 47 N. W. 1013; Stamper v. Venable, 117 Tenn. 557, 97 S. W. 812; Hardware etc. Co. v. Catrett, 45 Tex. Civ. App. 647, 101 S. W. 559. As is said in McLeod v. McLeod, *supra:* "Mere inadequacy of consideration is not a sufficient ground for setting aside and annulling a contract. As was said in Judge v. Wilkins, 19 Ala. 765: 'I follow the language of the authorities in saying that inadequacy of price, or other inequality in the bargain, is not within itself a sufficient ground to avoid a contract in a court of equity, on the ground of fraud; for courts of equity, as well as courts of law, must act upon the ground that every person, who is not under some legal disability, may dispose of his property in such manner and upon such terms, as he sees fit; and whether his bargains are discreet or not, profitable or unprofitable, are considerations,

the conveyance is an unequal one, where no force or duress is used.[7] A grantee will be bound by the fraud of his agent who secures by means of fraudulent concealment a tract of land for an exceedingly small consideration.[8] There must either be actual fraud or a fiduciary relation must exist to render inadequacy of consideration a ground for setting aside a deed. But if the inadequacy of consideration is so gross as to shock the conscience, a court will be justified in setting aside a deed;[1] and it is held that a payment in confederate

not for courts of justice, but for the party himself.'" That a deed for attorney's fees will not be set aside where the consideration was not unfair and the litigation was long and difficult, see Fellows v. Smith, 190 Pa. St. 301, 42 Atl. 678.

[7] McKinley v. McKinley, 66 S. W. 831.

[8] Stevens v. Ozburn, 1 Tenn. Ch. App. 213.

[9] Mayo's Executor v. Carrington's Executor, 19 Gratt. 74. See, also, Beverage's Committee v. Ralston, 98 Va. 625, 37 S. E. 283.

[1] Johnson v. Woodworth, 134 App. Div. 715, 119 N. Y. Supp. 146. It is said that, "it is not essential that the consideration should be adequate in point of actual value; that it is sufficient that a slight benefit be conferred on the defendant, or at his request on a third person, at law; and that mere folly and weakness, or want of judgment, will not defeat a contract, even in equity, when the folly is not so extremely gross as that, with other facts in corroboration, it does not establish a case for relief on the ground of fraud." Whitney v. Stearns, 16 Me. (4 Shep.) 394, 396. "It is not always necessary that consideration for a promise should be of some value to the promisor; damage or inconvenience to the promisee is sufficient consideration, and, where the court can see that there may have been some such inconvenience, it will uphold the contract": Williams v. Jensen, 75 Mo. 681, 685. "A sufficient consideration for a promise arises wherever, by the act of the promisee, a benefit results to the promisor, or, at his request, to a third person, or if a promisee sustains any loss of inconvenience, or subjects himself to any charge or obligation, at the instance of the promisor, although such promisor obtains no advantage therefrom": Wilson v. Baptist Education Soc. (N. Y.) 10 Barb. 308, 313. "Any benefit accruing to him who makes the promise, or any loss, trouble, or discharge undergone by or charge imposed upon him to whom the promise is made, is a sufficient consideration to sustain the promise; and hence, in the absence of fraud, mere inadequacy of consideration is no ground for avoiding a contract": Appeal of Clark, 19 Atl. 332, 333, 57 Conn. 565, (citing

money is not a valuable consideration, and that a grantee paying for the land in such money cannot be regarded as a *bona fide* purchaser for a valuable consideration.[2] Still the consideration paid may be so small and inadequate as to justify a suspicion of fraud. It is said "that in order to protect himself against the claim of a prior donee, or of a creditor, the party assuming to be a purchaser for a valuable consideration, must prove a fair consideration, not up to the full value, but a price paid which would not cause surprise, or make anyone exclaim, 'he got the land for nothing, there must have been some fraud or contrivance about it!' "[3] Where all the circumstances attending the transaction show that the grant was

Smith's Lectures on Contracts). "The quantum of benefit on the one hand, or the loss on the other, is immaterial": Cook v. Bradley, 7 Conn. 57, 62, 18 Am. Dec. 79. "Any act done by the promisee at the request of the promisor, however trifling the loss to himself or the benefit to the promisor, is a sufficient consideration for a promise made without fraud and with full knowledge of all the circumstances": Doyle v. Dixon, 97 Mass. 208, 213, 93 Am. Dec. 80; Ballard v. Burton, 64 Vt. 387, 16 L.R.A. 664, 24 Atl. 769, 771. "A very slight advantage to one party, or a trifling inconvenience to the other, is a sufficient consideration to support a contract when made by a person of good capacity who is not at the time under the influence of any fraud, imposition, or mistake": Traphagen's Exr. v. Voorhees, 12 Atl. 895, 901, 44 N. J. Eq. (17 Stew.) 21 (citing Harlan v. Harlon, 20 Pa. (8 Harris) 303). "In respect to the extent of the loss, trouble, or inconvenience to the promisee, it is immaterial that it is of the most trifling description, provided it be not utterly worthless in fact and law": Clark v. Sigourney, 17 Conn. 511, 517.

[2] Sutton v. Sutton, 39 Tex. 549; Willis v. Johnson, 38 Tex. 303.

[3] Worthy v. Caddell, 76 N. C. 82, 86. Especially where inadequacy of consideration is coupled with circumstances of imposition: Williams v. Longman, (Ia.) 78 N. W. 198. Where an attack is made upon an executed conveyance, the fact that the consideration is grossly inadequate can be regarded only as evidence of fraud, and of itself is not sufficient to set it aside: Davidson v. Little, 22 Pa. St. 245, 60 Am. Dec. 81. And see Keagle v. Pessell, 91 Mich. 618, 52 N. W. 58. The inadequacy must be such as to show fraud: See Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Walker v. Shepard, 210 Ill. 100, 71 N. E. 422; Jacobsen v. Nealand, 122 Ia. 372, 98 N. W. 158; Turner v. Washburn, (Ky.) 80 S. W. 460; Shepherd v. Turner, (Ky.) 97 S.

intended as a gift, the fact that the grantee actually paid a merely nominal consideration in money will not cause him to be treated as a purchaser for a valuable consideration within the meaning of the recording laws, and he is not entitled to priority over a prior unrecorded deed.[4] While a partial failure of consideration may be insufficient, even as between the parties, for setting aside a deed,[5] nevertheless, where the

W. 41; Obst v. Unnerstall, 184 Mo. 383, 83 S. W. 450; Rixey v. Rixey, 103 Va. 414, 49 S. E. 586.

[4] Ten Eyck v. Witbeck, 135 N. Y. 40, 31 Am. St. Rep. 809. In that case the owner of a farm of the value of twenty thousand dollars had conveyed it to his wife, and six years afterward conveyed it to his daughter. The deed to the daughter stated that it was made in consideration of the sum of ten dollars, and the payment of the entire net proceeds of the farm to the grantor annually during his lifetime, and one-third of such proceeds to his wife in case she survived him, one-third to another daughter for the same length of time, and provided for disposing of the proceeds in a specified way in other contingencies, and the deed also gave power to the grantee to sell the property after the grantor's death. The second deed was recorded first, but in an action of ejectment, it was held to be no bar to an action of ejectment by those claiming under the first deed. The court said: "We deem it unnecessary to undertake to determine here what degree of adequacy of price is required to uphold a subsequent deed first recorded. Upon this branch of the case we have no occasion to go, further than to hold that a small sum, inserted and paid perhaps because of a popular belief that some slight money consideration is necessary to render the deed valid, will not of itself satisfy the terms of the statute, where it appears upon the face of the conveyance, or by other competent evidence, that it was not the actual consideration." The court states that the cases of Fullenwider v. Roberts, 4 Dev. & B. 27; Worthy v. Caddell, 76 N. C. 82; Upton v. Bassett Cro. Eliz. 445; Doe v. Routledge, Cowp. 705, and Metcalfe v. Pulvertoft, 1 Ves. & B. 183, in so far as they hold that a purely nominal consideration is insufficient to protect an innocent purchaser, are in harmony with the views expressed by the court, and that so far as the cases of Webster v. Van Steenburgh, 46 Barb. 211, and Hendy v. Smith, 49 Hun, 510, hold a contrary doctrine, they do not meet with the approval of the court. It is held that where property worth eight hundred dollars is sold for two hundred dollars, the inadequacy of consideration will not avoid the deed: Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375.

[5] Ripperdam v. Weldy, 149 Cal. 667, 87 Pac. 276; Jackson v. Jack-

grantees break the agreement constituting the consideration, or render performance impossible by their wrongful acts, or, by their conduct in refusing to perform their part of the contract, raise a presumption of fraud, as where a grantee fails and utterly refuses to perform his agreement to support the grantor, in consideration of which the deed had been made, the deed may be set aside.[5a] In a recent case it was held that a man who had conveyed property to a woman in consideration of marriage could not reclaim the property on account of a subsequent estrangement, although a part of the consideration may have been a promise on the part of the wife to be kind and dutiful and use the property for their joint benefit, and support the husband in his old age.[6]

§ 815. **Antecedent debts as consideration.**—On the question of whether an antecedent debt can be a valuable consideration, so as to enable the grantee to claim the benefit of being a *bona fide* purchaser, there has been a wide difference of opinion. In many cases there have been other circumstances to be looked to besides the antecedent debt in determining whether the grantee is a purchaser for value. There may be

son, 222 Ill. 46, 78 N. E. 19, 6 L.R.A.(N.S.) 785.

[5a] McClelland v. McClelland, 176 Ill. 83, 51 N. E. 559; Dorsey v. Wolcott, 173 Ill. 539, 50 N. E. 1015; Landfair v. Thompson, 112 Ga. 487, 37 S. E. 717; Fabrice v. Von Der Brelie, 190 Ill. 460, 60 N. E. 835; Sherrin v. Flinn, 155 Ind. 422, 58 N. E. 549; Westerfield v. Pendleton, (Ky.) 45 S. W. 97; Lane v. Lane, 106 Ky. 530, 50 S. W. 857; Bevins v. Keen, (Ky.) 64 S. W. 428; Lockwood v. Lockwood, 124 Mich. 627, 83 N. W. 613; Reoch v. Reoch, 98 Wis. 201, 73 N. W. 989; Payette v. Ferrier, 20 Wash. 479, 55 Pac. 629; Cecil v. Henry, (Tex.) 93 S. W. 216; Cummings v. Moore, 27 Tex. Civ. App. 555, 65 S. W. 1113; Bevins v. Keen, (Ky.) 64 S. W. 428. See, also, Pironi v. Corrigan, (N. J.) 20 Atl. 218; Donnelly v. Rafferty, 172 Pa. St. 587, 33 Atl. 754; Mack v. Power Co., 101 Fed. 869, 42 C. C. A 67; Steffy v. Esley, 6 Ia. 228, 55 Pac. 239; Gillen v. Gillen, 238 Ill. 218, 87 N. E. 388; Gustin v. Crockett, 51 Wash. 67, 97 Pac. 1091; Richerson v. Moody, (Tex.) 42 S. W. 317; McIntire v. McIntire, 75 Neb. 397, 106 N. W. 29.

[6] Jackson v. Jackson, 222 Ill. 46, 6 L.R.A.(N.S.) 785, 78 S. E. 19.

on the part of the grantee a forbearance from suing, from enforcing a legal right, which is in contemplation of law, in many instances, a sufficient consideration to support a transfer. Where the creditors of an owner of land encumbered with a vendor's lien for the purchase money, took a deed from him without advancing any new consideration as security for the debts of the owner contracted prior to his purchase of the land from his vendor, the title of the creditors, it was held, was subject to the lien of the vendor.[7] It is said by Denio, J., that, "Where a conveyance is made, or a security taken, the consideration of which was an antecedent debt, the grantee or party taking the security is not looked upon as a *bona fide* purchaser. The expression in the statute is borrowed from the language of courts of equity, and must be interpreted in

[7] Johnson v. Graves, 27 Ark. 557. The court, per Stephenson, J., said: "The object of the law in all questions arising between vendor and vendee respecting the equitable lien of the former, is to give the vendor the benefit of his lien as against the vendee and those holding under him having notice of the lien, but to save him harmless whose money has been advanced in good faith without this notice, and upon the vendor's declaration in his deed. Let us apply this principle to the case at the bar. The vendee, Bell, executes to Johnston his deed of trust, to secure certain of his creditors, which debts he had contracted prior to his purchase of the land from Graves. This deed, at most, gives but an equitable title to Bell's creditors, and which they must proceed to execute before they can gain the legal title. They have by taking this security in nowise impaired Bell's liability to them, but would have all the remedy, after taking this security, they had before. Nor are they in worse condition by giving the vendor, Graves, priority over them than they were when they gave Bell the credit. If they had taken the land in satisfaction of the debt, or had made advances *upon the faith of the title* as it appeared of record, they would have occupied a different attitude in the case; but where creditors of the vendee take a conveyance from him merely as security for their antecedent debts, without advancing any new consideration, they are postponed to the rights of the vendor: 2 Wash. Real Prop. (2d ed. 89); Brown v. Vanlier, 7 Humph. 249; Harris v. Horner, 1 Dev. & B. Eq. 455, 30 Am. Dec. 182; Eubanks v. Poston, 5 Mon. 286; McGown v. Yerks, 6 Johns. Ch. 450; Chance v. McWhorter, 26 Ga. 315; Repp v. Repp, 12 Gill. & J. 341; Dickinson v. Tillinghast, 4 Paige, 215, 25 Am. Dec. 528."

the sense in which it is there understood; and it is well settled that a grantee or encumbrancer who does not advance anything at the time, takes the interest conveyed, subject to any prior equity attaching to the subject."[8] In a case in Kansas, the rule that a party who takes a deed in payment of a pre-existing debt is not a *bona fide* purchaser, is held to be applicable only where the property is purchased from an apparent owner, but who is not such, in fact, or who is not in law or equity the real owner, and not applicable where the purchaser takes the property in good faith from the true owner, in consideration of the relinquishment of a pre-existing debt.[9] A pre-existing debt is not such a consideration as will support the claim that the creditor is a *bona fide* purchaser.[1] If a grantor has been induced to convey by fraud a purchaser who takes

[8] In Wood v. Robinson, 22 N. Y. 564, 567. And see, also, in support of this view or relating to it, Cary v. White, 52 N. Y. 138; Craft v. Russell, 67 Ala. 9; Mingus v. Condit, 23 N. J. Eq. (8 Green, C. E.) 313; Sweeney v. Bixler, 69 Ala. 539; Halstead v. Bank of Kentucky, 4 Marsh. J. J. 554; Ashton's Appeal, 73 Pa. St. 153; Metrop. Bank v. Godfrey, 23 Ill. 579; Manhattan Co. v. Everston, 6 Paige, 457; Pancoast v. Duval, 26 N. J. Eq. 445; Upshaw v. Hargrove, 6 Smedes & M. 286; Morse v. Godfrey, 3 Story, 364; Alexander v. Caldwell, 55 Ala. 517; Gafford v. Stearns, 51 Ala. 434; Boon v. Barnes, 23 Miss. 136; Wheeler v. Kirtland, 24 N. J. Eq. 552; Short v. Battle, 52 Ala. 456; Padgett v. Lawrence, 10 Paige, 170, 40 Am. Dec. 232; Haynsworth v. Bischoff, 6 Rich. 159; Van Heusen v. Radcliff, 17 N. Y. 580, 72 Am. Dec. 480; Weaver v. Barden, 49 N. Y. 286; Thurman v. Stoddard, 63 Ala. 336; Jones v. Robinson, 77 Ala. 499; Wells v. Morrow, 38 Ala. 125; Spurlock v. Sullivan, 36 Tex. 511; Swenson v. Seale (Tex. Civ. App.), May 9, 1894), 28 S. W. Rep. 143; Overstreet v. Manning, 67 Tex. 657, 4 S. W. Rep. 448; Steffian v. Bank, 69 Tex. 513, 6 S. W. Rep. 823; Golson v. Fielder, 2 Tex. Civ. App. 400, 21 S. W. Rep. 173; Phelps v. Fockler, 61 Iowa, 340, 14 N. W. Rep. 729, 16 N. W. Rep. 210; Koon v. Tramel, 71 Iowa, 132, 32 N. W. Rep. 243; Edwards v. McKernan, 55 Mich. 520, 22 N. W. Rep. 20; Boxheimer v. Gunn, 24 Mich. 372; Moore v. Ryder, 65 N. Y. 438; Wood v. Robinson, 22 N. Y. 564; Dickerson v. Tillinghast, 4 Paige, 215, 25 Am. Dec. 528; Weaver v. Barden, 49 N. Y. 286; De Lancey v. Stearns, 66 N. Y. 157.

[9] Ruth v. Ford, 9 Kan. 17.

[1] Huff v. Maroney, 23 Tex. Civ. App. 465, 56 S. W. 754; Sparks v. Taylor, 90 Tex. 411, 6 L.R.A. (N.S.) 381, 90 S. W. 485.

the land in satisfaction of a pre-existing debt is not a *bona fide* purchaser.[2] A creditor who surrenders a judgment against the grantor for a deed, accepted as an absolute payment of the greater part of the claim is not a *bona fide* purchaser.[3] But the surrender of some other security for a pre-existing debt will be a good consideration.[4]

[2] Hirsch v. Jones (Tex. Civ. App.) 42 S. W. 604. See, also, as to antecedent debts: Adamson v. Souder, 205 Pa. 498, 55 Atl. 182; Catrelt v. Brown Hardware Co. (Tex. Civ. App.) 86 S. W. 1045; Lillibridge v. Allen, 100 Iowa, 582, 69 N. W. 1031; Williams v. Williams, 118 Mich. 477, 76 N. W. 1039.

[3] Howells v. Hettrick, 160 N. Y. 308, 54 N. E. 367. See, also, Freeman v. Tinsley (Tex. Civ. App.) 40 S. W. 835. A mortgagee cannot claim protection as a *bona fide* purchaser where the mortgage is taken as security for a pre-existing debt: Durham v. Craig, 79 Ind. 117; Adams v. Vanderbeck, 148 Ind. 92, 45 N. E. 645, 47 N. E. 24, 62 Am. St. Rep. 497; Martinsville First Nat. Bank v. Connecticut Mut. Life Ins. Co., 129 Ind. 241, 28 N .E. 695; Anthe v. Heide, 85 Ala. 236, 4 So. 380; Banks v. Long, 79 Ala. 319; Craft v. Russell, 67 Ala. 9; Marsh v. Ramsay, 57 S. C. 121, 35 S. E. 433; Breed v. Auburn Nat. Bank, 171 N. Y. 648, 63 N. E. 1115; Young v. Guy, 87 N. Y. 467; Smith v. Moore, 112 Iowa, 60, 83 N. W. 813; Holmes v. Stix, 104 Ky. 351, 47 S. W. 243; Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 823; Spurlock v. Sullivan, 36 Tex. 511; Stacey v. Henke, 32 Tex. Civ. App. 462, 74 S. W. 925; Small v. Small, 74 N. C. 16; Southerland v. Fremont, 107 N. C. 565, 12 S. E. 237; Collins v. Moore, 115 Ga. 327, 41 S. E. 609; Salisbury Sav. Soc. v. Cutting, 50 Conn. 113.

[4] Constant v. Rochester University, 111 N. Y. 604, 2 L.R.A. 734, 19 N. E. 631, 7 Am. St. Rep. 769; Wilson v. Knight, 59 Ala. 172. Where a promissory note is taken for a pre-existing indebtedness it is held in some states that it is taken for a valuable consideration so as to render the payee a *bona fide* holder under the meaning of the law of commercial paper: Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318; Robinson v. Smith, 14 Cal. 94; Naglee v. Lyman, 14 Cal. 450; Sackett v. Johnson, 54 Cal. 107; Prim v. Hammel, 134 Ala. 652, 32 So. 1006, 92 Am. St. Rep. 52; Haraszthy v. Shandel, 1 Colo. App. 137, 27 Pac. 876; Murphy v. Gumaer, 12 Colo. App. 472, 55 Pac. 951; Merchants Bank v. McClelland, 9 Colo. 608, 13 Pac. 723; Bruch v. Scribner, 11 Conn. 388, 29 Am. Dec. 303; Bridgeport City Bank v. Welch, 29 Conn. 475; Osgood v. Thompson Bank, 30 Conn. 27; Rockville Nat. Bank v. Citizens' Gas Light Co., 72 Conn. 576, 45 Atl. 361; Leach v. Lewis, 1 MacArthur (D. C.) 112; Gibson v. Conner, 3 Ga. 47; Meadow v. Bird, 22 Ga. 246; Beaile v. Southern Bank, 57 Ga. 274; Partridge v. Williams, 72 Ga. 807; Smith v. Jennings, 74 Ga.

§ 816. The other view.—In California, it is held that where a mortgage is given as security for a pre-existing debt,

551; Laster v. Stewart, 89 Ga. 181, 15 S. E. 42; Kaiser v. U. S. Nat. Bank, 99 Ga. 258, 25 S. E. 620; Walden v. Downing, 4 Ga. App. 534, 61 S. E. 1127; Olney First Nat. Bank v. Beaird, 3 Ill. App. 239; Vanliew v. Galesburg Second Nat. Bank, 21 Ill. App. 126; Bemis v. Horner, 62 Ill. App. 38; Mayo v. Moore, 28 Ill. 428; Conkling v. Vail, 31 Ill. 166; Manning v. McClure, 36 Ill. 490; Lull v. Stone, 37 Ill. 224; Saylor v. Daniels, 37 Ill. 331, 87 Am. Dec. 250; Bowman v. Millison, 58 Ill. 36; Doolittle v. Cook, 75 Ill. 354; Worcester Nat. Bank v. Cheney, 87 Ill. 602; Mix v. Bloomington Nat. Bank, 91 Ill. 20, 33 Am. Rep. 44; Joliet First Nat. Bank v. Adams, 138 Ill. 483, 28 N. E. 955; Peigh v. Huffman, 6 Ind. App. 658, 34 N. E. 32; Rowe v. Haines, 15 Ind. 445, 77 Am. Dec. 101; Straughan v. Fairchield, 80 Ind. 598; Proctor v. Baldwin, 82 Ind. 370; Spencer v. Sloan, 108 Ind. 183, 9 N. E. 150, 58 Am. Rep. 35; Voss v. Chamberlain, 139 Iowa, 569, 19 L.R.A.(N.S.) 106, 117 N. W. 269; Best v. Crall, 23 Kan. 482, 33 Am. Rep. 185; Birket v. Edward, 68 Kan. 295, 64 L.R.A. 568, 74 Pac. 1100, 104 Am. St. Rep. 405; Mallard v. Aillet, 6 La. Ann. 92; Nott v. Watson, 11 La. Ann. 664; Citizens' Bank v. Payne, 18 La. Ann. 222, 89 Am. Dec. 650; Dolhonde's Succession, 21 La. Ann. 3; La. Ann. State Bank v. Gaiennie, 21 La. Ann. 555; Smith v. Isaacs, 23 La. Ann. 454; Giovanovich v. Citizens' Bank, 26 La. Ann. 15; Levi v. Ford, 41 La. Ann. 873, 6 So. 671; Guinn v. Lee, 9 Gill (Md.) 137; Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620; Buchanan v. Mechanics Loan, etc. Inst., 84 Md. 430, 35 Atl. 1099; Merrian v. Granite Bank, 8 Gray (Mass.) 254; Cicopee Bank v. Chapin, 8 Metc. (Mass.) 40; Blanchard v. Stevens, 3 Cush. (Mass.) 162, 50 Am. Dec. 723; Stoddard v. Kimball, 4 Cush. (Mass.) 604; Williams v. Cheney, 3 Gray (Mass.) 215; Culver v. Benedict, 13 Gray (Mass.) 7; Gardner v. Gager, 1 Allen (Mass.) 502; LeBreton v. Peirce, 2 Allen (Mass.) 8, 1 Am. L. Reg. N. S. 35; Fisher v. Fisher, 98 Mass. 303; Lindsay v. Chase, 104 Mass. 253; Lee v. Whitney, 149 Mass. 447, 21 N. E. 948; Nat. Revere Bank v. Morse, 163 Mass. 383, 40 N. E. 180; St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189; Rosemond v. Graham, 54 Minn. 323, 56 N. W. 38, 40 Am. St. Rep. 336; Haugan v. Sunwall, 60 Minn. 367, 62 N. W. 398; Fair v. Howard, 6 Nev. 304; Allaire v. Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175; Hamilton v. Vought, 34 N. J. L. 187; Armour v. Michael, 36 N. J. L. 92; Harris v. Horner, 21 N. C. 455, 30 Am. Dec. 182; Holderby v. Blum, 22 N. C. 51; Potts v. Blackwell, 56 N. C. 449; Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822; Bank of Republic v. Carrington, 5 R. I. 515, 73 Am. Dec. 83; Cobb v. Doyle, 7 R. I. 550; Charleston Bank v. Chambers, 11 Rich. (S. C.) 657; Woodsen v.

the mortgagee is a purchaser for a valuable consideration

Owens (Miss. 1892) 12 So. 207; Richardson v. Rice, 9 Baxt. (Tenn.) 290, 40 Am. Rep. 92; Trigg v. Saxton (Tenn. Ch. 1896) 37 S. W. 567; Van Wyck v. Norvell, 2 Humph. (Tenn.) 192; King v. Doolittle, 1 Head (Tenn.) 77; Vatterlien v. Howell, 5 Sneed (Tenn.) 441; Gosling v. Griffin, 85 Tenn. 737, 3 S. W. 642; Marx v. Dreyfus (Tex. Civ. App. 1894) 26 S. W. 232, 853; Alexander v. Lebanon Bank, 19 Tex. Civ. App. 620, 47 S. W. 840; Bruce v. Weatherford First Nat. Bank (Tex. Civ. App. 1901) 60 S. W. 1006; Greneaux v. Wheeler, 6 Tex. 515; Kauffman v. Robey, 60 Tex. 308, 48 Am. Rep. 264; Texas Banking etc. Co. v. Turnley, 61 Tex. 365; Brown v. Thompson, 79 Tex. 58, 15 S. W. 168; Herman v. Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632; Wright v. Hardie, 88 Tex. 653, 32 S. W. 885; Sawyer v. Cutting, 23 Vt. 486; Atkinson v. Brooks, 26 Vt. 569, 62 Am. Dec. 592; Griswold v. Davis, 31 Vt. 390; Arnold v. Sprague, 34 Vt. 402; Pinney v. Kimpton, 46 Vt. 80; People's Nat. Bank v. Clayton, 66 Vt. 541, 29 Atl. 1020; Prentice v. Zane, 2 Gratt. (Va.) 262; Peters v. Gay, 9 Wash. 383, 37 Pac. 325; Hotchkiss v. Fitzgerald Patent Prepared Plaster Co., 41 W. Va. 357, 23 S. E. 576; In re Huddell, 12 Fed. Cas. No. 6,825, 8 Wkly. Notes Cas. (Pa.) 407; Pugh v. Durfee, 1 Blatchf. (U. S.) 412, 20 Fed. Cas. No. 11,460; Wood v. Seitzinger, 2 Fed. 843; Metropolis Bank v. Jersey City 1st Nat. Bk. 19 Fed. 301; Circleville First Nat. Bk. v. Monroe Bk., 33 Fed. 408; Townseley v. Sumerall, 2 Pet. (U. S.) 170, 7 L. ed. 386; Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. ed. 865; Goodman v. Simmonds, 20 How. (U. S.) 343, 15 L. ed. 934; McCarty v. Roots, 21 How. (U. S.) 432, 16 L. ed. 162; Brooklyn City etc. R. Co. v. Nat. Bk. of Republic, 102 U. S. 14, 26 L. ed. 61; American File Co. v. Garrett, 110 U. S. 288, 4 Sup. Ct. 90, 28 L. ed. 149. In other states, the rule announced is that a pre-existing indebtedness is not sufficient to constitute the payee in a promissory note a holder for value: Wallace v. Mobile Branch Bank, 1 Ala. 565; Collum v. Mobile Branch Bk. 4 Ala. 21, 37 Am. Dec. 725; Marston v. Forward, 5 Ala. 347; Mobile Bk. v. Hall, 6 Ala. 639, 41 Am. Dec. 72; Thompson v. Armstrong, 7 Ala. 256; Andrews v. McCoy, 8 Ala. 920, 42 Am. Dec. 669; Boyd v. McIvor, 11 Ala. 822; McKenzie v. Montgomery Branch Bk., 28 Ala. 606, 65 Am. Dec. 369; Fenouille v. Hamilton, 35 Ala. 319; Wagner v. Simmons, 61 Ala. 143; Mobile Bk. v. Poulniticz, 61 Ala. 147; Loeb v. Peters, 63 Ala. 243, 35 Am. Rep. 17; Connerly v. Placters etc. Ins. Co., 66 Ala. 432; Miller v. Boykin, 70 Ala. 469; Boykin v. Mobile Bk., 72 Ala. 262, 47 Am. Rep. 408; Marks v. Montgomery First Nat. Bk., 79 Ala. 550, 58 Am. Rep. 620; Haden v. Lehman, 83 Ala. 243, 3 So. 528; Vann v. Marbury, 100 Ala. 438, 23 L.R.A. 325, 14 So. 273, 56 Am. St. Rep. 70; Thompson v. Maddux, 117 Ala. 468, 23 So. 157; Bertrand

within the meaning of the registry acts, giving priority to the

v. Barkman, 13 Ark. 150; Iowa College v. Hill, 12 Iowa, 462; Ryan v. Chew, 13 Iowa, 589; Ruddick v. Lloyd, 15 Iowa, 441, 83 Am. Dec. 423; Van Patton v. Beals, 46 Iowa, 62; Union Nat. Bk. v. Barber, 56 Iowa, 559, 9 N. W. 890; Bone v. Tharp, 63 Iowa, 223, 18 N. W. 906; Noteboom v. Watkins, 103 Iowa, 580, 72 N. W. 766; Keokuk County State Bank v. Hall, 106 Ia. 540, 76 N. W. 832; Lee v. Snead, 1 Metc. (Ky.) 628, 71 Am. Dec. 494; Alexander v. Springfield Bk., 2 Metc. (Ky.) 534; May v. Quimby, 3 Bush. (Ky.) 96; Greenbaum v. Megibben, 10 Bush. (Ky.) 419; Gowen v. Wentworth, 17 Me. 66; Smith v. Hiscock, 14 Me. 449; Bramhall v. Beckett, 31 Me. 205; Nutter v. Stover, 48 Me. 163; Smith v. Bibber, 82 Me. 34, 19 Atl. 89, 17 Am. St. Rep. 464; Henriques v. Ypsilanti Sav. Bank, 84 Mich. 168, 47 N. W. 558; Dowagiac City Bank v. Dill, 84 Mich. 549, 47 N. W. 1019; Maynard v. Davis, 127 Mich. 571, 8 Detroit Leg. N. 460, 86 N. W. 1051; Holmes v. Carmen, Freem. Ch. (Miss.) 408; Harney v. Pack, 4 Sm. & M. (Miss.) 229; Brooks v. Whitsom, 7 Sm. & M. (Miss.) 513; Pope v. Pope, 40 Miss. 516; McLeod v. First Nat. Bk., 42 Miss. 99; Perkins v. Swank, 43 Miss. 349; Hinds v. Pugh, 48 Miss. 268; Meridian First Nat. Bk. v. Strauss, 66 Miss. 479, 6 So. 232, 14 Am. St. Rep. 579; Terry v. Hickman, 1 Mo. App. 119; Brainard v. Reavis, 2 Mo. App. 490; Hodges v. Black, 8 Mo. App. 389; Feder v. Abrahams, 28 Mo. App. 454; Conrad v. Fisher, 37 Mo. App. 352, 8 L.R.A. 147; Wells v. Jones, 41 Mo. App. 1; Napa Valley Wine Co. v. Rinehart, 42 Mo. App. 171; Goodman v. Simonds, 19 Mo. 106; Logan v. Smith, 62 Mo. 455; Davis v. Carson, 69 Mo. 609; Deere v. Marsden, 88 Mo. 512; Crawford v. Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Boatman's Sav. Inst. v. Holland, 38 Mo. 49; Grant v. Kidwell, 30 Mo. 455; Loewen v. Forsee, 137 Mo. 29, 38 S. W. 712, 59 Am. St. Rep. 489; Jenness v. Bean, 10 N. H. 266, 34 Am. Dec. 152; Williams v. Little, 11 N. H. 66; Fletcher v. Chase, 16 N. H. 38; Rice v. Raitt, 17 N. H. 116; Webster v. Howe Mach. Co. 54 Conn. 394, 8 Atl. 482; Wardell v. Howell, 9 Wend. (N. Y.) 170; Rosa v. Brotherson, 10 Wend. (N. Y.) 85; Hart v. Palmer, 12 Wend. (N. Y.) 523; Ontario Bank v. Worthington, 12 Wend. (N. Y.) 593; Manhattan Co. v. Reynolds, 2 Hill (N. Y.) 140; Stalker v. McDonald, 6 Hill (N. Y.) 93, 40 Am. Dec. 389; Dean v. Howell Lalor (N Y.) 39; Scott v. Betts, Lalor (N. Y.) 363; Small v. Smith, 1 Den. (N. Y.) 583; Carlson v. Winterson, 3 Misc. (N. Y.) 63, 22 N. Y. Suppl. 553, 51 N. Y. St. 775; Furniss v. Gilchrist, 1 Sandf. (N. Y.) 53; Femby v. Pritchard, 2 Sandf. (N. Y.) 151; White v. Springfield Bank, 3 Sandf. (N. Y.) 222; N. Y. Ex. Co. v. DeWolfe, 3 Bosw. (N. Y.) 86; Duncan v. Gosche, 8 Bosw. (N. Y.) 243, 21 How. Pr. (N. Y.) 344; Mickles v. Colvin, 4 Barb. (N. Y.) 304; Farrington v. Frankfort Bank, 24

one who conveyance is first recorded.[5] In a case in Mississippi, the court said: "It is now well settled that if a party take a security or specific property in satisfaction and dis-

Barb. (N. Y.) 554; Prentiss v. Graves, 33 Barb. (N. Y.) 621; Cardwell v. Hicks, 37 Barb. (N. Y.) 458; Ocean Bank v. Dill, 39 Barb. (N. Y.) 577; Chesbrough v. Wright, 41 Barb. (N. Y.) 28; Trader's Bank v. Bradner, 43 Barb. (N. Y.) 379; West v. Am. Ex. Bank, 44 Barb. (N. Y.) 175; American Ex. Bank v. Corliss, 46 Barb. (N. Y.) 19; Buhrman v. Baylis, 14 Hun (N. Y.) 608; Lintz v. Howard, 18 Hun (N. Y.) 424; Ayres v. Doying, 42 Hun (N. Y.) 630; State Nat. Bank v. Coykendall, 58 Hun (N. Y.) 205, 12 N. Y. Suppl. 334, 34 N. Y. St. 432; Larbig v. Peck, 69 N. Y. App. Div. 170, 74 N. Y. Suppl. 602; Scott v. Ocean, Bank, 23 N. Y. 289; Lawrence v. Clark, 36 N. Y. 128; Jones v. Schreyer, 49 N. Y. 674; Turner v. Treadway, 53 N. Y. 650; Atlantic Nat. Bank v. Franklin, 55 N. Y. 235; Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142; Potts v. Mayer, 74 N. Y. 594; Porter v. Andrus, 10 N. D. 558, 88 N. W. 567; Sutton v. Kautsman, 6 Ohio Dec. (Reprint) 910, 8 Am. L. Rec. 658; Riley v. Johnson, 8 Ohio, 526; Roxborough v. Messick, 6 Ohio St. 448, 67 Am. Dec. 346; Reznor v. Hatch, 7 Ohio St. 248; Gebhart v. Sorrels, 9 Ohio St. 461; Copeland v. Manton, 22 Ohio St. 398; Pitts v. Foglesong, 37 Ohio St. 676, 41 Am. Rep. 540; Secor v. Witter, 39 Ohio St. 218; Union Trust Co. v. Clellan, 40 W. Va. 405, 21 S. E. 1025; Conrad v. Lane, 1 Phillip (Pa.) 73, 7 Leg. Int. (Pa.) 110; Boyer v. Dickson, 7 Phila. (Pa.) 190; United States Trust Co. v. Hart, 3 Pa. Co. Ct. 270; Gleason v. Crider, 14 Pa. Co. Ct. 670; Oakford v. Johnson, 2 Miles (Pa.) 203; Jackson v. Polack, 2 Miles, (Pa.) 362; Petrie v. Clark, 11 Serg. & R. (Pa.) 377, 14 Am. Dec. 636; Depeau v. Waddington, 6 Whart. (Pa.) 220, 36 Am. Dec. 216; Kirkpatrick v. Muirhead, 16 Pa. St. 117; Lenheim v. Wilmarding, 55 Pa. St. 73; Bronson v. Silverman, 77 Pa. St. 94; Smith v. Hoagland, 78 Pa. St. 252; Clarion First National Bank v. Gregg, 79 Pa. St. 384; Royer v. Keystone Nat. Bk., 83 Pa. St. 248; Cummings v. Boyd, 83 Pa. St. 372; Bardsley v. Belp, 88 Pa. St. 420; Penn. Bank v. Frankish, 91 Pa. St. 339; Maynard v. Phila. Sixth Nat. Bk., 98 Pa. St. 250; Carpenter v. Nat. Bk. of Republic, 106 Pa. St. 170; Liggett Spring etc. Co. Appeal, 111 Pa. St. 291, 2 Atl. 684; Altoona Second National Bank v. Dunn, 151 Pa. St. 228, 25 Atl. 80, 31 Am. St. Rep. 742; Prentice v. Zane, 2 Gratt. (Va.) 262; Jenkins v. Schaub, 14 Wis. 1; Bowman v. VanKuren, 29 Wis. 209, 19 Am. Rep. 554; Body v. Jewsen, 33 Wis. 402; Knott v. Tidyman, 86 Wis. 164, 56 N. W. 632; Black v. Tarbell, 89 Wis. 390, 61 N. W. 1106; Burnham v. Merchants Exchange Bank, 92 Wis. 277, 66 N. W. 510.

[5] Frey v. Clifford, 44 Cal. 335. And see, as to commercial paper, Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318; Robinson v. Smith, 14

charge of a pre-existing debt, which is thereby extinguished, he is a *bona fide* purchaser, and not affected by previous equities."[6] And likewise in Alabama, where a creditor takes an absolute deed in payment of a pre-existing debt, he becomes a purchaser for a valuable consideration entitled to the protection of the registry acts.[7] But if the indebtedness is not satisfied, and the creditor takes a mortgage as security for its payment, he is not such *bona fide* purchaser, and, if the consideration be partly an old debt, and partly one created at the time, he will be protected only to the extent of the new debt.[8]

§ 817. **Presumption that deed states true consideration.**—The statement in the deed that a certain sum has been paid as the consideration is an admission or acknowledgment of the grantor that such is the fact, and such statement may be accepted as *prima facie* evidence of its truth.[9] Hence,

Cal. 94; Nagle v. Lyman, 14 Cal. 450. And see, generally, Work v. Brayton, 5 Ind. 396; Coddington v. Bay, 20 Johns. 637, 11 Am. Dec. 342; Lawrence v. Clark, 36 N. Y. 128; Youngs v. Lee, 12 N. Y. 551; Meads v. Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331; Mobile Life Ins. Co. v. Randall, 71 Ala. 220.

[6] Love v. Taylor, 26 Miss. 567, 574, and cases cited. See, also, Wert v. Naylor, 93 Ind. 431; Heath v. Silverthorn, 39 Wis. 416; Chaffee v. Atlas Lumber Co., 43 Neb. 224, 47 Am. St. Rep. 753; Wright v. Bundy, 11 Ind. 398; Babcock v. Jordan, 24 Ind. 14; Doolittle v. Cook, 75 Ill. 354; Royer v. Keystone Nat. Bank, 83 Pa. St. 248; Cummings v. Boyd, 83 Pa. St. 372; Busey v. Reese, 38 Md. 264; Cecil Bank v. Heald, 25 Md. 562; Jackson v. Reid, 30 Kan. 10, 1 Pac. Rep. 308; Ruth v. Ford, 9 Kan. 17; Haynes v. Eberhardt, 37 Kan. 308, 15 Pac. Rep. 168; Lawrence v. Tucker, 23 How. 14; Shirras v. Craig, 7 Cranch, 34; Conrad v. Atlas Ins. Co., 1 Pet. 386; Soule v. Shotwell, 52 Miss. 236. See, also, McElwee v. Kennedy, 56 S. C. 154, 34 S. E. 86; Reinach v. New Orleans etc. Co., 50 La. Ann. 497, 23 So. 455; Brown v. Sumter, 55 S. C. 51, 32 S. E. 816.

[7] Saffold v. Wade's Executor, 51 Ala. 214; Ohio Life Ins. & Trust Co. v. Ledyard, 8 Ala. 866. A pre-existing debt is sufficient to support the claim of *bona fide* purchaser: Adams v. Vanderbeck, 148 Ind. 92, 45 N. E. 645, 62 Am. St. Rep. 497. See Murray v. First National Bank of Concordia, 5 Kan. App. 456, 49 Pac. 326.

[8] Wells v. Morrow, 38 Ala. 125.

[9] Belden v. Seymour, 8 Conn. 310, 21 Am. Dec. 661; Barter v. Green-

where a person has the title vested in him, and executes a deed reciting a valuable consideration, it is never necessary as against him, or those claiming under him, or as against a stranger, to show what reason, other than the grantor's will led him to execute it.[1] "A deed of itself imports a consideration. The recital of a consideration is conclusive for the purpose of supporting the deed against the grantor and his heirs. A voluntary conveyance or gift to a stranger is good against the grantor and his heirs. It is also good against a subsequent purchaser for value in the absence of actual fraud." [2]

§ 818. Presumption as against strangers—Conflict in the decisions—Comments.—While there can be no doubt that as against the grantor himself and his heirs, the acknowlment in the deed that a certain consideration has been paid is *prima facie* evidence of the truth of the fact recited, yet when it comes to apply this rule to strangers, the reasons on which it is founded when applied to the grantor do not so forcibly, if at all, appear. A distinction can well be drawn between the effect as evidence of a statement made by the grantor when he alone is affected by its truth or falsity, and the effect of such statement when the rights of others are involved. In some courts no distinction is made between the parties themselves and strangers as to the *prima facie* evidence of the recital acknowledging the payment of the consideration. In others, this rule is confined in its application to cases affecting the parties only, and its existence when applied to strangers strenuously denied. It is thought that this subject is of sufficient importance to warrant a somewhat fuller discussion

leaf, 65 Me. 405; Bayliss v. Williams, 6 Cold. 440; Clements v. Landrum, 26 Ga. 401. See, also, Hoover v. Binkley, 66 Ark. 645, 51 S. W. 73; Harraway v. Harraway, 136 Ala. 499, 34 So. 836.

[1] Rockwell v. Brown, 54 N. Y. 210.

[2] Wells, J., in Trafton v. Hawes, 102 Mass. 533, 541, 3 Am. Rep. 494, citing Beal v. Warren, 2 Gray, 447.

than the mere statement that in some States the one view prevails, and in others the opposite. Hence, in the following sections will be found instances in which each view of the law has by different courts been taken.

§ 819. **Decisions that the rule applies to strangers.**— In some of the States the rule is applied not only to parties but to strangers also. As an instance we may cite the case where an owner of land conveyed it to an infant, reciting in the deed that the consideration had been paid by such infant. A judgment creditor of the father of the infant caused the land to be sold on execution on his judgment, alleging that the father had paid the consideration, and had caused the deed to be made to his child for the purpose of defrauding his creditors, and that thereby he had a resulting trust in the land which could be sold under execution. The court held that the recital of the payment of the consideration by the infant was *prima facie* evidence of this fact, and that the party attacking the deed must show by clear and satisfactory evidence the falsity of this recital.[3] An owner of land conveyed the same to one person, and before the registration of the deed conveyed the same land to another, who caused his deed to be first placed on record. The latter, if he had taken his deed without notice of the execution of the prior one, and had paid the consideration, would, of course, have the better title, and the court held that the recital in his deed of the payment of the consideration was evidence of such fact as between him and the prior grantee.[4] So in another case an owner of land

[3] Gaugh v. Henderson, 2 Head, 628. But in the subsequent case of Bayliss v. Williams, 6 Cold. 445, the same court said that this point did not seem to have been carefully discussed or considered.

[4] Wood v. Chapin, 13 N. Y. (3 Kern.) 509, 67 Am. Dec. 62. Where a bargain and sale deed recites a consideration a *prima facie* case is made sufficient to support a verdict in favor of the grantee as against the grantor's heirs where there is no evidence to overcome it: Mowry v. Mowry, 103 Cal. 314.

conveyed it by deed, and the grantee executed a mortgage to his grantor to secure the payment of the purchase price. Before the mortgage was recorded, the grantee sold the land to another, the deed reciting that a consideration of a certain amount had been paid. In the contest for priority between the first grantor, and also mortgagor, and the second grantee, upon the issue whether the latter was a purchaser in good faith and for value, it was decided that the recital in the deed of payment of the consideration was evidence of such payment.[5] "The acknowledgment in a deed of the receipt of the consideration money," said Sutherland, J., speaking for the court, "is *prima facie* evidence of its payment. It is equivalent to, and like, a receipt for money. It is liable to be explained or contradicted; but, until impeached, it is legal and competent evidence of payment. Nor is its operation confined to the immediate parties to the deed. It does not operate by way of estoppel, but as evidence merely, and must have the effect of sustaining the deed by establishing, *prima facie*, the consideration for which it was given, against any person who may seek collaterally to impeach it." [6]

§ 820. **Decisions that the rule does not apply to strangers.**—In a case in New Hampshire, a deed which purported to have been executed upon a pecuniary consideration, and which acknowledged the receipt of its payment, was attacked by a creditor as being fraudulent against existing creditors of the vendee. The court held that the recital of the payment of the consideration was not evidence of the

[5] Jackson v. McChesney, 7 Cowen, 360, 17 Am. Dec. 521, and cases cited.

[6] Jackson v. McChesney, *supra*. See, also, Medley v. Mask, 4 Ired. Eq. 339; Cocke v. Trotter, 10 Yerg. 213; Whitbeck v. Whitbeck, 9 Cowen, 266, 18 Am. Dec. 503; Hayward's Heirs v. Moore, 2 Humph. 584; West Portland Homestead Assn. v. Lawnsdale, 19 Fed. Rep. 291; Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172; Long v. Dollarhide, 24 Cal. 218. See Gillan v. Metcalf, 7 Cal. 137.

fact as against such creditors.[7] In a case in Alabama, there was a contest between a prior and a subsequent mortgagee of the same land, the subsequent mortgagee attempting to defeat

[7] Kimball v. Fenner, 12 N. H. 248. Parker, C. J., in delivering the opinion of the court, said: "The question may be stated, then, in other words, whether a deed, which purports to be executed upon a pecuniary consideration, and contains an acknowledgment of the receipt of it, furnishes of itself evidence that such consideration was in fact received, or whether, as against existing creditors, it is not to be regarded as a mere voluntary conveyance, and presumed to be fraudulent until some evidence is offered of the consideration upon which it was executed. There is no doubt that the clause acknowledging the receipt of a consideration furnishes evidence against the grantor that the consideration specified has been paid, and this receipt, being under seal, and part of the deed itself, cannot be contradicted by him for the purpose of defeating the instrument: Morse v. Shattuck, 4 N. H. 229, 17 Am. Dec. 419. But, for all other purposes, the effect of this clause, even between the parties, is that of a mere receipt, which may be contradicted; and it furishes the grantee, therefore, only *prima facie* evidence of the consideration upon which the deed is founded. Thus, it may be shown that the actual consideration was more than that expressed: Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661; or less: Morse v. Shattuck, 4 N. H. 229, 17 Am. Dec. 419; or that it was iron instead of money: McCrea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103; or that nothing was paid: Shephard v. Little, 14 Johns. 210; Bowen v. Bell, 20 Johns. 338, 11 Am. Dec. 286; and, of course, that nothing was contracted to be paid. A deed may be a voluntary deed, notwithstanding it purports to be made upon a sufficient consideration. Upon what principle is it that this mere receipt, which may thus be contradicted and controlled between the parties, is even *prima facie* evidence of the payment of a consideration, against a third person, who shows a *prima facie* title by a levy on the land which belonged to his debtor, and who is no party to the deed, has in no way admitted its validity, and has, or may have, no knowledge respecting the transaction upon which it is founded? He is not in privity with the title of the grantee. On the contrary, it is adverse to him. . . . The execution of the deed must be proved, whoever is the party contesting it. Being proved, it contains the admission of the grantor in writing that a consideration has been paid, and this furnishes evidence of that fact against him. It contains no admission of the creditors when used against them. But it is invalid against them without some evidence that it is founded upon a consideration. Is the admission of the grantor, then, evidence against the creditor to show that fact? If it be so, it must be either because the admis-

the prior mortgage on the ground that it was made to defraud creditors, and therefore was void. It was held that the recital of the debt in the first mortgage could not be taken as evidence of the existence of the debt, and that the transaction was made in good faith. "These are but the written admissions of a debtor, which may be manufactured by him in furtherance of a contemplated fraud." [8] This view is taken in Pennsylvania, and in a controversy between a purchaser, claiming to be such for a valuable consideration, and the holder of an antecedent equity, Mr. Chief Justice Lewis, after stating that the receipt of payment is evidence of payment against the grantor, and all who *subsequently* derive title from

sion is under seal, or because it is contained in the deed itself. A verbal admission or declaration of the grantor that there was a consideration which had been paid would be good evidence as against him to establish that fact, but not against third persons: Braintree v. Hingham, 1 Pick. 245. And so of a mere receipt, or any other writing disconnected from the deed: Jackson v. Richards, 6 Cowen, 617, 623. We are not aware of any rule by which a seal can add to the authenticity of the receipt, or give it the character of competent evidence as against parties having no connection with it: McCrea v. Purmort, 16 Wend. 474. It would still be hearsay evidence, or rather *res inter alios acta:* 3 Stark. Ev. 1300; 1 Phil. Ev. (ed. 1820) 173; Cowen & Hill's ed. 229, et seq. and notes 432, 435. The actual payment of the money, or other thing mentioned in it, must still be proved. And we are of opinion that the fact that this receipt is contained in the deed does not add to its character as evidence, or confer upon it any tendency to prove itself against third persons, which it would not have if contained in a separate instrument. It proves merely that the grantor admitted that a consideration existed which had been paid, and not that one actually existed or has been discharged. It is a recital of that fact, and thus not evidence against strangers to the deed: 1 Stark. Ev. 289, § 156, and notes; Carver v. Jackson, 4 Pet. 83. It is said that the origin and purpose of this admission or acknowledgment in a deed is to prevent a resulting trust in the grantor, and that it is merely formal or nominal, and not designed to conclusively fix the amount either paid or to be paid: 8 Conn. 312. Being formal or nominal, it cannot be evidence against third persons that anything was paid or to be paid." See to the same effect: King v. Meade, 60 Kan. 539, 57 Pac. 113 (citing text).

[8] De Vendal v. Malone's Executors, 25 Ala. 272, 277.

him, but no evidence whatever of such fact against a stranger, or even against a prior purchaser, continued: "Against them it is nothing but hearsay. It is a mere *ex parte* declaration, not under oath, taken without any opportunity to cross-examine. It has been long settled that such declarations are not evidence against strangers. . . . If such evidence were received against strangers for the purpose of extinguishing their equitable rights, the salutary rules established for ages would be subverted; hearsay evidence would be substituted for testimony under the sanction of an oath, and all the advantages of a cross-examination would be swept away. Under such a system no equitable title could be protected. But it is urged that there is a presumption that the grantor and grantee have acted with integrity. This may be so, but that is no reason why their declarations should be given in evidence against persons who have no connection with them. If they are acquainted with material facts, they are as much bound to deliver their testimony under oath as other persons if competent witnesses. . . . But the rejection of a receipt signed by a stranger implies no imputation of dishonesty in the party signing it. It is always signed whenever a conveyance is made, and proves nothing further, even against the grantor, than that he has either received the purchase money or has taken security for it. Taking security for it is no payment which would defeat a prior title. *Bona fide* payment is an affirmative fact peculiarly within the knowledge of the party making such payment or claiming advantage from it. It is, therefore, easy for him to prove it. While on the other hand, the opposite party who is a stranger to the transaction, might have insuperable difficulties in proving a negative. It is against all the reason and life of the law that such a burthen should be imposed upon him." [9]

[9] Lloyd v. Lynch, 28 Pa. St. 419, 424, 70 Am. Dec. 137. See to the same point, Rogers v. Hall, 4 Watts, 359; Union Canal Co. v. Young, 1

§ 821. **Comments.**—The cases holding that the recital in a deed of the payment of the consideration is not evidence of that fact as against a stranger, state, as it seems to us, the true and correct principle. If the payment of the consideration price is a fact essential to the establishment of a right or claim, this fact should be proven as are other facts. The acknowledgment of payment is an admission on the part of the grantor, contained in writing it is true, but of no greater force for this reason, except for its certainty, than if made orally. Wherever his admissions will bind himself or others, the acknowledgment that he has received the consideration, should as an admission have the effect of *prima facie* evidence. But where he is powerless to make admissions to the detriment of others, it is immaterial in what form he may put such admissions. If he cannot bind others by a verbal admission, no good reason exists for allowing him to do so by putting it in writing. The question is not as to the *mode* in which the admission by the grantor of payment is made, but as to his *power* to make it; and one of the most firmly established principles of law is that one person shall not suffer by the declarations or admissions made by another out of his presence, without the opportunity to deny or cross-examine, unless there is some relation of privity, mutual interest, or agency between them.[1]

§ 822. **Proof of real consideration.**—The recital in the deed that the consideration has been paid may be contradicted by parol evidence. It may be shown by such evidence that the consideration was not paid at all, or only partially paid,

Whart. 410, 432, 30 Am. Dec. 212; Clark v. Depew, 25 Pa. St. 509, 64 Am. Dec. 717; Henry v. Raiman, 25 Pa. St. 354, 360, 64 Am. Dec. 703; Bolton v. Johns, 5 Pa. St. 145, 47 Am. Dec. 404; Nolen v. Gwynn, 16 Ala. 725; Hawley v. Bullock, 29 Tex. 216; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274, 287.

[1] This section was cited with approval in King v. Meade, 60 Kan. 539, 57 Pac. 113.

or paid in a different way from that stated in the deed.[2] Where there are two mortgages upon a piece of land, and the mortgagor executes a deed to one of the mortgagees, not in

[2] Altringer v. Capehart, 68 Mo. 441; Bingham v. Weiderwax, 1 N. Y. 514; McCrea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103; Goward v. Waters, 98 Mass. 599; Baker v. Connell, 1 Daly, 470; Barnum v. Childs 1 Sand. 62; Moris v. Tillson, 81 Ill. 616; Henderson v. Fullerton, 54 How. Pr. 425; Taggart v. Stanberry, 2 McLean, 546; Frink v. Green, 5 Barb. 457; Fontaine v. Boatmen's Bank, 57 Mo. 553; Rhine v. Ellen, 36 Cal. 362, 370; Coles v. Soulsby, 21 Cal. 47, 51; Irvine v. McKeon, 23 Cal. 472; Bennett v. Solomon, 6 Cal. 134, 137; Peck v. Vandenberg, 30 Cal. 22; Spear v. Ward, 20 Cal. 659, 676; Miller v. McCoy, 50 Mo. 214; Averill v. Loucks, 6 Barb. 24; Stackpole v. Robbins, 47 Barb. 219; Rosboro v. Peck, 48 Barb. 92; Rose v. Rose, 7 Barb. 177; Graves v. Porter, 11 Barb. 593; Sanford v. Sanford, 61 Barb. 302, 5 Lans. 493; Fellows v. Emperor, 13 Barb. 100; McNulty v. Prentice, 25 Barb. 212; Clapp v. Terrell, 20 Pick. 250; Halliday v. Hart, 30 N. Y. 494; Arnot v. Erie Railway Co., 67 N. Y. 321; Baker v. Union Mutual Life Ins. Co., 43 N. Y. 287; Huebsch v. Scheel, 81 Ill. 281; Hannan v. Oxley, 23 Wis. 519; Hubbard v. Allen, 59 Ala. 283; Paige v. Sherman, 6 Gray, 511; Morris Canal Co. v. Ryerson, 3 Dutch. 467; Rabsuhl v. Lack, 35 Mo. 316; Miller v. Goodwin, 8 Gray, 542; O'Neale v. Lodge, 3 Har. & McH. 433, 1 Am. Dec. 377; Drury v. Tremont etc Co., 13 Allen, 171; Harper v. Perry, 28 Iowa, 63; Lawton v. Buckingham, 15 Iowa, 22; Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; Pennsylvania Salt Mfg. Co. v. Neel, 54 Pa. St. 9; Pierce v. Brew, 43 Vt. 295; Bullard v. Briggs, 7 Pick. 533, 19 Am. Dec. 292; Hull v. Adams, 1 Hill, 603, 2 Denio, 310; Anthony v. Harrison, 14 Hun, 210; Murray v. Smith, 1 Duer, 428; Upson v. Badeau, 3 Brad. 15; Walcot v. Ronalds, 2 Rob. (N. Y.) 620; Banks v. Brown, 2 Hill Ch. 538, 1 Riley Ch. 131, 30 Am. Dec. 380; Doe v. Beardsley, 2 McLean, 414; Goodell v. Pierce, 2 Hill, 662; Greenbault v. Davis, 4 Hill, 647; Carty v. Connolly, 91 Cal. 15; Cardinal v. Hadley, 158 Mass. 352, 35 Am. St. Rep. 492; Moffatt v. Bulson, 96 Cal. 106, 31 Am. St. Rep. 192; Byers v. Locke, 93 Cal. 493, 27 Am. St. Rep. 215; Fall v. Glover, 34 Neb. 522; Barbee v. Barbee, 108 N. C. 581; Blair v. Carpenter, 75 Mich. 167; Nichols v. Nichols, 123 Pa. St. 438; Fort v. Richey, 128 Ill. 502. And see, also, Jordan v. Cooper, 3 Serg. & R. 564; Hamilton v. McGuire, 3 Serg. & R. 355; Watson v. Blaine, 12 Serg. & R. 131, 14 Am. Dec. 669; Hutchinson v. Sinclair, 7 Mon. 291; Curry v. Lyles, 2 Hill, 404; Swisher v. Swisher's Admr. Wright, 755; Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519; Higdon v. Thomas, 1 Har. & G. 139, 17 Am. Dec. 431; Lingan v. Henderson, 1 Bland. 249; Bowen v. Bell, 20 Johns. 338, 11 Am. Dec. 286; Depeyster v. Gould,

payment of his debt, but as an additional security only, although the deed may recite that it is in consideration of the grantee's mortgage, and the balance due on the other mortgage, the grantee will not be compelled to pay the other mort-

2 Green Ch. 474, 29 Am. Dec. 723; Schemmerhorn v. Vanderheyden, 1 Johns. 139, 3 Am. Dec. 304; Kickland v. Menasha Woodenware Co. 68 Wis. 34, 60 Am. Rep. 831, 31 N. W. Rep. 471; Wood v. Morawetz, 15 R. I. 518, 9 Atl. Rep. 427; Sullivan v. Lear, 23 Fla. 463, 11 Am. St. Rep. 388, 2 So. Rep. 846; Calvert v. Nickles, 26 S. C. 304, 2 S. E. Rep. 116; Conlon v. Grace, 26 Minn. 276, 30 N. W. Rep. 880. The true consideration may be shown by parol: Martin v. White, 115 Ga. 866, 42 S. E. 279; Leggett v. Patterson, 114 Ga. 714, 40 S. E. 736; Worrell v. Forsyth, 141 Ill. 22, 30 N. E. 673; Ford v. Savage, 111 Mich. 144, 69 N. W. 240; Fitzpatrick v. Hoffman, 104 Mich. 228, 62 N. W. 349; Le May v. Brett, 81 Minn. 506, 84 N. W. 339; Jensen v. Crosby, 80 Minn. 158, 83 N. W. 43; Ord. etc. Bank v. Bower, 5 Neb. (Unof.) 375, 98 N. W. 834; Columbia etc. Bank v. Baldwin, 64 Neb. 732, 90 N. W. 890; Forester v. Van Auken, 12 N. D. 175, 96 N. W. 301; Conklin v. Hancock, 67 Oh. St. 455, 66 N. E. 518; Wilcox v. Priester, 68 S. C. 106, 46 S. E. 553; Medical College Laboratory v. N. Y. University, 178 N. Y. 153, 70 N. E. 467; Faust v. Faust, 144 N. C. 383, 57 S. E. 22; Whitmen v. Corley, 72 S. C. 410, 52 S. E. 49; O'Farrell v. O'Farrell (Tex. Civ. App.) 119 S. W. 899; Windsor v. R. Co., 37 Wash. 156, 79 Pac. 613; Butt v. Smith, 121 Wis. 566, 99 N. W. 328, 105 Am. St. Rep. 1039; Lenhardt v. Ponder, 64 S. C. 354, 42 S. E. 169; Wheeler v. Campbell, 68 Vt. 98, 34 Atl. 35; Halvorsen v. Halvorsen, 120 Wis. 52, 97 N. W. 494; Cuddy v. Foreman, 107 Wis. 519, 83 N. W. 1103; R. Co. v. Crandall, 75 Ark. 89, 86 S. W. 855, 112 Am. St. Rep. 42; Lumber Co. v. Lumber Co., 90 Ark. 426, 119 S. W. 822; Min. Co. v. Patterson, 153 Cal. 624, 96 Pac. 90; Herrin v. Abbe, 55 Fla. 769, 18 L.R.A.(N.S.) 907, 46 So. 183 (citing text); Goette v. Sutton, 128 Ga. 179, 57 S. E. 308; Allen v. Rees, 136 Ia. 423, 8 L.R.A.(N.S.) 1137, 110 N. W. 583; Blackwell v. Blackwell, 196 Mass. 186, 81 N. E. 910; Scudder v. Morris, 107 Mo. App. 634, 82 S. W. 217; Wiltrout v. Showers, 82 Neb. 777, 118 N. W. 1080. Recital of consideration is only prima facie evidence. It is not conclusive. See Crafton v. Inge, 124 Ky. 89, 98 S. W. 325. It does not of itself conclusively raise an obligation to pay the amount recited: McGiverin v. Keefe, 130 Ia. 97, 106 N. W. 369. Nor does a recital of a fictitious consideration impair the validity of the deed: Burrow v. Hicks (Ia.) 120 N. W. 727. In Butt v. Smith (*supra*) it was held that the grantee in a deed may show that the amount stated in the deed as the consideration therefor was incorrectly computed and recover a resulting over payment.

gage debt, but may show by parol evidence what was the real consideration.[3] When it becomes necessary in an action upon a covenant of seisin to ascertain the damages for the breach, the true consideration, and the fact that only a part of it has been paid, may be proven by parol evidence, notwithstanding that the deed recites a different consideration, and contains an acknowledgment of its full payment.[4] So, in an action upon a covenant of warranty, it may be shown that the true consideration was greater than the amount named in the deed.[5]

§ 823. **Action for purchase price.**—"In an action for the consideration money expressed in a deed for lands sold, the clause acknowledging the receipt of a certain sum of money as the consideration of the conveyance or transfer is open to explanation by parol proof. The only effect of this consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration. For every other purpose it is open to explanation, and may be varied by parol proof."[6] Parol evidence is also admissible to show an additional consideration not inconsistent with the deed. Thus, the consideration of natural love and affection, though not expressed in the deed, may be shown for the purpose of sustaining the conveyance.[7] And a contemplated marriage, it seems, may be shown as an additional consideration for a deed or a contract to convey.[8] If a part of the consideration for a deed is that the grantee shall assume and pay a debt secured by a mortgage, it will be his duty as between him and the grantor to do so, although the deed may

[3] Huebsch v. Scheel, 81 Ill. 281.

[4] Bingham v. Weiderwax, 1 Comst. 509, 514.

[5] Harper v. Perry, 28 Iowa, 57, 63; Lawton v. Buckingham, 15 Iowa, 22.

[6] Barnum v. Childs, 1 Sand. Ch. 58, 62, per Vanderpool, J. See Jewell v. Walker, 109 Ga. 241, 34 S. E. 337, quoting text.

[7] Hannan v. Oxley, 23 Wis. 519, 522. See, also, Preble v. Baldwin, 6 Cush. 549; Gale v. Coburn, 18 Pick. 402.

[8] Miller v. Goodwin, 8 Gray, 542.

be made subject to the mortgage, and contain a general covenant against all encumbrances excepting the mortgage, and may express as the consideration simply the value of the equity of redemption.[9]

§ 824. **Quantity of land conveyed.**—If the land conveyed by a deed is described by boundaries, and as "containtaining four acres, more or less," and the grantee pays the grantor for the land at a certain rate per acre for four acres, the grantor may show by parol evidence that the boundaries named in the deed would apply to a tract containing five acres, as well as to a tract containing four acres; he may also show by parol that he and the grantee employed a surveyor before the execution of the deed to ascertain the amount of the land, under an agreement that the price should be at a stipulated sum per acre, and that the grantee paid for the land upon the inadvertent statement of such surveyor, that the tract contained four acres, when, in fact it contained five; and the grantor is entitled to recover for the additional acre at the stipulated rate.[1] In accordance with this principle the grantor may show that the purchase money has not been paid, and, in an action to recover the purchase money, he is not estopped by the acknowledgment on the face of the deed that the consideration has been paid.[2]

§ 825. **Parol promise of grantee to convey other land.**—Where the grantor, as a consideration for his deed, re-

[9] Drury v. Tremont Imp. Co., 13 Allen, 171. See Murray v. Smith, 1 Duer, 412. Where the consideration for a deed to a railroad company is that the grantee shall erect and maintain its depot on the land, and the depot is erected and maintained for a number of years and then removed, the land does not revert to the grantor, but he may maintain an action for partial failure of consideration: Berkley v. Union Pac. Ry. Co., 33 Fed. Rep. 794.

[1] Paige v. Sherman, 6 Gray, 511.

[2] Taggart v. Stanberry, 2 McLean, 543.

lies upon the parol promise of the grantee to convey certain other land to him, and the grantee refuses to perform his agreement, the grantor may recover the value of the property from the grantee upon an implied *assumpsit*. If, in such a case, the grantor show that the grantee agreed to give another tract of land worth a certain price for the land so conveyed, this is practically an admission on the part of the grantee that the value of the land conveyed by the grantor was such sum.[3] And it may be observed, that if the grantee has put it out of his power to comply with his promise by conveying to another person the land he had promised to convey to his grantor, the grantor is not required to demand a deed from the grantee before commencing an action to recover the value of the land.[4] It may be shown by parol evidence that the grantor, for the sum stated as the consideration in the deed, agreed to convey to the grantee two lots of land, each for a price agreed upon, that the grantee paid to the grantor the price agreed to be paid for both lots, and that, through the grantor's fraud or mistake, the deed conveyed only one of the lots. If the grantor when requested to convey the other lot refuses to do so, the grantee may recover the consideration which he has paid for it, with interest.[5]

§ 826. **Verbal promise.**—It may also be shown by parol, in contradiction of the acknowledgment of the receipt of the consideration, that the grantee, as a part of the consideration, made a verbal promise that he would pay the grantor whatever he might receive over a specified amount upon the resale of the land, and an action of *assumpsit* will lie to

[3] Bassett v. Bassett, 55 Me. 127.

[4] Bassett v. Bassett, 55 Me. 127. Where as parts of one transaction a grantor executes a deed and the grantee executes an agreement to reconvey, the execution of one instrument is a sufficient consideration to support the other: Wilson v. Fairchild, 45 Minn. 203.

[5] Goodspeed v. Fuller, 46 Me. 141, 71 Am. Dec. 572. But see in this connection the earlier cases in

recover the excess.[6] So, it may be shown by parol evidence for the purpose of creating a resulting trust that the consideration price was not paid by the grantee, but by a third person.[7] Such evidence does not tend to contradict the deed. The recital of payment may state that the consideration was paid by the grantee, but it does not state that it was his money. This is a fact outside of the conveyance.

§ 827. **Vesting of title.**—If a tract of land, a part of a Mexican grant, is conveyed in consideration of an agreement on the part of the grantee to prosecute the claim before the courts until it is finally confirmed, the title vests absolutely in the grantee. In case he fails to perform his agreement, the remedy of the grantor lies in an action for damages for breach of the agreement.[8]

§ 828. **Retention of purchase money by grantee.**—The grantor may show, notwithstanding the acknowledgment of payment of the consideration in the deed, that the grantee retained a part of the money to be applied to the grantor's use.[9] So it may likewise be shown that the part of the money

Maine of Steele v. Adams, 1 Greenl. 1, and Emery v. Chase, 5 Greenl. 232.

[6] Hall v. Hall, 8 N. H. 129.

[7] Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; Scoby v. Blanchard, 3 N. H. 170; Dudley v. Botsworth, 10 Humph. 9, 51 Am. Dec. 690. It may be shown by parol evidence that a deed made by a judgment debtor after a sale on execution was made to enable the grantee to redeem the land from the sale, and that he agreed to hold the property, make necessary advances, and upon a resale, after deducting what he had advanced to pay the remainder to the judgment debtor: Byers v. Locke, 93 Cal. 493, 27 Am. St. Rep. 212. See, also, Michael v. Foil, 100 N. C. 178, 6 Am. St. Rep. 577; Ryman v. Mosher, 71 Ind. 596; McCarthy v. Pope, 52 Cal. 561; Price v. Sturgis, 44 Cal. 591; Miller v. Kendig, 55 Iowa, 174; Hodges v. Green, 28 Vt. 358; Hess v. Fox, 10 Wend. 437; Trowbridge v. Wetherbee, 11 Allen, 361; Collins v. Tillou, 26 Conn. 368, 68 Am. Dec. 398; Kintner v. Jones, 122 Ind. 148.

[8] Hartman v. Reed, 50 Cal. 485.

[9] Schillinger v. McCann, 6 Greenl. 314.

retained by the grantee was to be paid by him to a third person for the grantor's benefit.[1] So it is permissible to show by parol evidence that the grantee has retained a part of the consideration money, under an agreement to pay the note of the grantor to a third person, and in an action for money had and received to his use, such third person may recover the amount of the note and interest.[2]

§ 829. **Whether a gift or an advancement.**—When a deed made by a father to his son, expressed a consideration of two thousand dollars, parol evidence was admitted to show that no money was really paid, but that the deed was made as an advancement to the son.[3] The question whether in such a case the conveyance should be considered as a gift, or as an advancement, or partly each, will depend, of course, upon the intent of the grantor. And it is held that where land is conveyed by a father to his son, worth at least two thousand dollars, and it is shown that the intention of the grantor in making the deed was to make an advancement, equal to the advancement made to each of his other sons, amounting to one thousand dollars, the grantee should be charged with an advancement of only such sum of one thousand dollars.[4] So, also, where the consideration of a deed from husband to wife was called in question, it was held that the presumption was that it was a gift or advancement and that the burden was on the grantee to show the contrary.[5] Where a deed of bargain and sale recites a pecuniary consideration, it may be shown that there was also the consideration of an advancement to the daughter of the bargainor.[6] So where a deed recites that a consideration of so much money has been paid,

[1] Burbank v. Gould, 15 Me. 118.
[2] Dearborn v. Parks, 5 Greenl. 81, 17 Am. Dec. 206.
[3] Meeker v. Meeker, 16 Conn. 383.
[4] Meeker v. Meeker, 16 Conn. 383.
[5] Strayer v. Dickerson, 205 Ill. 257, 68 N. E. 767.
[6] Hayden v. Mentzer, 10 Serg. & R. 329.

it may be shown by parol that the real consideration was a specified quantity of iron, at a price agreed upon.[7]

§ 830. **Reason for this rule admitting parol evidence as to consideration.**—There is a well-defined distinction between a release and a mere receipt. A release extinguishes an obligation. It may be considered as a conveyance, inasmuch as it may be said to transfer to the releasee a right due to the releasor. It, therefore, as an instrument in writing, cannot be contradicted by parol evidence. But a receipt is a mere admission of payment, entitled to some weight as an admission, but subject to explanation or contradiction. It is at the present time unnecessary to insert an acknowledgment of the receipt of the consideration in the deed at all, as a writing imports a consideration,[8] and even if it did not, the grantor could not defeat his own voluntary deed. The reasons on which the rule allowing parol evidence to be received to show the true consideration of a deed are very fully explained in a case in Kentucky. As an able exposition of the law on this subject we quote the language of Mr. Justice Robertson, who says: "The authorities on this subject in England, as well as in the States of this Union, are various and contradictory. But we believe that the consistent doctrine, and that which accords best with analogy, and with the practice and understanding of mankind, is that an acknowledgment in a deed of the receipt of the consideration is only *prima facie* evidence of payment. The acknowledgment is inserted more for the purpose of showing the actual amount of consideration than its

[7] McCrea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103. This is regarded as a leading case on this point, and the cases sustaining and in conflict with this view are cited and commented upon. And see Nickerson v. Saunders, 36 Me. 413; Emmons v. Littlefield, 13 Me. 233; Bowen v. Bell, 20 Johns. 338, 11 Am. Dec. 286; Morse v. Shattuck, 4 N. H. 229, 17 Am. Dec. 419; Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661.

[8] See Merle v. Mathews, 26 Cal. 455.

payment; and it is generally inserted in deeds of conveyance, whether the consideration has been paid, or only agreed to be paid. If the consideration has not been paid, such an acknowledgment in a deed would be intended to mean that the specified amount had been assumed by note or otherwise. An ordinary receipt is not conclusive evidence of the facts attested by it. A separate receipt for the price of land would, it seems to us, be much stronger evidence that the money had been paid than the customary acknowledgment in the deed of conveyance. At all events, it should be as cogent. But it may be contradicted; why may not the other? An attention to the principles upon which parol testimony is admissible to explain or avoid the effect or the apparent import of a writing, may reconcile many, if not all, of the authorities which seem to be in conflict. One of these principles is, that in certain classes of cases, the statute of frauds and perjuries requires writing to vest rights; it would be subversive of the policy of the statute to allow parol testimony to change the legal import of the written evidence of a right adopted to certify it; therefore, in all such cases, no inferior grade of testimony shall be admitted to supply or control the intrinsic meaning of the writing. Another principle, and one more universal than the former in its application, is that wherever a right is vested, or created, or extinguished by contract, or otherwise, and writing is employed for that purpose, parol testimony is inadmissible to alter or contradict the legal and common-sense construction of the instrument. But that any writing, which neither by contract, the operation of law, nor otherwise, vests or passes or extinguishes any right, but is only used as evidence of a *fact,* and not as evidence of a contract or right, may be susceptible of explanation by extrinsic circumstances or facts. Thus, a will, a deed, or a covenant in writing, so far as they transfer, or are intended to be evidence of rights, cannot be contradicted or opposed, in their legal construction, by facts *aliunde.* But receipts and other

writings which only acknowledge the existence of a simple fact, such as the payment of money for example, may be susceptible of explanation, and liable to contradiction by witnesses. A party is estopped by his deed. He is not to be permitted to contradict it; so far as the deed is intended to pass a right, or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no further. A deed is not conclusive evidence of everything which it may contain. For instance, it is not the only evidence of the date of its execution; nor is its omission of a consideration conclusive evidence that none passed; nor is its acknowledgment of a particular consideration an objection to other proof of other and consistent considerations. And by analogy, the acknowledgment in a deed, that the consideration had been received, is not conclusive of the fact. *This is but a fact.* And testing it by the rationality of the rule which we have laid down, it may be explained or contradicted. It does not *necessarily* and undeniably prove the fact. It creates no right. It extinguishes none. A release cannot be contradicted or explained by parol, because it extinguishes a pre-existing debt. But no receipt can have the effect of destroying, *per se,* any subsisting right. It is only *evidence* of a fact. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not pay the debt, it is only evidence that it has been paid. Not so of a written release. It is not only evidence of the extinguishment, but is the extinguisher itself. The acknowledgment of the payment of the consideration in a deed is a fact not essential to the conveyance. It is immaterial whether the price of the land was paid or not; and the admission of its payment in the deed is generally merely formal. But if it be inserted for the purpose of attesting the fact of payment (as it seldom, if ever, is in this country), it is not better evidence than a sealed receipt on a separate paper would be; and, as we have already said, it seems to us that it would not be as good, for obvious reasons. The practice of

inserting such acknowledgments in deeds is very common, whether the consideration had been paid or not. 'For and in consideration of $——, in hand paid,' etc., is a commonplace phrase, which may be found in deeds generally. And it is seldom intended as evidence of payment, or for any other practical purposes, except to show the amount of consideration. To establish the conclusiveness of such loose expressions, therefore, might produce extensive injustice. If a note had been given for the consideration, and afterward without payment a deed be executed for the land, with the commonplace phraseology in relation to the price, would this be conclusive evidence that the notes had been paid off and discharged? Surely not." [9]

§ 831. **Parol agreement to execute devise.**—An owner of land conveyed it to another, the deed expressing a consideration in money, and acknowledging the receipt of the consideration. The true consideration, however, was the parol agreement of a third party to devise to the grantor a certain farm, and such third person executed his will at the same time, making in it such a devise. The grantor having entered upon the land and cut timber, the court held in an action of trespass *quare clausum fregit* against the grantor, that the deed was made upon good consideration, and that it was unnecessary to examine into the cases in which parol evidence is admitted or rejected for the purpose of contradicting the consideration. "The principle," said the court, "which seems to govern this case, is that where a vendor, without fraud or mistake, accepts of the engagement of a third person for the consideration agreed on, and on the faith of such engagement acknowledges the receipt of the consideration, it is against equity that he should be permitted to defeat the operation of the grant by showing that the consideration was not paid. As between vendor and vendee the consideration is to

[9] Gully v. Grubbs, 1 Marsh. J. J. 387, 389.

be treated as fully paid, and the vendor is estopped from denying it." [1]

§ 852. **Community property.**—In some of the States the rules of the common law relative to property held by husband and wife have been changed, and a distinction is made between separate property and community property. Separate property is such as is acquired before marriage or is acquired afterward by gift, bequest, devise, or descent, with the rents, issues, and profits thereof. All other property acquired after marriage by either husband or wife, or both, is declared to be community property. But it is presumed that all property acquired after marriage is community property, and the party claiming it to be separate property has the burden of establishing this fact.[2] But as a party has the right to rebut this presumption, the deed, so far as it

[1] McMullin v. Glass, 27 Pa. St. 151.

[2] Moore v. Jones, 63 Cal. 12; Kohner v. Ashenauer, 17 Cal. 581; Adams v. Knowlton, 22 Cal. 288; Peck v. Vandenberg, 30 Cal. 11; Alverson v. Jones, 10 Cal. 9, 70 Am. Dec. 689; Tryon v. Sutton, 13 Cal. 493; Ramsdell v. Fuller, 28 Cal. 42, 87 Am. Dec. 103; McDonald v. Badger, 23 Cal. 399, 83 Am. Dec. 123; Mott v. Smith, 16 Cal. 557; Bernal v. Gleim, 33 Cal. 668; Smith v. Smith, 12 Cal. 224, 73 Am. Dec. 533; Meyer v. Kinzer, 12 Cal. 252, 73 Am. Dec. 538; Tustin v. Faught, 23 Cal. 241; Althof v. Conheim, 38 Cal. 233, 99 Am. Dec. 363; Burton v. Lies, 21 Cal. 91; Pixley v. Huggins, 151 Cal. 131; Riley v. Pehl, 23 Cal. 70; Landers v. Bolton, 26 Cal. 420. But by amendment to statute in California, where property is conveyed to married woman by instrument in writing, the presumption is that title is thereby vested in her as her separate property. C. C. § 164. See, also, in connection with text: Schuler v. Savings etc. Soc., 1 West Coast Rep. 125; Browder v. Clemens, 61 Tex. 587; Rice v. Rice, 21 Tex. 66; Pearce v. Jackson, 61 Tex. 644; Zorn v. Traver, 45 Tex. 520; Lott v. Keach, 5 Tex. 394; Brackett v. Devine, 25 Tex. 194; Cox v. Miller, 54 Tex. 25; Wood v. Wheeler, 7 Tex. 20; Cooke v. Bremond, 27 Tex. 459, 86 Am. Dec. 626; Schmeltz v. Garey, 49 Tex. 49; Huston v. Curl, 8 Tex. 239, 58 Am. Dec. 110; Mitchell v. Marr, 26 Tex. 329; De Blane v. Lynch, 23 Tex. 25; Love v. Robertson, 7 Tex. 6, 56 Am. Dec. 41; Chapman v. Allen, 15 Tex. 278. See chapter on principles of construction where the subject of community property is fully treated.

recites the payment of a consideration by a particular person, or from particular friends, may be contradicted,[3] and this may be done by parol evidence.[4] It may be shown by such evidence, where it is recited in a deed from a mother to her married daughter, that it was made in consideration of love and natural affection, as well as for a sum of money, that no money consideration existed, and that the deed was one of gift, having thus the effect of making the land so conveyed the separate property of the daughter instead of the common property of herself and husband.[5] But where the wife is dead and the record shows that the title is vested in the husband alone, a purchaser for value of the land is not chargeable with notice that the land was in fact community property, where there is nothing to affect him with notice.[6]

§ 833. **In North Carolina acknowledgment is release.** —In North Carolina, the rule seems to be that the acknowledgment in a deed that the consideration has been paid is, in an action to recover the purchase money, a release, and is a bar to the action. And in one of the cases in which this is held, the court remarks that the effect of adhering to this rule, "will only be to make men cautious in executing deeds; but if it be understood that a solemn acknowledgment under

[3] Moore v. Jones, 63 Cal. 12.

[4] Peck v. Brummagim, 31 Cal. 440, 89 Am. Dec. 195, and cases cited above.

[5] Peck v. Vandenberg, 30 Cal. 11. Commencing on page 22 will be found a valuable and exhaustive review by Judge Sawyer of the cases bearing upon this subject. The learned justice reviews first the common-law authorities on the question of the extent to which the consideration expressed in a deed may be explained or contradicted, and then adverts to the cases in which evidence has been admitted to show that a conveyance made after marriage was separate property. See Higgins v. Johnson, 20 Tex. 393, 70 Am. Dec. 394; Gonor v. Gonor, 11 Rob. (La.) 526; Claiborne v. Tanner, 18 Tex. 70; Huston v. Curl, 8 Tex. 240, 58 Am. Dec. 110; Rose v. Houston, 11 Tex. 326, 62 Am. Dec. 478; McIntyre v. Chappell, 4 Tex. 187; Love v. Robertson, 7 Tex. 8, 56 Am. Dec. 41.

[6] Woodward v. Suggett, 59 Tex. 619. And see Morris v. Meek, 57 Tex. 385.

seal is insufficient to prove the payment of money, it is to be apprehended that many perjuries will arise."[7] But it is held that, in a court of equity, the obstacle to contradicting the recital of payment is removed when the recital results from inadvertence and is inserted under mistake as to its legal effect and without intention of the parties that it shall operate to preclude recovery of the purchase money.[8] And recent decisions in North Carolina weaken, if they do not absolutely overrule, the cases, holding that the recital of payment of consideration is a bar in an action to recover the purchase price.[9]

§ 834. Showing absence of consideration to defeat deed.—As has been shown, the courts allow the greatest latitude of inquiry as to what consideration really passed between the parties, and the grantor is not estopped by his acknowledgment of payment in any action which he may bring for the recovery of the purchase money or other object, so long as the validity of the deed as an operative conveyance is not attacked. But the rule which we have been considering is subject to the important qualification that parol evidence cannot be admitted for the purpose of destroying the effect and operation of the deed.[1] From this rule, it follows that the grantor cannot claim that a trust results to him-

[7] Brockett v. Foscue, 1 Hawks (L. & Eq.) 64, 67; Lowe v. Weatherley, 4 Dev. & B. 212; Mendenhall v. Parish, 8 Jones (N. C.) 106, 78 Am. Dec. 269; Graves v. Carter, 2 Hawks (L. & Eq.) 576, 11 Am. Dec. 786; Spiers v. Clay's Administrator, 4 Hawks (L. & Eq.) 22.

[8] Shaw v. Williams, 100 N. C. 272, 6 S. E. 196.

[9] See in this connection: Faust v. Faust, 144 N. C. 383, 57 S. E. 22; Kendrick v. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592; Barbee v. Barbee, 108 N. C. 581, 13 S. E. 215; Deaver v. Deaver, 137 N. C. 240, 49 S. E. 113.

[1] Grout v. Townsend, 2 Hill, 554, 557; Coles v. Soulsby, 21 Cal. 47; Wilkinson v. Scott, 17 Mass. 257; McCrea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103; Kinnebrew v. Kinnebrew, 35 Ala. 636; Beach v. Cooke, 28 N. Y. 537, 86 Am. Dec. 266; Stackpole v. Robbins, 47 Barb. 219; Arthur v. Arthur, 10 Barb. 24; Bullard v. Briggs, 7 Pick. 537, 19 Am. Dec. 202; Goodspeed v. Fuller, 46 Me. 141, 71 Am. Dec. 572; Rockwell v. Brown, 54 N. Y. 213;

self when he has executed a deed without consideration. This would be defeating the deed by parol evidence, which cannot be done.[2] Creditors, of course, can show that a deed was made without consideration for the purpose of defeating it.[3]

Peck v. Vandenberg, 30 Cal. 23. See, also, Commercial Bank etc. v. Norton, 1 Hill, 509; Doe v. Beardsley, 2 McLean, 412, 414; Philbrook v. Delano, 29 Me. 410; Goodwin v. Gilbert, 9 Mass. 510; Wilt v. Franklin, 1 Binn. 502, 2 Am. Dec. 474; Barnum v. Childs, 1 Sand. 58, 62; Winans v. Peebles, 31 Barb. 371; Farrington v. Barr, 36 N. H. 86; Graves v. Graves, 29 N. H. 129, Strong v. Whybark, 204 Mo. 341, 12 L.R.A.(N.S.) 240, 102 S. W. 968; 3 Wash. Real Prop. (4th ed.) 377.

[2] Burn v. Winthrop, 1 Johns. Ch. 329; Burt v. Wilson, 28 Cal. 632; Graves v. Graves, 29 N. H. 129; Ownes v. Ownes, 23 N. J. Eq. 60; Jackson v. Cleveland, 15 Mich. 94, 90 Am. Dec. 266; Graff v. Rohrer, 35 Md. 327; Hutchins v. Lee, 1 Atk. 447; Lloyd v. Spillett, 2 Atk. 250; Young v. Peachy, 2 Atk. 257. And see Morris v. Morris, 2 Bibb. 311; Randall v. Phillips, 3 Mason, 388; McKenney v. Burns, 31 Ga. 295.

[3] Peck v. Vandenberg, 30 Cal. 22; Johnson v. Taylor, 4 Dev. 355. And see Hubbard v. Allen, 59 Ala. 296; Fellows v. Smith, 40 Mich. 689. See where the recital of a consideration in a deed from a corporation showed that the act was not authorized by the charter: Franco-Texan Land Co. v. McCormick, 85 Tex. 416, 34 Am. St. Rep. 815. See, also, §§ 710, *ante*, and 1000, *post*.

CHAPTER XXV.

PRINCIPLES OF CONSTRUCTION.

PART I.

GENERAL PRINCIPLES.

§ 835. Construction for court.
836. Intention of parties.
836a. Unusual form of deed.
837. Technical terms.
838. Expression of grantor's motive.
838a. Expressions limiting title conveyed.
838b. Subsequent clauses neither enlarging nor limiting grant.
838c. Further consideration—Execution sales.
839. Surrounding circumstances.
840 This is but one rule.
841. Appearance at time of sale.
842. Illustrations.
843. Grammatical construction.
843a. Repugnant clauses.
844. Resort to punctuation.
844a. Deed should be construed as a whole.
845. Construing deeds together.
846. Rule in Shelley's case.
846a. "Heirs" qualified by other words.
846b. Illustrations.
846c. "Heirs" construed as children to effectuate intention.
846d. Illustrations.
§ 846e. Limitations to children.
847. Lawful issue.
848. Construction against grantor.
849. Divers estates.
849a. Deed of executor passing individual interest.
850. Construction favorable to operation of deed.
850a. Merger of contract to convey in deed.
850b. Stipulation surviving deed.
850c. Deed correcting prior deed.
851. Contemporaneous exposition.
852. Election of grantee.
853. Passing present interest with other provisions to take effect upon death of grantor.
854. No present interest passing.
854a. Application of this principle.
855. Tendency to uphold deed.
855a. Deed or will.
855b. Same subject—Further illustrations.
855c. When a will.
856. Conveyance of estate not owned by grantor.
857. Conveyance in fee with condition upon a right of possession in the grantors.
858. Limited estates.

§ 859. Same subject—Continued.
860. Conveyance to wife and children.
861. Relation from re-execution of lost deed.
862. Water power.
862a. Right to rent.
862b. Deed on last day of rent term.
862c. Right to rent when vendor retains possession.
862d. Liability for rent of purchaser in possession.
863. Appurtenances and incidents.
864. Construction of particular words.

PART II.

COMMUNITY PROPERTY.

865. In what States exist.
866. The civil law.
867. In other countries.
§ 868. Presumption of community property.
868a. Improvemnts on community property.
869. Grants from the government—Rule in Texas.
870. In California and Louisiana.
871. Land purchased by earnings of wife.
872. Gift to husband or wife.
872a. Subsequently acquired title passes.
873. Voluntary gift in fraud of wife.
874. Title acquired after voluntary separation.
875. Gift in compensation for services.
875a. Unrecorded tax deeds.
876. Rebuttal of presumption of community property.
877. Presumption when deed is made to wife.
878. The rule in Texas.
879. Purchase on credit.
880. Tortious possession and deed in consideration of surrender thereof.

§ 835. **Construction for court.**—It is not intended in this chapter to enter into a detailed examination of the number of cases decided on the import of particular language found in the deed. There are, however, a few well-established rules of construction which are resorted to by courts in the construction of deeds. But it is doubtful how far arbitrary rules can be of service where the only object is to determine the intention of the parties. In fact, the truth was well expressed by Mr. Justice Sanderson, who said that "in the construction of written instruments, we have never derived much aid from the technical rules of the books. The only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place our-

selves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it."[1] This is the main object of all construction. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention. In this chapter are given some of the general rules of construction, while in other chapters will be found sections relating to the construction of language used in those clauses which form the different parts of a deed. The construction of a deed is for the court.[2] But if the language of the deed will permit more than one inference to be drawn from it, and such inferences depend on controverted facts, the jury is to pass on the deed,[3] and if the construction is dependent upon the meaning the parties attached to the words or upon extrinsic facts in connection with the deed, the question is a mixed one of law and fact.[4] If the description is ambiguous, a disputed question of fact as to the grantor's intention, is one for the jury,[5] and so it is a question of fact if the ambiguity is created by a collateral matter.[6] In determining whether growing crops passed by the deed to the grantee, dependent upon the fact whether the deed should become operative on the day of its delivery or on the day it bears

[1] In Walsh v. Hill, 38 Cal. 481, 487.

[2] Trotier v. St. Louis, B. & S. Ry. Co., 180 Ill. 471, 54 N. E. 487; Merwin v. Morris, 71 Conn. 555, 42 Atl. 855; Holmes v. Weinheimer, 66 S. C. 18, 44 S. E. 82; New River Mineral Co. v. Painter, 100 Va. 507, 42 S. E. 300; City of Memphis v. Wait, 102 Tenn. 274, 52 S. W. 161; Phoenix Ins. Co. v. Neal, 23 Tex. Civ. App. 427, 56 S. W. 91; Eddy v. Bosley, 34 Tex. Civ. App. 116, 78 S. W. 565; Paul v. Chenault, 44 S. W. 682; Hurst v. Hurst, 7 W. Va. 289, 339; Snooks v. Wingfield, 52 W. Va. 441, 44 S. W. 277; Tenderson v. Missouri Tie etc. Co., 104 Mo. App. 290, 78 S. W. 819.

[3] Glover v. Gasque, 67 S. C. 18, 45 S. E. 113.

[4] Trustees etc. of Town of East Hampton v. Vail, 151 N. Y. 463, 45 N. E. 1030.

[5] Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591.

[6] Rock v. Greenewald, 22 Pa. Super. Ct. 641.

date, the question is for the jury;[7] and if the contract, while sufficiently certain to pass the property, is so indefinite on the passing of timber, as to necessitate a resort to parol evidence to determine its meaning, the question of what actually was transferred by the conveyance is for the jury to decide.[8] The question of the identity of the land conveyed is one of fact and not of law.[9] Where the name of the grantee written in a deed might be read either as "Mack" or as "Mock" the court has the power to determine which name was meant to be used.[1] As it is the duty of the court to construe a deed offered in evidence, evidence cannot be received of the construction given to it by a party to it.[2] It is the duty of the court to construe a deed according to its legal effect in the absence of ambiguity.[3] Where there is ambiguity, however, the question should be submitted to the jury.[4] The interpretation may in some cases be a mixed question of law and fact.[5]

[7] Kammrath v. Kidd, 89 Minn. 380, 95 N. W. 213, 99 Am. St. Rep. 603.

[8] Ward v. Gay, 137 N. C. 397, 49 S. E. 884.

[9] McCasland v. Aetna Life Ins. Co., 108 Ind. 130, 9 N. E. 119.

[1] Tenderson v. Missouri Tie etc. Co., 104 Mo. App. 290, 78 S. W. 819. But where a plaintiff named William "Halladay" read in an action to establish title a deed in which the grantee was named as William "Halliday," the court held that it was for the jury to decide whether the plaintiff was the grantee named in the deed: Halladay v. Gass, 64 N. Y. Supp. 825, 51 App. Div. 539. See, also, McCartney v. McCartney, 93 Tex. 359, 55 S. W. 310; Cochran v. Missouri K. & T. 367.

[2] Folk v. Graham, 82 S. C. 66, 62 S. E. 1106.

[3] Merwin v. Morris, 71 Conn. 555, 42 Atl. 855; Trotier v. R. R. Co., 180 Ill. 471, 54 N. E. 487; McGuigan v. Hennessy, 24 Mont. 202, 61 Pac. 1; Holmes v. Weinheimer, 66 S. C. 18, 44 S. E. 82; Memphis v. Waite, 102 Tenn. 274, 52 S. W. 161; New River etc. Co. v. Painter, 100 Va. 507, 42 S. E. 300; Snooks v. Wingfield, 52 W. Va. 441, 44 S. E. 277; Fenderson v. Tie etc. Co., 104 Mo. App. 290, 78 S. W. 819; Bank v. Hawkins, 30 R. I. 171, 73 Atl. 617; Folk v. Graham, 82 S. C. 66, 62 S. E. 1106; Eddy v. Bosley (Tex.) 78 S. W. 565; R. Co. v. Dunham (Tex.) 88 S. W. 849.

[4] Kammrath v. Kidd, 89 Minn. 380, 95 N. W. 213; Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591; Ashcraft v. Cox (Ky.) 77 S. W. 718.

[5] East Hampton v. Vail, 151 N. Y. 463, 45 N. E. 1030. And see Gillespie v. Powell, 132 Ga. 353, 64 S. E. 80; Ward v. Gay, 137 N. C. 397, 49 S. E. 884; Bank v. Hawk-

§ 836. Intention of parties.—As in the case of all contracts, the intent of the parties to the deed, when it can be obtained from the instrument, will prevail, unless counteracted by some rule of law.[6] A deed conveyed a certain gore or strip of flats described in the deed, and continued: "The said strip or gore to begin at the lower end of Milk Wharf, so called, and to run four hundred and eighty feet to the channel. And the said grantors, for the consideration aforesaid, hereby release to the said grantee, or to any other person or persons that may build any wharf on the western line of said strip of flats and in the continuation of the said new wharf and on the line thereof to the eastward, all our right, title and interest to the said gore of flats to the channel, or so far as our right extends, for the use and benefit of the proprietors of the wharf which may be built as aforesaid. To have and to hold the said granted and bargained premises, with the privileges and appurtenances thereof, to the said grantee, his heirs and assigns, to his and their use and behoof forever." The deed also contained the usual covenants of warranty, and it was held that by the first description the grantee took an absolute estate in fee of the property described, and that by the

ins, 30 R. I. 171, 73 Atl. 617. The words of the deed should be interpreted to common understanding and usage: Talbert v. Mason, 136 Iowa, 373, 14 L.R.A.(N.S.) 878, 113 N. W. 918, 125 Am. St. Rep. 259; Clark v. Boosey, 52 Or. 448, 97 Pac. 755; Sweeney v. Landers, 80 Conn. 575, 69 Atl. 566.

[6] Brannan v. Mesick, 10 Cal. 95; Thomas v. Hatch, 3 Sum. 170; Bent v. Rogers, 137 Mass. 192; Bryan v. Bradley, 16 Conn. 474; Litchfield v. Cudworth, 15 Pick. 23; Racouillat v. Sansevain, 32 Cal. 376; Frost v. Spaulding, 19 Pick. 445, 31 Am. Dec. 150; Deering v. Long Wharf, 25 Me. 51; Wallis v. Wallis, 4 Mass. 135, 3 Am. Dec. 210; Marshall v. Fisk, 6 Mass. 24, 4 Am. Dec. 76; Barnes v. Haybarger, 8 Jones (N. C.) 76; Jennings v. Brizeadine, 44 Mo. 332; Jackson v. Blodgett, 16 Johns. 172; Mills v. Cattin, 22 Vt. 98; Waterman v. Andrews, 14 R. I. 589; Cumberland Building and Loan Assn. v. Aramingo Episcopal Church, 13 Phila. 171; Pike v. Monroe, 36 Me. 309, 58 Am. Dec. 751; Jackson v. Myers, 3 Johns. 388, 3 Am. Dec. 504; Callis v. Lavelle, 44 Vt. 230; Smith v. Brown, 66 Tex. 543.

second description all the right, title, and interest of the grantors to the property described passed to the grantee, and not to the use and benefit of the wharf which might be built.[7] If a question of law arises upon the construction of a deed, it is the province of the court to construe it and to decide from the language what the intention of the parties was.[8] When the intention of the parties can be plainly ascertained, arbitrary rules are not to be resorted to.[9] The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention if practicable, when not contrary to law.[1] A party executed to four others an instrument, which, beginning in the ordinary form of a bargain and sale deed, purported to convey to them, for a certain consideration, the property described, with a general war-

[7] Deering v. Long Wharf, 25 Me. 51.

[8] Mulford v. Le Franc, 26 Cal. 88. See, also, Bell v. Woodward, 46 N. H. 337; Thornberry v. Churchill, 4 Mon. 29, 16 Am. Dec. 125; Hurley v. Morgan, 1 Dev. & B. 425, 28 Am. Dec. 579.

[9] Kimball v. Semple, 25 Cal. 449; Prentice v. Duluth Storage and Forwarding Co., 58 Fed. Rep. 437; Free and Accepted Masons v. School Town of Newpoint, 138 Ind. 141; United States v. Cameron, 21 Pac. Rep. 177 (Ariz. Apr. 6, 1889).

[1] Pike v. Monroe, 36 Me. 309, 58 Am. Dec. 751; Means v. Presbyterian Church, 3 Watts & S. 303; Moore v. Griffin, 22 Me. 350; Mills v. Catlin, 22 Vt. 98; Benedict v. Gaylord, 11 Conn. 332, 29 Am. Dec. 299; Chouteau v. Suydam, 21 N. Y. 170; Wolfe v. Scarborough, 2 Ohio St. 361. See Churchill v. Reamer, 8 Bush, 256; Clute v. New York Cent. etc. R. R. Co., 120 N. Y 267; Bartholomew v. Muzzy, 61 Conn. 387, 29 Am. St. Rep. 206; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Atlantic City v. Realties Co. (N. J.) 70 Atl. 345; Hopkins v. Hopkins (Tex.) 114 S. W. 673; Bowden v. Patterson (Tex.) 111 S. W. 182. The effort should be so to construe the deed as seems most likely to effectuate the intention of the parties: Melick v. v. Pidcock, 44 N. J. Eq. 525, 6 Am. St. Rep. 901; Post v. Weil, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809; Berridge v. Glassey, 112 Pa. St. 442, 56 Am. Rep. 324; Eisely v. Spooner, 23 Neb. 470, 8 Am. St. Rep. 128; Bradley v. Zehmer, 82 Va. 685; Lowdermilk v. Bostick, 98 N. C. 299. But a deed can convey nothing except what it describes, whatever may have been the intention of the parties: Thayer v. Finton, 108 N. Y. 394.

ranty of title. Then followed a power of attorney giving authority to the grantees to take possession of the property, and to sell and convey, or lease, the same in the name of the grantor, and to receive the purchase money and rents. The grantor also agreed not to sell, lease, or authorize any other person to sell or lease the property, or revoke the power of attorney, unless default was made in the payment of the consideration in the installments mentioned in the deed. The deed contained a covenant that if the amount was paid at the time agreed upon, the instrument should take effect as a full conveyance in fee of the land, and also a covenant, in case of the grantor's failure to fulfill his covenants, the instrument should take effect as a conveyance. The instrument was held to be a conveyance upon a condition precedent, until the performance of which no title passed to the grantees. On performance of the condition the title would vest in the grantees without any further act on the grantor's part, but until that time the title remained in the grantor.[2] In a deed the grantor conveyed "all his right, title, interest, and estate in and to all the estate, real, personal, or mixed, which J. C. *and* J. C., junior, died, seised or possessed of." It was held that the word "and" did not mean the joint estate alone, but that the deed conveyed the interest of the grantor in all the estate, whether joint or several.[3] "It was the manifest intent of the parties, that the grantor's right in all the estate, whether joint or several, should pass. And such must be the operation of the deed. It is not uncommon to construe *and* to mean *or,* and *or* to mean *and,* when necessary to carry into effect the intention of the parties."[4] A deed conveyed to the grantee, "and her heirs and assigns forever, a certain piece or parcel of land situated, lying, and being in Halifax, and is the same farm on

[2] Brannan v. Mesick, 10 Cal. 95.

[3] Litchfield v. Cudworth, 15 Pick. 23.

[4] Litchfield v. Cudworth, *supra.* Subsequent acts of the parties may be considered in construing an ambiguous deed: Wilson v. Carrico, 140 Ind. 533, 49 Am. St. Rep. 213.

which [the grantor] now lives; that is to say, one undivided half of the same, with the buildings thereon, with the privileges and appurtenances thereto belonging, . . . always provided that in the event of her decease, the same shall revert to me, if living, if not, to my heirs, being the same farm which I purchased of Darius Plumb." The *habendum* was to the grantee, "and her heirs and assigns, to her and their own proper use, benefit, and behoof forever." The deed contained the usual covenants of warranty, seisin, and against encumbrances, and also this clause following the covenants: "Always reserving the reversion to myself and heirs, as stipulated in the deed." The court held that the manifest intent was to convey an estate for life and not an estate in fee, and the deed must take effect according to such intent.[5] In a re-

[5] Flagg v. Eames, 40 Vt. 16, 94 Am. Dec. 363. And see, also, Collins v. Lavelle, 44 Vt. 230; Colby v. Colby, 28 Vt. 10. No peculiar form of words is necessary to make a deed operative. Any words showing an intention to convey will be sufficient: Baker v. Westcott, 73 Tex. 129; Jennings v. Brezeadine, 44 Mo. 335; American Emigrant Co. v. Clark, 62 Iowa, 182. An instrument in the following form will convey the title to real estate: "Know all men by these presents, that I, John Martin, of the city of Philadelphia, mariner, in consideration of the sum of one thousand dollars, to me paid by Elizabeth Martin, gentlewoman, the receipt whereof is hereby acknowledged, as also for divers other good and valuable considerations, have granted, bargained, sold, conveyed, and assigned, and by these presents do grant, bargain, sell, convey, and assign all debts, dues, or demands wheresoever and whatsoever, real, personal, or mixed, which are due and owing, or of right, belonging unto me, either by virtue of inheritance, legacies, bonds, notes, book debts, or otherwise, or which hereafter may become due. The said Elizabeth Martin to have and to hold the same unto her, the said Elizabeth, her heirs and assigns forever": McWilliams v. Martin, 12 S. & R. 269, 14 Am. Dec. 688. And see Harper v. Blean, 3 Watts, 475, 27 Am. Dec. 367; Dice v. Sheffer, 3 W. & S. 419; Stone's Appeal, 2 Pa. St. 432. Where the grantee duly signed and acknowledged an indorsement on a deed in these words: "I assign the within for value received," it is held that the title to the land described in the deed will pass to the assignee: Harlowe v. Hudgins, 84 Tex. 107, 31 Am. St. Rep. 21. See, also, Lemon v. Graham, 131 Pa. St. 447, 6 L.R.A. 663. But it is held in Lessee of Bentley's Heirs v. De Forest, 2 Ohio 221, 15 Am. Dec.

cent case in Alabama, the court through Mr. Justice Denson, said: "It is true the real inquiry in the construction of a deed is to establish the intention of the parties, especially that of the grantor; but a corollary to this rule is that the intention must, if possible, be gathered from the language used in the instrument submitted for construction, and that, when it can in this way be ascertained, arbitrary rules are not to be resorted to. If, however, two conflicting intentions are expressed, there is no alternative but to construe the deed by these rules even though they may be denominated arbitrary." [6]

§ 836a. **Unusual form of deed.**—Although the form of a deed may be unusual, the intention of the grantor, when it appears, must be given effect, and the deed will not be declared void unless the various clauses are so repugnant as to leave no other course to be followed.[7] If a husband executes a deed to his wife containing a stipulation that when she shall cease to live with him as his wife the title shall revert to him, the title will not revert on the wife's commission of

546, that an indorsement on a deed assigning it does not convey an interest in the land described, and at best can be considered only an executory contract. See, also, Doe ex dem. Linker v. Long, 64 N. C. 296; Arms v. Burt, 1 Vt. 303, 18 Am. Dec. 680; Tunstall v. Long, 109 N. C. 316. But the deed must contain words of some kind indicating an intent to convey: Webb v. Mullins, 78 Ala. 111; Hummelman v. Mounts, 87 Ind. 178; Brown v. Manter, 21 N. H. 528, 53 Am. Dec. 223; Sharp v. Bailey, 14 Iowa, 387, 81 Am. Dec. 489; Davis v. Davis, 43 Ind. 561.

[6] Dickson v. Van Hoose, 157 Ala. 459, 19 L.R.A.(N.S.) 719, 47 So. 718, citing §§ 836 and 837 *supra* and, also, the following authorities: 17 Am. & Eng. Enc. Law p. 2; 13 Cyc. Law & Proc. p. 694 (11); Campbell v. Gilbert, 57 Ala. 569; Campbell v. Noble, 110 Ala. 394, 19 So. 28; May v. Ritchie, 65 Ala. 602; Green Bay & M. Canal Co. v. Hewett, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382; Maker v. Lazell, 83 Me. 562, 23 Am. St. Rep. 795, 22 Atl. 474; Wilkins v. Norman, 139 N. C. 40, 111 Am. St. Rep. 767, 51 S. E. 797; Robinson v. Payne, 58 Miss. 690. A construction will be given to a deed to effectuate the intention of the parties: Cook v. Hensler, 57 Wash. 392, 107 Pac. 178.

[7] Cravens v. White, 73 Tex. 577, 15 Am. Rep. 803.

adultery.[8] If the only reason urged for construing a particular clause in a deed is founded upon the technical words which have been used, the court may disregard them in determining the effect to be given to the conveyance, and such a construction should be adopted as on a general view of the instrument, and of the intention which the parties had in view, seems most likely to carry their intention into effect.[9] To effectuate the intention of the parties the whole deed should be read, and, if possible, effect should be given to the *habendum* clause as well as to the clause containing the words of grant, as the object of the *habendum* clause is to enlarge, limit or explain the estate conveyed,[1] and a construction will be adopted which will give validity to the deed rather than one which will nullify it.[2]

§ 836b. **Recognition of moral and legal obligation.**— So, if a deed is susceptible of two interpretations, one of which is a recognition of a moral and legal obligation on the grantor towards a third person, while the other would tend to show the grantor's commission of fraud, the court will assume that he intended to respect the right of such third person and to have his conduct in accordance with the moral law.[3] Technical terms in the deed must yield to the intent of the grantor when the same can be ascertained, and is not repugnant to any rule of law.[4] And arbitrary rules will not be applied when the real intention can be secured from the language of the deed,[5] as the main object of all construction is to discover

[8] Rayor v. Rayor, 142 Ill. 375, 31 N. E. Rep. 678.

[9] Post v. Weil, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809.

[1] Jacobs v. All Persons, 12 Cal. App. 163, 106 Pac. 896.

[2] Maxwell v. McCall, 124 N. W. 760.

[3] Bell v. Gardner & Lacey Lumber Co., 85 S. C. 182, 67 S. E. 151.

[4] Maxwell v. Harper, 51 Wash. 351, 98 Pac. 756; Simonds v. Simonds, 199 Mass. 552, 19 L.R.A. (N.S.) 686, 85 N. E. 860.

[5] Dickson v. Van Hoose, 47 So. 718.

such intention.[6] While conditions defeating an estate are not viewed with favor, yet when such condition and defeasance are clear and explicit, the court must give effect to the intention of the parties.[7] But if the law has given to the words a definite meaning, the court must construe the deed by giving to such words their legal signification.[8] In giving effect to the intention of the parties that must be considered certain, which can be made certain.[9] The unexpressed intention of the parties to a deed cannot change its effect, where its terms are clear and unambiguous.[1] If an action is not brought for the purpose of reforming a deed, but of construing a reservation, evidence as to what was the intention of the parties to the deed is not material.[2] The true signification of ambiguous words may be determined by the context.[3] The court should put itself in the position of the parties,[4] and should endeavor

[6] Triplett v. Williams, 149 N. C. 394, 24 L.R.A.(N.S.) 514, 63 S. E. 79. The whole deed must be considered: Brown v. Reeder, 108 Md. 653, 71 Atl. 717; Clark v. Northern Coal & Coke Co., 112 S. W. 629; Bernero v. McFarland Real Estate Co., 134 Mo. App. 290, 63 S. E. 79.

[7] Epperson v. Epperson, 108 Va. 471, 62 S. E. 344.

[8] Condor v. Secrest, 149 N. C. 201, 62 S. E. 921. When the intent of the parties is ascertained from the whole instrument in the light of the surrounding circumstances it will be carried into effect: Tanner v. Ellis, (Ky.) 127 S. W. 995; and consideration should be given to the entire deed as well as to the acts of the parties: Turner v. Creech, 58 Wash. 439, 108 Pac. 1084. Unless contrary to some principle of law, the intent of the parties will be carried into effect: Irwin v. Stover (W. Va.) 67 S. E. 1119. Technical rules of construction cannot be applied to defeat the intention of the parties as it appears from the whole deed: Kelly v. Parsons (Ky.) 127 S. W. 792.

[9] Hubbard v. Whitehead, 221 Mo. 672, 121 S. W. 69. The intention will prevail: Pack v. Whitaker, 65 S. E. 496; Blauvelt v. Pasaic Water Co., 72 Atl. 1091; Empire Bridge Co. v. Larkin Soap Co., 117 N. Y. Supp. 1134, 132 App. Div. 943.

[1] City of Geneva v. Henson, 195 N. Y. 447, 88 N. E. 1104.

[2] Hutchins v. Berry, (N. H.) 75 Atl. 650.

[3] Price v. Griffin, 150 N. C. 523, 29 L.R.A.(N.S.) 935, 64 S. E. 372.

[4] Shinnecock Hills etc. Co. v. Aldrich, 116 N. Y. Supp. 532, 132 App. Div. 118.

to carry into effect the intention of the parties where it is not contrary to law or repugnant to the terms of the grant.[5]

§ 837. **Technical terms.**—"The intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect." [6] And if a deed cannot take effect in the precise way intended, yet if it can operate in another mode it will be so construed.[7] If there is a conflict in a deed between what is

[5] Cotting v. City of Boston, 201 Mass. 97, 87 N. E. 205. The purpose for which the deed was given should be considered: Friedman v. Ender, 116 N. Y. Supp. 461.

[6] Chief Justice Kent, in Jackson v. Myers, 3 Johns. 388, 395, 3 Am. Dec. 504; Prentice v. Duluth Storage and Forwarding Co., 58 Fed. Rep. 437.

[7] Parker v. Nichols, 7 Pick. 111; Goodtitle v. Bailey, Cowp. 600; Barrett v. French, 1 Conn. 354, 6 Am. Dec. 241; Lynch v. Livingston, 8 Barb. 463; 2 Seld. 422; Jackson v. Blodgett, 16 Johns. 172; Doe v. Salkeld, Willes, 673; Wallis v. Wallis, 4 Mass. 135, 3 Am. Dec. 210; Haggerston v. Hanbury, 5 Barn. & C. 101; Smith v. Frederick, 1 Russ. 174; Bryan v. Bradley, 16 Conn. 474; Russell v. Coffin, 8 Pick. 143; Brewer v. Hardy, 22 Pick. 376; 33 Am. Dec. 747; Roe v. Tanmar, Willes, 682; Walker v. Hall, 2 Lev. 213; Thompson v. Attfield, 1 Vern. 40; Thorne v. Thorne, 1 Vern. 141; Rogers v. Eagle Fire Ins. Co., 9 Wend. 611; Doe d. Lewis v. Davies, 2 Mees. & W. 503; Doe d. Starling v. Prince, 20 L. J. N. S. C. P. 223; Doe d. Daniell v. Woodroffe, 10 Mees. & W. 608; Coltman v. Senhouse, 2 Lev. 225; Crossing v. Scudamore, 2 Lev. 9; 1 Mod. 175; Harrison v. Austin, Carth. 38; Doe d. Were v. Cole, 7 Barn. & C. 243; Adams v. Steer, Cro. Jac. 210; Rigden v. Vallier, 2 Ves. Sr. 253; Haggerson v. Hanbury, 5 Barn. & C. 101; Nash v. Ash, 1 Hurl. & C. 160. See, also, Winborne v. Downing, 105 N. C. 20; Lemon v. Graham, 131 Pa. St. 447, 6 L.R.A.. 663; Starnes v. Hill, 112 N. C. 1, 22 L.R.A. 598; Moore v. City of Waco, 85 Tex. 206; Carson v. Fuhs, 131 Pa. St. 256; Staffordville Gravel Co. v. Newell, 53 N. J. L. 412, 19 Atl. Rep. 209; Greer v. Pate, 85 Ga. 552; Behmyer v. Odell, 31 Ill. App. 350; Huber v. Crosland, 140 Pa. St. 575; 21 Atl. Rep. 404; Campbell v. Morgan, 68 Hun, 490; Field v. City of Providence, 17 R. I. 803; Smith v. Smith, 71 Mich. 633, 40 N. W. Rep. 21; Ratliffe v. Marrs, 87 Ky. 26;

written and what is printed, the written part prevails.[8] Where in a printed blank form of a warranty deed the printed words "forever, a certain piece and parcel of land lying and being" are stricken out, and the words "all my right, title, and interest in and unto" are inserted in their place, followed by a description of the land, the deed containing a covenant, "that until the ensealing of these presents, we are the sole owners of the premises, and that they are free," etc., the deed is a quitclaim deed.[9] If the deed contains a clause decisively showing the intention of the parties, ambiguities and inconsistencies in other clauses of the deed will not defeat such intention.[1] As said by Lord Wensleydale: "The question is

8 S. W. Rep. 876; White's Trustee v. White, 86 Ky. 602; 7 S. W. Rep. 26; Wonn v. Pittman, 82 Ga. 637; Brown v. Ferrell, 83 Ky. 417; Grieber v. Lindenmeier, 42 Minn. 99; Anderson v. Logan, 105 N. C. 266.

[8] Cummings v. Dearborn, 56 Vt. 441. This is the rule with regard to all contracts: McNear v. McComber, 18 Iowa, 17; Hill v. Miller, 76 N. Y. 32; Carrigan v. Insurance Co., 53 Vt. 418, 38 Am. Rep. 687; Clarke v. Woodruff, 83 N. Y. 518; Weisser v. Maitland, 3 Sand. 318; Robertson v. French, 4 East, 130. But both the written and printed parts will be construed together and operation given to both if possible: Harper v. Albany Mut. Ins. Co., 17 N. Y. 194; Alsagar v. St. Catharine's Dock Co., 14 Mees. & W. 794; Goix v. Low, 1 Johns. Cas. 341; Hunter v. General Mut. Ins. Co. of N. Y., 11 La. Ann. 139; Wallace v. Insurance Co., 4 La. 289; Cushman v. Northwestern Ins. Co., 34 Me. 487; Howland v. Comm. Ins. Co., Anth. 46; Goicoechla v. Louisiana State Ins. Co., 6 Mart., N. S. (La.) 51; 17 Am. Dec. 175; Loveless v. Thomas, 152 Ill. 479, 38 N. E. 907; Miller v. Mowers, 227 Ill. 392, 81 N. E. 420.

[9] Cummings v. Dearborn, 56 Vt. 441. The word "premises" may refer to the interest intended to be conveyed as well as to the land.

[1] Bent v. Rogers, 137 Mass. 192. In Coleman v. Beach, 97 N. Y. 545, 553, Mr. Chief Justice Ruger, in delivering the opinion of the court, said: "If the disposition which the owner of property desires to make does not contravene any positive prohibition of law, his control over it is unlimited, and the only office which the courts are called upon to perform, in construing his transfers of title, is to discover and give effect to his intentions. In the case of repugnant dispositions of the same property contained in the same instrument, the courts are of necessity compelled to choose between them; but it is only when they are irreconcilably repugnant that such a disposition of the question is required to be made. If it is the clear

not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed; a most important distinction in all classes of construction, and the disregard of which often leads to erroneous conclusions."[2] The express language of a deed, however, cannot be subverted by a mere matter of convenience or taste.[3] Where a technical word is used, evidently in a sense different from its technical signification, the court will give to it the construction which the grantor intended.[4] While a grantor has the right to assign to words in the deed a meaning different from that which they ordinarily bear,[5] still the construction of a deed is the province of the court.[6] All conveyances

intent of the grantor that apparently inconsistent provisions shall all stand, such limitations upon, and interpretations of the literal signification of the language used, must be imposed, as will give some effect if possible to all the provisions of the deed."

[2] In Monypenny v. Monypenny, 9 Hoffm. L. Cas. 146. See, also, Ex parte Chick, Re Meredith, 11 Chip. D. 739; Evans v. Vaughan, 4 Barn. & C. 266; Hilbers v. Parkinson, 25 Chip. D. 203; Smith v. Packhurst, 3 Atk. 126.

[3] Fratt v. Woodworth, 32 Cal. 219; 91 Am. Dec. 573.

[4] Central Pacific R. R. Co. v. Beal, 47 Cal. 151.

[5] Morrison v. Wilson, 30 Cal. 344. See Wilcoxson v. Sprague, 51 Cal. 640.

[6] Moody v. Palmer, 50 Cal. 32. See Whitman v. Steiger, 46 Cal. 256. A deed is not a mere quitclaim deed which contains the words, "have bargained, sold, and quitclaimed, and by these presents do bargain, sell, and quitclaim, . . . all our right, title, and interest, estate, claim, and demand, both at law and in equity, and as well in possession as in expectancy": Wilson v. Irish, 62 Iowa, 260. Where a person who holds a second mortgage, and is also co-assignee in bankruptcy of the estate of the mortgagor, executes a quitclaim deed of the property to a third person, the latter becomes an assignee of the second mortgage, but does not take the interest of the grantor as co-assignee in bankruptcy; the assignees in bankruptcy still retain the equity of redemption: Southwick v. Atlantic Fire & Mar. Ins. Co., 133 Mass. 457. Where the deed shows an intent to transfer any future interest which the grantor might acquire, the deed will be treated in equity as an executory agreement to convey, and the grantor will be compelled to convey the interest subsequently acquired: Hannon v. Christopher, 34 N. J. Eq. 459. Where a person conveys to a town and "their successors and assigns

affecting real estate, so far as questions of their validity, force, effect, and construction are concerned, must depend entirely on the law of the place where the property is situated.[7] Words which are not technical must be construed as bearing their ordinary signification.[8] "Rules of construction are adopted with a view to ascertain the intention of the parties, and are founded in experience and reason, and not arbitrarily adopted. They are not intended to make terms for contracting parties, but simply to ascertain what the language means which they have employed in their contracts. There are words in deeds, as in notes and other instruments which have a technical meaning, and are construed accordingly; but language in deeds or notes, or other instruments, not technical, must be taken in its ordinary and usual sense. There is no reason why a rule which will discover the meaning of language not technical, in a note or other instrument, may not be resorted to, to ascertain the meaning of language not technical in a deed."[9]

§ 838. **Expression of grantor's motive.**—The effect of the deed must depend upon the effect of the language used. A grantor can impose conditions, and can make the title conveyed dependent upon their performance. But if he does not make any condition, but simply expresses the motive which induces him to execute the deed, the legal effect of the granting

for literary purposes," with the agreement that the town should keep the property in repair 'for the specific purpose of maintaining a public school," this is not a dedication of the property to public uses: McGehee v. Woodville, 59 Miss. 648.

[7] West v. Fitz, 109 Ill. 425; Riley v. Borroughs, 41 Neb. 296, 59 N. W. 929; In re Delehanty, 11 Ariz. 366, 17 L.R.A.(N.S.) 173, 95 Pac. 109; Lumber Co. v. Sawyer, 135 Wis. 525, 116 N. W. 255. As to the law of place in the construction of covenants, see Bethell v. Bethell, 54 Ind. 428, 23 Am. Rep. 650. See, also, as to law of place, Doe d. Moore v. Nelson, 3 McLean, 383; Clarke v. Graham, 6 Wheat. 577, 5 L. ed. 334. See as to statutory provisions: Butterfield v. Beall, 3 Ind. 203; Root v. Brotherson, 4 McLean, 230.

[8] Bradshaw v. Bradbury, 64 Mo. 334.

[9] Bradshaw v. Bradbury, 64 Mo. 334, 336, per Henry, J.

words cannot be controlled by the language indicating the grantor's motive.[1] Thus, where a deed states in the *habendum* clause that it is made "for the sole and separate use and benefit of the wife and her children forever," these words will not give any estate to the children; they perform no other office than to indicate the grantor's motive. The court said that, if it had not been the intention of the parties to convey an absolute fee to the grantee, "the land would doubtless have been conveyed to a trustee, to manage it, and to apply the profits to the support of the wife and children, and provision made for turning over their interests to the children as they should respectively attain full age. The consideration flowed from her alone, and her husband, being insolvent, the burden of maintaining the family was cast upon her. The language of the *habendum* of the deed already quoted merely indicates the motive for the conveyance to her, which was to provide a home and the means of support for herself and children, free from the control of her husband, and secure from the claims of his creditors." [2] If the grantor recites that his purpose is to convey a life estate with the remainder in fee to his children, but grants the property to the grantee and his heirs in fee simple, the grantee will take such estate, as the granting part of the deed governs.[3] If a grantor, who, as a devisee under a will and executrix, has the right to convey, subject to the rights of the creditors of the estate, the legal title to the land devised to her, the fact that she describes herself as administratrix does not affect the deed so far as her right or the right of heirs to avoid it is concerned.[4] If the grantor describes himself as the "administrator of the goods" of a decedent, and declares that the "administrator as aforesaid" conveys the property and that he, "administrator," has signed and executed

[1] Mauzy v. Mauzy, 79 Va. 537.
[2] Mauzy v. Mauzy, 79 Va. 537, 539, and cases cited.
[3] Dunbar v. Aldrich, 79 Miss. 698, 31 So. 341.
[4] Turnbull v. Leavitt, 158 Mich. 545, 123 N. W. 43.

the deed, although he signs his individual name without the addition to his title as administrator, his intention to convey as administrator of the estate is sufficiently manifest.[5]

§ 838a. Expressions limiting title conveyed.—If a grantor conveys all his right, title, and interest, and adds "being a one-half undivided interest," the operation of the deed to convey all the grantor's interest, is not limited by these words, nor will they be construed as excepting any interest conveyed by the prior words of grant.[6] Subsequent provisions will not be deemed to have the effect of restricting what has been previously granted.[7] The effect of a deed conveying land cannot be destroyed by a clause stating that it is intended to convey the title which the grantor received from a specified deed, when, by the latter, no title whatever was conveyed.[8] The question is not always one of intent, but of enforcing established and well-defined principles of law. When it was sought to show, by the language of the deed and by evidence offered for that purpose, that the grantor received no title by the conveyance specified in his deed, and hence his deed passed no title, Mr. Justice Emery said: "In support of this contention the defendant invokes the broad proposition that, in considering written instruments, courts should always seek for the actual intent of the parties, and give effect to that intent when found, whatever the form of the instrument. The proposition has been stated perhaps as broadly as this in text-books and judicial opinions, but it is not universally true. It is hedged about by some positive rules of law, which the parties must heed if they would effectuate their intent, or avoid consequences they did not intend. Muniments of title, especially, are guarded by positive rules of law, to secure their certainty,

[5] Sapp v. Cline, 131 Ga. 433, 62 S. E. 529.

[6] McLennan v. McDonnell, 78 Cal. 273.

[7] Thornton v. Mehring, 117 Ill. 55; Pike v. Monroe, 36 Me. 309, 58 Am. Dec. 751.

[8] Maker v. Lazell, 83 Me. 562, 23 Am. St. 795.

precision, and permanency. If, in the effort to ascertain the real intent of the parties, one of these rules is encountered, it must control, for no positive rule of law can be lawfully violated in the search for intent. Some of these rules prevent an intent from becoming effectual, however clearly expressed, because the language required by the rule was not used. . . . There is one rule pertaining to the construction of deeds, as ancient, general, and rigorous as any other. It is the rule that a grantor cannot destroy his own grant, however much he may modify it or load it with conditions—the rule that having once granted an estate in his deed, no subsequent clause, even in the same deed, can operate to nullify it. We do not find that this rule has ever been disregarded, or even seriously questioned, by courts. We find it often stated, approved, and sometimes made a rule of decision."[9] Thus, where an owner of land "releases, quitclaims, and conveys [to the grantee], and its successors and assigns forever, all his claim, right, title, and interest of every name and nature, legal or equitable in, and to" the land, and by a subsequent clause declares that "the interest and title intended to be conveyed by this deed is only that acquired" by the grantor by virtue of a specified deed which had been previously executed to him, and which it is assumed conveys to him only an undivided half interest in the land, the two clauses are inconsistent. The words contained in the granting clause must prevail, and the whole interest of the grantor will pass by the deed.[1] It is said in a recent case that the granting clause in a deed "determines the interest conveyed, and that, unless there be repugnancy, obscurity, or ambiguity in that clause, it prevails over introductory statements or recitals in conflict therewith, and over the *habendum*, too, if that clause is contradictory of or repugnant to it."[2]

[9] Maker v. Lazell, 83 Me. 562, 23 Am. St. Rep. 795.

[1] Green Bay and Mississippi Canal Co. v. Hewett, 55 Wis. 96, 42 Am. Rep. 701.

[2] Dickson v. Van Hoose, 151 Ala.

§ 838b. Subsequent clauses neither enlarging nor limiting grant.—Where a description concludes with a statement "meaning and intending to convey the same premises conveyed to me," this will not enlarge the grant, but is merely an aid to trace the title.[3] If the description in a deed is clear and complete, a statement that it is the same land described in a recorded agreement will not, by reference to such agreement, be construed as showing that a smaller quantity of land was conveyed than would appear from the face of the deed.[4] In case a fee is conveyed, it is not rendered a qualified fee, because the deed contains a declaration of the use, but it is to be construed as directory to the administration of the trust.[5] When land is conveyed to the bishop of the Roman Catholic Church, for the benefit of the church, and to his assigns and successors forever, a fee simple, in the absence of any conditions subsequent, either express or implied, is vested in such bishop in trust for the church.[6] If the granting

459, 19 L.R.A.(N.S.) 719, 47 So. 718, citing § 836a of the text and also the following: Webb v. Webb, 29 Ala. 588, 606; McMillan v. Craft, 135 Ala. 148, 33 South, 26; Gould v. Womack, 2 Ala. 83; Kershaw v. Boykin, 1 Brev. 301; Huntington v. Havens, 5 Johns. Ch. 23; Green Bay & M. Canal Co. v. Hewett, 55 Wis. 96, 42 Am. St. Rep. 701, 12 N. W. 382; 13 Cyc. Law & Proc. pp. 619, 666, 9 Am. & Eng. Enc. Law, p. 139, 17 Am. & Eng. Enc. Law, p. 8; Wilkins v. Norman, 139 N. C. 40, 111 Am. St. Rep. 767, 51 S. E. 797; Berridge v. Glassey, 112 Pa. 442, 56 Am. Rep. 322, 3 Atl. 583; Whetstone v. Hunt, 78 Ark. 230, 93 S. W. 979, 8 A. & E. Ann. Cas. 443; 3 Washb. Real Prop. 6th ed. § 2360.

[3] Brown v. Heard, 85 Me. 294.

[4] Jones v. Webster Woolen Co., 85 Me. 210. That the tendency is to uphold the deed, see § 855, *post*.

[5] Board of Commissioners of Mahoning County v. Young, 59 Fed. Rep. 96, 8 C. C. A. 27.

[6] Gabert v. Olcott, 86 Tex. 121. See, also, Pritchard v. Bailey, 113 N. C. 521; Branson v. Studebaker, Ind. 548; Branson v. Studebaker, 133 Ind. 147; Bodwell Granite Co. v. Lane, 83 Me. 168; 21 Atl. Rep. 829. A statement in a deed that it is made for a special and particular purpose will not create, by implication, a condition subsequent, as where a deed to a city states in the *habendum* that the land conveyed is to be held forever as and for a street, to be kept as a public highway. If the city fails to use the land conveyed as a street, it does not revert to the grantor: Kilpatrick v. Mayor of Baltimore, 81

clause in a deed is sufficient to convey all of the interest of the grantor, and the deed also contains a clause stating that it is expressly agreed that the interest conveyed by the deed by the grantor "is that only which he acquired by a conveyance" from another person, and the grantor has not acquired any interest from the latter, but owns an interest acquired from a different source, the interest of the grantor is conveyed by the deed.[7]

§ 838c. **Further consideration—Execution sales.**—So, in the case of a deed made pursuant to a sale on execution, where the deed conveys all the right, title, and interest of the judgment debtor in and to certain property specifically described, and contains the phrase, "being a leasehold unexpired, originally granted" in a manner described, the fee will pass to the purchaser when the execution debtor is, in fact, at the time of the sale, the owner of the property. The recital as to the leasehold interest will not have the effect of limiting the estate conveyed by the preceding general terms of description.[8] Likewise, if the language in the deed shows that an undivided moiety is conveyed, and it is subsequently claimed, that by virtue of an added clause in the deed the grantor really intended to convey an undivided one-quarter interest only, the court, if such be the meaning of the clause, will reject it for repugnance.[9] If a grantor conveys land by a definite description, and then adds, "intending hereby to convey the same lands, and no other, which passed to me by virtue of" a mortgage which he designates, and if the description covers other land than that included in the mortgage, the title to the

Md. 179, 27 L.R.A. 643, 48 Am. St. Rep. 509. See, where the purpose expressed is for a street, Soukup v. Topeka, 54 Minn. 66, 50 N. W. Rep. 824; Greene v. O'Connor, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. Rep. 692. As to park, see Flaten v. City of Moorehead, 51 Minn. 518, 19 L.R.A. 195, 53 N. W. Rep. 807.

[7] Wilcoxson v. Sprague, 51 Cal. 640.

[8] Dodge v. Walley, 22 Cal. 226.

[9] Cutler v. Tufts, 3 Pick. 272.

additional land will be conveyed by the deed.[1] The whole object is to construe the deed so as to give effect to it, if possible, as a conveyance, and clauses which are repugnant to the general intention of the deed must be declared void.[2] Hence, a grant made in the premises of a deed cannot be contradicted or retracted in a subsequent part of the deed.[3]

§ 839. **Surrounding circumstances.** — The circumstances connected with the transaction and the situation of the parties may be considered in arriving at the intent of the parties.[4] On a portion of public land occupied by two parties, a dam and mill had been erected. One of these conveyed to the other six acres of the land, describing the part conveyed by metes and bounds, with the hereditaments and appurtenances thereunto belonging. It was agreed between the parties that the purchaser from the government of this land should convey his recognized portion of it to the other. By reason of the structure of the dam, the water had flowed over the land of both parties, and the court held that the right to flow the land was an appurtenance, and was so understood at the time of the execution of the deed.[5] Where land adjoins tidewaters and is conveyed "with the flats adjoining the land and appertaining thereto, meaning to convey only the flats of right

[1] Wilder v. Davenport, 58 Vt. 642.

[2] Wilcoxson v. Sprague, 51 Cal. 640.

[3] Winter v. Gorsuch, 51 Md. 180; Budd v. Brooke, 3 Gill. 198, 43 Am. Dec. 321.

[4] Truett v. Adams, 66 Cal. 218; Treat v. Strickland, 23 Me. 234; Pico v. Coleman, 47 Cal. 65; Morris Canal etc. Co. v. Matthiesen, 17 N. J. Eq. (2 Green) 385; Mulford v. Le Franc, 26 Cal. 88; Abbott v. Abbott, 53 Me. 356; Hadden v. Shoutz, 15 Ill. 581; Dunn v. English. 23 N. J. L. (3 Zab.) 126; Adams v. Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Bradford v. Cressey, 45 Me. 9; Hamm v. San Francisco, 17 Fed. Rep. 119; Winnipiseogee etc. Co. v. Perley, 46 N. H. 83; French v. Carhart, 1 N. Y. (1 Const.) 96; Saunders v. Clark, 29 Cal. 299; Wade v. Deray, 50 Cal. 376; Kinney v. Hooker, 65 Vt. 333, 36 Am. St. Rep. 864. See Piper v. True, 36 Cal. 606; Sprague v. Edwards, 48 Cal. 239; Kingsland v. New York, 45 Hun, 198.

[5] Hadden v. Shoutz, 15 Ill. 581.

belonging to said parcel of land," the grantee will take only such flats as the court may determine to belong to the parcel of land conveyed, unless it is shown by sufficient evidence that the language was used by the parties in a different sense. If such is the case, the language must receive that construction which will carry out the intention of the parties.[6] Whether an instrument is or is not a deed, is a question of law to be decided by the court, and it cannot be shown to be a deed by evidence *dehors* the instrument.[7] Courts will not look at the extrinsic circumstances attending the execution of a deed, where its language is clear, unambiguous and not requiring construction[8] but in case of doubt, the court may consider not only the language, but also the circumstances surrounding the transaction and the situation of the parties.[9] In the case of a gift, the relationship of the parties and the object of the donor may be considered.[1] After the execution of a deed, the intent of the grantor although he may remain in possession cannot be shown by subsequent deeds and mortgages made by the grantor.[2] If there is no ambiguity in the deed, it is

[6] Treat v. Strickland, 23 Me. 234.

[7] Corlies v. Van Note, 16 N. J. L. (1 Har.) 324.

[8] New York Life Insurance & Trust Co. v. Hoyt, 161 N. Y. 1, 55 N. E. 299, affirming 52 N. Y. Supp. 813, 31 App. Div. 84.

[9] Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264, 96 N. W. 488; Fullager v. Stockdale, 138 Mich. 363, 101 N. W. 576; Newaygo Co. v. Chicago & W. M. Ry. Co., 64 Mich. 114, 30 N. W. 910; Smith v. Smith, 71 Mich. 633, 40 N. W. 21; Elgin City Banking Co. v. Center, 83 Ill. App. 105; Center v. Elgin Banking Co., 185 Ill. 534, 57 N. E. 439; Whittaker v. Whittaker, 99 Mass. 367; Inhabitants of Cambridge v. Inhabitants of Lexington, 34 Mass. (17 Pick.) 22; Shartenberg v. Ellery, 27 R. I. 414, 62 Atl. 979; Hart v. Saunders, 74 Neb. 818, 105 N. W. 709; Mallory v. Mallory, 86 Ill. App. 193; Long v. Timms, 107 Mo. 512, 17 S. W. 898; Casto v. Baker, 59 W. Va. 683, 53 S. E. 600; Daum v. Conley, 27 Colo. 56, 59 Pac. 753; Farnsworth v. Noffsinger, 46 W. Va. 410, 33 S. E. 246; Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250; Hart v. Saunders, 74 Neb. 818, 105 N. W. 709.

[1] Vawter v. Newman, 74 Kan. 290, 86 Pac. 135.

[2] Ranken v. Donovan, 166 N. Y. 626, 60 N. E. 1119. The court should view the language used in the light of the surrounding circumstances. Lancaster etc. Co. v.

not proper to inquire into the surrounding circumstances [3] as such evidence is admitted only in case of doubt to aid the court in construing the language and ascertaining the intent of the grantor.[4] If the grantor uses the words "exception" and "reservation" together, showing that he does not know their technical signification, the intention of the parties will be gathered from the deed, interpreted by the light afforded by surrounding circumstances.[5]

§ 840. **This is but one rule.**[6]—The rule mentioned in the preceding section is but one of the numerous rules of construction, the object of all of which is to ascertain the intent of the parties. Generally, in the construction of every doubtful or ambiguous deed, the intent cannot be obtained by the application of one rule alone. All should be considered, and to each should be given its proper weight. As illustrating the manner to be adopted in arriving at the intent of the parties, the language of Mr. Chief Justice Shaw, of Massachusetts, is peculiarly pertinent: "The same individual, owning two tenements adjoining, may carve out and sell any portion that he pleases, and the terms of the grant, as they can be learned, either by words clearly expressed, or by just and sound construction, will regulate and measure the rights of the grantee. In construing the words of such a grant, where

Jones, 75 N. H. 172, 71 Atl. 871; Ray v. Grube, 115 N. Y. Supp. 737, 131 App. Div. 294.

[3] Highland Realty Co. v. Groves, 130 Ky. 374, 113 S. W. 420.

[4] Maxwell v. Harper, 51 Wash. 351, 98 Pac. 756. See, also, Bernero v. McFarland Real Estate Co., 134 Mo. App. 290; Towns v. Brown, 114 S. W. 773.

[5] City Club of Auburn v. McGeer, 198 N. Y. 609, 92 N. E. 105. Extrinsic circumstances may be considered: White v. Bailey, 65 W. Va. 573, 64 S. E. 1019. Where a deed is ambiguous in its terms, parol evidence as to the surrounding circumstances may be received and considered for the purpose of ascertaining the intention of the parties: Maxwell v. McCall, Iowa, 124 N. W. 760.

[6] This section is cited as authority in Hickey v. Lake Shore etc. Ry. Co., 51 Ohio St. 40, 23 L.R.A. 396, 46 Am. St. Rep. 545.

the words are doubtful or ambiguous, several rules are applicable, all, however, designed to aid in ascertaining what was the intent of the parties, such intent, when ascertained, being the governing principle of construction. And first, as the language of the deed is the language of the grantor, the rule is, that all doubtful words shall be construed most strongly against the grantor, and most favorably and beneficially for the grantee. Again, every provision, clause, and word in the same instrument shall be taken into consideration in ascertaining the meaning of the parties, whether words of grant, of covenant, or description, or words of qualification, restraint, exception, or explanation. Again, every word shall be presumed to have been used for some purpose, and shall be deemed to have some force and effect, if it can have. And further, although parol evidence is not admissible to prove that the parties intended something different from that which the written language expresses, or which may be the legal inference and conclusion to be drawn from it, yet it is always competent to give in evidence existing circumstances, such as the actual condition and situation of the land, buildings, passages, watercourses, and other local objects, in order to give a definite meaning to language used in the deed, and to show the sense in which particular words were probably used by the parties, especially in matters of description."[7] Where the meaning is doubtful, evidence as to the acts of the parties may be admitted to show the intent.[8] But where the terms of the deed are plain and intelligible, and the instrument can operate, evidence as to the acts of the parties claiming under it is not admissible.[9] The intent, when clearly expressed, cannot be altered by evidence of extraneous circumstances.[1]

[7] In Salesbury v. Andrews, 19 Pick. 250, 252.

[8] Winnipiseogee etc. Co. v. Perley, 46 N. H. 83.

[9] Dunn v. Bank of Mobile, 2 Ala. 152; Hutchings v. Dixon, 11 Md. 29.

[1] Means v. Presbyterian Church, 3 Watts & S. 303.

§ 841. **Appearance at time of sale.**—If, by an artificial arrangement, an owner of land has created an advantage for one part of the land to the detriment of the other, the holders of the two parts upon a severance of the ownership, take them as they openly and visibly appeared at time of the deed. As said by Selden, J.: "The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may at any time, rearrange the qualities of the several parts. But the moment a severance occurs by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right by altering arrangements then openly existing, to change materially the relative value of the respective parts."[2] A person leased a tract of land to A, reserving the streams of water and the soil under them, with the privilege of erecting upon any part of the premises mills and dams, and reserving also the land which might be overflowed in consequence of such dams. A sold a part of the premises to B with like exceptions, and the

[2] Lampman v. Milks, 21 N. Y. 505, 507.

latter erected a dam on his land, by which the land of A was overflowed. The court held that until the original owner exercised his rights and erected dams, the reservation was inoperative, and if considered strictly as an exception, was void for uncertainty.[3] Where a tract of land is conveyed, described by metes and bounds, with a mill upon it, and there was at the time of the conveyance a raceway to conduct the water from the mill running along the side of a stream beyond the limits of the land conveyed into other land owned by the grantor, and finally discharging into the stream, and this raceway had been used for many years in connection with the mill, and was required for the convenient use of the mill, the right to the uninterrupted flow of the water through the whole extent of the raceway passed by the conveyance, as appurtenant to the mill.[4] If a deed grants a right of way over other

[3] Thompson v. Gregory, 4 Johns. 81, 4 Am. Dec. 255.

[4] New Ipswich Factory v. Batchelder, 3 N. H. 190, 14 Am. Dec. 346. The court quoted this language from Nicholas v. Chamberlain, Cro. James, 121: "It was held by all the court, upon demurrer, that if one erect a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterward sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and the pipes pass with the house; *because they are necessary and quasi appendant thereto.* And he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require. So it is, if a lessee for years of a house and land erect a conduit upon the land, and after the term determines, the lessor occupies them together for a time, and afterward sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and pipes, and liberty to amend them." The court then declares that the rule thus laid down "seems to us to be founded on sound reason and good sense, and to apply in all its force to the case now before us. A raceway may be as necessary an appurtenance to a mill to conduct the water from it, as a canal to conduct to it the water necessary to work it. In many cases a severance of the appurtenance from the thing to which it is appurtenant, would render both useless. For aught we know, that may be the case in this instance. But however that may be, the case finds that the raceway was necessary for the convenient working of the mills. Shepherd in his Touch-

lands of the grantor, and subsequently, by parol agreement, the parties locate the precise position of the way, the right of way which will pass to a subpurchaser is limited and defined by such agreement.[5]

§ 842. Illustrations.—Another illustration of the principle that where the owner of two tenements sells one of them, the grantee takes the premises with the benefits and burdens which appear at the time of the conveyance to belong to it, is a case where the owner of a spring lot and of a paper mill on another tract had conveyed the water to the mill by an artificial arrangement. He sold the spring lot, and the court held that the grantee took it subject to the burden.[6] If a boundary line is described as running up the river to certain falls, "thence continuing to run in such a direction as to include a millyard and the whole of a millpond, which may be raised by a dam on said falls to a certain road," the description determines the boundary of the land itself, and not the height to which it is permissible to raise the pond.[7] It was said by Judge Story: "It has been very correctly stated at the bar, that in the construction of grants the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties. In truth, every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for."[8] But actual knowledge on the part of the contracting parties will repel the presumption of law, that in the case of

stone, 89, says: 'By the grant of mills the waters, floodgates, and the like, that are of necessary use to the mills, do pass,' and we entertain no doubt that the raceway in this case passed by Barrett's deed, as an appurtenance to the mill."

[5] Kinney v. Hooker, 65 Vt. 333, 36 Am. St. Rep. 864.

[6] Seymour v. Lewis, 13 N. J. Eq. 439, 78 Am. Dec. 108.

[7] Hull v. Fuller, 4 Vt. 199.

[8] In United States v. Appleton, 1 Sum. 492, 501.

the sale of land the parties contract with reference to the physical condition of the property at the time.[3] The result of the decisions on this question is thus summed upon by Mr. Justice Folger: "1st. That when an owner of a whole tenement has by some artificial arrangement of the material properties of his estate, added to the advantages and enhanced the value of one portion of it, he cannot after selling that portion with those advantages openly and visibly attached, voluntarily break up the arrangement, and thus destroy or materially diminish the value of the portion sold. 2d. It is further held, that the moment the severance of the tenement takes place by a sale of a part, the right of the owner to redistribute the properties of the respective portions ceases, and easements and servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. 3d. It is further held, that parties are presumed to contract in reference to the condition of the property at the time of the sale, and that neither has a right by altering arrangements then openly existing, to change materially the relative value of the respective parts." [1]

§ 843. **Grammatical construction.**—"A grammatical construction is not always to be followed, and it has been well said that neither false English nor bad Latin will make void a deed when the meaning of the party is apparent. In construing an instrument, that construction is always to be adopted which will accomplish the object for which the instrument was executed." [2] A father executed a deed to his son, reserving a maintenance to himself, and requiring the pay-

[3] Simmons v. Cloonan, 47 N. Y. 3.

[1] In Simmons v. Cloonan, 47 N. Y. 3, 9. And see, also, Curtis v. Ayrault, 47 N. Y. 73; Cox v. Matthews, 1 Vent. 237; Hazard v. Robinson, 3 Mason, 272; Brakely v. Sharp, 2 Stockt. Ch. 206; Robbins v. Barnes, Hob. 131; Palmer v. Fletcher, 1 Lev. 122, 2 Sid. 167; Shury v. Piggot, 3 Bulst. 339; Kilgour v. Ashcom, 5 Har. & J. 82; Dunkles v. Milton R. R. Co., 4 Fost. (N. H.) 489.

[2] Hancock v. Watson, 18 Cal. 137, per Cope, J., and see Cotting v. Boston, 201 Mass. 97, 87 N. E. 205.

ment of his debts. The deed contained a condition giving the grantor a right of re-entry in case the grantee neglected to pay such debts, *and* suffered the grantor to be put to cost, trouble, or expense on account of such debts. The court held, that after the grantor's death, the neglect to pay a debt which he owed, although not presented after his death, worked a forfeiture of the estate, and that the grammatical sense of words is not to be adhered to in the construction of either a deed or a will where a contrary intent is manifest; and that the word "and" may be read "or," when by so doing effect will be given to the intent of the parties.[3] "It is not the practice of courts of justice to divest persons of their estates by a rigid adherence to the rules of gramatical construction, or by a strict interpretation of the language of an instrument, when the sense in which the words were used is apparent from other portions of the instrument viewed in the light of the attending facts. The sole object to be obtained in the construction of contracts is to ascertain the real intention of the parties; and with this view the whole contract and all its provisions, together with the relations of the parties toward each other, will be considered; and effect will be given to the intent thus ascertained, however clumsily the instrument may be worded, and however grossly it may violate the strict rules of grammatical construction."[4]

§ 843a. **Repugnant clauses.**—If a deed contains two clauses repugnant to each other, the first will prevail.[5] But,

[3] Jackson v. Topping, 1 Wend. 388, 19 Am. Dec. 515.

[4] Sprague v. Edwards, 48 Cal. 239, 249, per Mr. Justice Crockett, in delivering the opinion of the court. See, also, Racouillat v. Sansevain, 32 Cal. 376, 387. Relative words in the construction of all contracts are generally deemed to refer to the nearest antecedent: Bold v. Molineux, Dyer, 14 *b*: Com. Dig. tit. Parols (A. 14); Rex v. Inhabitants of St. Mary's, 1 Barn. & Ald. 327; Baring v. Christie, 5 East, 398; 2 Parsons on Contracts (6th ed.), 513. But see Gray v. Clark, 11 Vt. 583; Stamiland v. Hopkins, 9 Mees. & W. 178; Carbonel v. Davies, 1 Strange, 394.

[5] Pritchett v. Jackson, 103 Md. 696, 63 Atl. 965; Blackwell v. Blackwell, 124 N. C. 269, 32 S. E. 676.

if possible, the repugnant provisions should be so construed as to reach the true intent of the parties and to accomplish this purpose the deed should be considered as a whole.[6] The granting clause will control the *habendum* unless the latter clearly express the true intent of the parties.[7] The courts will avoid a construction which will create a repugnance between different parts of a deed.[8] If there is a repugnance between the language of the grantor and words incorporated in the deed as a recital from some other instrument, the language of the grantor will prevail over the recital.[9] If the deed contains a provision which accords with a rule of law, a proviso in conflict with the law, which would defeat the deed, will not be allowed to prevail over the former.[1] Reliance cannot be placed on one recital as establishing a fact where another recital in the deed explains and vitiates the first, as the deed must be considered as a whole.[2] The whole instrument should be considered and that construction adopted which is most consistent with its apparent intent.[3] A clause in a deed conveying and warranting the land described without any definition of the nature and character of the estate granted, is not repugnant to the *habendum* clause, vesting a life estate in the grantee.[4] Technical words in the granting and *habendum* clauses must give way to a clause

[6] McDougal v. Musgrave, 46 W. Va. 509, 33 S. E. 281. See, also, Hitchler v. Boyles, 21 Tex. Civ. App. 230, 51 S. W. 648.

[7] Owensboro & N. R. R. Co. v. Griffith, 92 Ky. 137, 17 S. W. 277. See, also, Chicago Lumbering Co. v. Powell, 120 Mich. 51, 78 N. W. 1022; Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666; Welch v. Welch, 183 Ill. 237, 55 N. E. 694. The *habendum* will control if it is manifest that such was the grantors intention: Wilson v. Terry, 130 Mich. 73, 89 N. W. 566; Powers v. Hibberd, 114 Mich. 533, 72 N. W. 339.

[8] Chew v. Kellar, 171 Mo. 215, 71 S. W. 172.

[9] Scott v. Michael, 129 Ind. 250, 28 N. E. 546.

[1] Noyes v. Guy, 2 Ind. 205, 48 S. W. 1056.

[2] Perry v. Clift, 54 S. W. 121.

[3] Hitchler v. Boyles, 21 Tex. Civ. App. 230, 51 S. W. 648.

[4] Welch v. Welch, 183 Ill. 237, 55 N. E. 694. The *habendum* cannot be used to cut down the granting clause: Hads v. Tiernan, 213

limiting the interest of the grantee to a life estate.[5] But if a fee is conveyed by one clause to the wife, and a life estate by a following clause to her husband, the latter will be rejected on account of repugnancy.[6] Still if the purpose of the deed can clearly be ascertained, repugnant words, although they appear first in the deed, must yield to that purpose.[7] If a deed contains full covenants of warranty and also an agreement that the grantees will not sell during the grantor's lifetime and will convey during such period at his request, the repugnant words will yield to the deed and the estate conveyed by the deed will not be defeated.[8] And it may be stated as a general proposition that exceptions, conditions or reservations inconsistent with the interest granted by the deed and which have a tendency to depreciate or destroy it, are of no effect.[9] The rule that prevails in Missouri is that the intention as gathered from the whole instrument should govern and this rule supersedes the old rule of construction that the granting clause should prevail over the *habendum* in case of repugnancy.[1] A case illustrating the rule that the granting

Pa. 44, 62 Atl. 172; Lamb v. Medsker, 35 Ind. App. 662, 74 N. E. 1012, unless the *habendum*, as shown by the whole instrument expresses true intent of the parties: Owensboro & N. R. Co. v. Griffith, 92 Ky. 137, 17 S. W. 277.

[5] Atkins v. Baker, 112 Ky. 877, 66 S. W. 1023.

[6] Blackwell v. Blackwell, 124 N. C. 269, 32 S. E. 676.

[7] Goldsmith v. Goldsmith, 46 W. Va. 426, 33 S. E. 281. General words in the *habendum* clause will not control special words of limitation used in the grant: Hunter v. Patterson, 142 Mo. 310, 44 S. W. 250. As the object of the *habendum* is to define the extent of the grant, the court will reject it only when the repugnance between the estate granted and that limited in the *habendum* is clear and irreconcilable: McDill v. Meyer, 128 S. W. 364.

[8] Durand v. Higgins, 67 Kan. 110, 72 Pac. 567.

[9] Riddle v. Town of Charlestown, 42 W. Va. 796, 28 S. E. 831. See, also, McCoy v. Pease, 17 Tex. Civ. App. 303, 42 S. W. 659; Gaskins v. Hunton, 92 Va. 528, 23 S. E. 885; Adams v. Fisher, 143 Mich. 673, 107 N. W. 705; McCullock v. Holmes, 111 Mo. 445, 19 S. W. 1096; Pritchett v. Jackson, 103 Md. 696, 63 Atl. 695.

[1] Utter v. Sidman, 170 Mo. 284, 70 S. W. 702.

clause must prevail over the *habendum* is one where a father and mother executed a deed to their daughter, granting it to her for her own use free from all marital rights of her present or any future husband while the *habendum* clause was to her and her assigns forever with a covenant of general warranty and providing that if she should die without bodily heirs, the land conveyed should revert to the heirs of the father and mother. This limitation was considered to be repugnant to the granting clause and not to prevent the passing of the fee.[2] But a provision in a deed to two grantees after the granting clause, that upon the death of both the grantees, "the aforesaid land shall inure to the heirs" of one of the grantees is not repugnant to the other parts of the deed and is valid.[3] If a reconciliation between the repugnant clauses in a deed is impossible, the clause will be retained which gives the greatest estate and the clause in conflict with this will be rejected.[4] If the deed conveys in its granting part an absolute estate, a clause declaring that the property shall revert to the grantee's heirs upon the death of the parties is void as it is impossible to limit a remainder on a fee.[5] If a deed conveys property to the grantees,

[2] Hughes v. Hammond, 136 Ky. 694, 26 L.R.A.(N.S.) 808, 125 S. W. 144. In case of repugnancy the rule recognized in Alabama is that the granting clause will prevail over the *habendum*: Dickson v. Wildman, 175 Fed. 580.

[3] Parsons v. Kendall, 81 Kan. 192, 105 Pac. 121. As to conflict between *habendum* and other clauses, see Pack v. Whitaker, 65 S. E. 496; Wallace v. Hodges, 160 Ala. 276, 49 So. 312; Hudson's Heirs v. Hudson's Admr., 121 S. W. 973. The former of two inconsistent clauses will prevail: Lewman v. Owens, 132 Ga. 484, 64 S. E. 544. See as to repugnant clauses: Loughridge v. Ball, 118 S. W. 321; Adams v. Merrill, 87 N. E. 36.

[4] Hopkins v. Hopkins, 114 S. W. 63.

[5] Gaylord v. Barnes, 113 N. Y. Supp. 605, 128 App. Div. 810. At common law the *habendum* could not devest an estate already granted: Triplett v. Williams, 149 N. C. 394, 24 L.R.A.(N.S.) 514, 63 S. E. 79; Dickson v. Van Hoose, 157 Ala. 459, 19 L.R.A. (N.S.) 719, 47 So. 718. But in some jurisdictions the rule is that the intent of the deed must be obtained from the entire deed without regarding the formal divisions: Triplett v. Williams, 149 N. C. 394, 24 L.R.A.(N.S.) 514, 63 S. E. 79.

"their heirs and assigns forever" and the *habendum* reads to the grantees "their lifetime and then to their heirs and assigns forever," the clause granting a fee simple estate will prevail where there is nothing in the context to show the grantor's intention.[6] An owner of the absolute estate in a tract of land executed a deed in which he recited that he was possessed of a life estate, and the granting clause conveyed all the interest of the grantor in the property, while the *habendum* clause recited that the grantee was to hold "all and singular the life estate and interest" of the grantor. The court held that whatever interest in the property the grantor possessed, passed by the deed.[7] The different parts of the deed should not be construed as repugnant to one another, if a reconciliation can be effected by any reasonable interpretation so as to make each effective.[8]

§ 844. **Resort to punctuation.**—While little regard is is to be paid to punctuation, yet it may be looked to as a last resort. "Punctuation," says Mr. Justice Baldwin, "is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail; but the court will first take the instrument by its four corners in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it." [9] No estate should be dependent upon the omission of a comma or semi-colon, but the punctuation should be disregarded.[1]

[6] Teague v. Sowder, 121 Tenn. 132, 114 S. W. 484.

[7] Dickson v. Van Hoose, 157 Ala. 459, 19 L.R.A.(N.S.) 719, 47 So. 718.

[8] Burgess v. McCommas, Tex. (Civ. App.) 129 S. W 382. Different clauses must be harmonized where possible so as to give effect to the deed: McDill v. Meyer, (Ark.) 128 S. W. 364.

[9] Ewing v. Burnet, 11 Pet. 41. See, also, Doe v. Martin, 4 Term Rep. 65, 3 Dane Abr. 558: Olivet v. Whitworth, 82 Md. 258, 33 Atl. 723.

[1] Carolina Real Estate Co. v. Bland, 152 N. C. 225, 67 S. E. 483.

§ 844a. **Deed should be construed as a whole.**—If possible, some effect must be given to every word in a deed and it must be harmonized with the other language of the conveyance.[2] The modern rule is that the grantor's intention should control. In construing the instrument, it is to be taken as a whole, and the plain intent of the grantor will prevail over technical words of legal signification.[3] The word "accepted" may be construed as "excepted."[4] Even though the words employed by the parties will destroy the grant, still where the instrument itself clearly expresses their will, the courts should proceed no further in determining its meaning.[5] Where there is no mistake or oversight, the language of the deed determines the meaning of the parties to the deed.[6] A fair and reasonable meaning should be given to the words used[7] and separate parts are to be considered in the light of other parts so that the deed may be construed in its entirety.[8] Hence, words which apparently are appropriate to a condition only, may introduce a covenant, condition or declaration of trust, and to decide within which clause it should fall, the whole clause must be considered.[9] It is a well settled rule that it is to be presumed that technical words are used in a technical sense, unless a contrary intent appears upon the face of the instrument, and that words possessing a well known definite legal signification are to be treated as having been used in their definite legal signification.[9a] If there is anything in the deed to show the grantor's intention to use technical words in a different sense, the court will undertake to ascertain and

[2] Moran v. Lezotte, 54 Mich. 83, 19 N. W. 557.

[3] Uhl v. Ohio R. Co., 51 W. Va. 106, 41 S. E. 340.

[4] Dougan v. Town of Greenwich, 77 Conn. 444, 59 Atl. 505.

[5] Jennings v. Brizeadine, 44 Mo. 332.

[6] Hudson's Heirs v. Hudson's Admr., 121 S. W. 973.

[7] Tinder v. Tinder, 131 Ind. 381, 30 N. E. 1097.

[8] McCoy v. Fahrney, 182 Ill. 60, 55 N. E. 61.

[9] Mackenzie v. Trustees of Presbytery of Jersey City, 67 N. J. Eq. 652, 3 L.R.A.(N.S.) 227, 61 Atl. 1027.

[9a] Nye v. Lovitt, 92 Va. 710, 24 S. E. 345.

effectuate the intention of the grantor,[1] and pnuctuation is never allowed to interfere with the natural and customary meaning of the language used.[2] The plain intent of the deed will not be defeated by any inaccuracy of the language employed.[3] If the grantee assumes and agrees to pay all existing mortgages, liens, taxes and claims of every character the latter clause does not restrict the claims to such as are indicated by the terms "mortgages, liens, and taxes," [4] as general words are not limited by the addition of restrictive words, where such an intention is not clearly apparent.[5] The character "&" in a deed is equivalent to the word "and." [6] The *habendum* clause in case of doubt is frequently an important fact in arriving at the intent of the parties.[7] The language in which the deed is expressed controls the construction but, if necessary, consideration can be given to the circumstances leading up to its execution; the object always to be kept in view, however, is to give its language such an interpretation as will effectuate the intention which the parties may be presumed to have had in the use of the words, wherever this can be accomplished without straining the language beyond its fair import.[8] In the case of the misspelling of a word the construction will be according to the meaning of the word intended, especially so, when, if effect was given to the word actually used, no effect

[1] Wallace v. Hodges, 160 Ala. 276, 49 So. 312.

[2] O'Brien v. Brice, 21 W. Va. 704; Thatcher v. Wardens, etc., 37 Mich. 264.

[3] Jacoby v. Nichols, 62 S. W. 734.

[4] Gage v. Cameron, 212 Ill. 146, 72 N. E. 204.

[5] S. E. & H. L. Shepherd Co. v. Shibles, 100 Me. 314, 61 Atl. 700.

[6] Beedy v. Finney, 118 Iowa, 276, 91 N. W. 1064.

[7] Linville v. Greer, 165 Mo. 380, 65 S. W. 579; Meacham v. Blaess, 141 Mich. 258, 104 N. W. 579. The intent may be collected by giving proper effect to the language used, considered in the light of the circumstances connected with the transaction, the situation of the parties and the condition of the country and also the estate granted: Proctor v. Maine Cent. R. Co., 96 Me. 458, 52 Atl. 933.

[8] Deery v. City of Waterbury, 82 Conn. 567, 25 L.R.A. 681, 74 Atl. 908.

would be given to clause in which the word appears.[9] A deed should be construed in its entirety and in the light of all its provisions.[1] It should be viewed as an entire instrument, and should be construed as a whole, giving proper consideration to every part of it.[2] If possible no part should be rejected,[3] nor any part considered ineffective,[4] and it is possible that a number of facts may lead to a conclusion which no one singly would justify.[5] If a party claims under a deed, he must accept it as a whole and he cannot adopt those parts which are favorable to him, and reject those that are unfavorable.[6]

§ 845. **Construing deeds together.**—When two or more deeds are executed at the same time between the same parties, in relation to the same subject matter, they may, in some instances, for the purpose of construing their intent and effect, be taken together and treated as one instrument.[7] But to enable two or more instruments to be read together it is

[9] Baustic v. Phillips, 134 Ky. 711, 121 S. W. 629.

[1] Waldermeyer v. Loebig, 222 Mo. 540, 121 S. W. 75; Stoepler v. Silberberg, 220 Mo. 258, 119 S. W. 418; White v. Bailey, 65 W. Va. 573, 23 L.R.A.(N.S.) 232, 64 S. E. 1019; Lyford v. City of Laconia, 75 N. H. 220, 22 L.R.A.(N.S.) 1062, 72 Atl. 1085.

[2] Wolfe v. Dyer, 95 Mo. 545, 8 S. W. 551; M'Cullock v. Holmes, 111 Mo. 445, 19 S. W. 1096; Davenport v. Gwilliams, 133 Ind. 142, 22 L.R.A. 244, 31 N. E. 790; Chew v. Zweib, 29 Tex. Civ. App. 311, 69 S. W. 207; Hunt v. Hunt, 119 Ky. 39, 68 L.R.A. 180, 82 S. W. 998; Williams v. Owen, 116 Ind. 71, 18 N. E. 389.

[3] Jones v. Pashby, 62 Mich. 614, 29 N. W. 374.

[4] Williams v. Owen, 116 Mo. 71, 18 N. E. 389.

[5] Crocker v. Cutting, 166 Mass. 183, 33 L.R.A. 245, 44 N. E. 214.

[6] Jacobs v. Miller, 50 Mich. 119, 15 N. W. 42. All the provisions of the deed must be considered by the court: Young v. Camp Mfg. Co., 110 Va. 678, 66 S. E. 843, and effect must be given to it as a whole if possible: Fletcher v. Lyon, 123 S. W. 801. A deed should be construed so that all its parts shall be made operative if possible: Lyford v. City of Laconia, 75 N. H. 220, 22 L.R.A.(N.S.) 1062, 72 Atl. 1085.

[7] Clap v. Draper, 4 Mass. 266, 3 Am. Dec. 215; Cornell v. Todd, 2 Denio, 130; King v. King, 7 Mass. 496; Patterson v. Donner, 48 Cal. 369; Cloyes v. Sweetser, 3 Cush.

not sufficient that they were made between the same parties and at the same time. The rule cannot apply unless the instruments themselves show, or the fact is made to appear by extrinsic evidence, that they relate to the same transaction. Hence, where a party's title to two adjoining parcels of land is derived by a separate deed for each parcel, from the same grantor, and bearing the same date, but which do not refer to each other, and in one of the deeds a piece of land which is parcel of the premises conveyed by the other deed is in terms excepted, each deed must stand by itself; and as the exception is not for a part or the thing granted by the deed in which it was contained, it is void.[8] When the same grantor makes

403; Jackson v. McKenny, 3 Wend. 233, 20 Am. Dec. 690; Jackson v. Dunsbagh, 1 Johns. Cas. 91; Gerdes v. Moody, 41 Cal. 335; Pulliam v. Bennett, 55 Cal. 368. See Putnam v. Stewart, 97 N. Y. 411; Moore v. Fletcher, 16 Me. 63, 33 Am. Dec. 633; Leach v. Leach, 4 Ind. 628, 58 Am. Dec. 642; Wildman v. Taylor, 4 Ben. 42; Isham v. Morgan, 9 Conn. 374, 23 Am. Dec. 361.

[8] Cornell v. Todd, 2 Denio, 130. Said the court, per Bronson, C. J.: "It is not necessary that the instruments should in terms refer to each other, if, in point of fact they are parts of a single transaction. But until it appears that they are such, either from the writings themselves, or by extrinsic evidence, the case is not brought within the rule. Now, here there is no reference in either of the two deeds to the other; nor is there any extrinsic evidence, if such would have been admissible, that they were both parts of one act. They are between the same parties, and have the same date; but it is not inferable from those facts alone that they are parts of a single transaction. It may very well be that the same parties should have several transactions in one day, and of the same general nature, and yet that each one should be distinct from and wholly independent of the other. But there is something more than the want of a connecting link between these two deeds. They do not relate to the same subject matter. It is true that they are both conveyances of land; but the parcels are separate and distinct, and each deed stands upon its own independent consideration. This is a decisive feature in the case. Where two deeds neither refer to each other, nor relate to the same subject matter, I am not aware of any principle upon which one can be made to qualify, or in any way affect the legal construction of the other. No extrinsic evidence could help out the defendant's case; for whatever might be proved, it would still remain true that the deeds themselves neither refer the one to

separate deeds to different grantees, they will not be construed together in determining the rights of the grantees with respect to the common subject matter.[9] Where a grantor executed a deed conveying the absolute fee, and, at the same time, the grantee executed an instrument which recited that he received the property charged with the settlement of the just debts of the grantor, this instrument is admissible in evidence in an action of ejectment brought by the grantee to show, on the part of the defendant, that the grantee had put a trust in the property, and that therefore the widow of the grantor, who had intermarried with the defendant since the execution of the deed, was entitled to dower in the land.[1] If several deeds of release are executed as parts of one and the same transaction in effecting a partition of real estate between heirs, tenants in common, they must, in their construction, be read together, and by their combined effect the rights of the parties under them must be settled.[2] Reciting a previous agreement in a deed is equivalent to confirming and renewing it.[3] While

the other, nor do they relate to the same subject matter; and parol evidence cannot be allowed to control the legal effect or operation of a deed." For a case in which an absolute deed and a deed in trust for the benefit of the grantor's unsecured creditors were construed together, see Kruse v. Prindle, 8 Or. 158.

[9] Rexford v. Marquis, 7 Lans. 249.

[1] Doe v. Bernard, 15 Miss. (7 Smedes & M.) 319. And see Bell v. Mayor of New York, 10 Paige, 49; Pepper v. Haight, 20 Barb. 429; Ford v. Belmont, 7 Rob. (N. Y.) 97; Everett v. Thomas, 1 Ired. 252; Field v. Huston, 21 Me. 69.

[2] White v. Brocaw, 14 Ohio St. 339.

[3] Salbourn v. Houstoun, 1 Bing. 433; Barfoot v. Freswell, 3 Keb. 465; Sampson v. Easterby, 9 Barn. & C. 505. But covenants contained in a prior agreement will not run with the land because the deed recites that it is executed "per agreement": Close v. Burlington, Cedar Rapids etc. Ry. Co., 64 Iowa, 149. And see Hunt v. Amidon, 4 Hill, 345; 40 Am. Dec. 283. Where land was sold on condition that the vendee and a third party should execute a bond not to erect certain buildings on the land, and the bond was signed before the execution of the deed, but both were delivered on the same day, the court held that the two instruments should be construed as parts of one and the same transaction, notwithstanding that the deed did not refer to the bond, and the bond recited that the vendee had purchased the land: Rob-

for the purpose of reaching a proper construction, several deeds may be considered together,[4] the court cannot consider a deed made subsequently by the grantor to a third person.[5] If a deed refers to a will for the purpose of stating with greater exactness the rights of some of the parties, the deed and will should be read together as parts of one transaction.[6] If at or about the same time, between the same parties, and concerning the same subject matter, a deed and an agreement are made, they will be considered as one instrument.[7] Likewise the court may consider a will, lease, and deed executed about the same time and appearing to be parts of one transaction, and may for the purpose of construing the deed, consider the circumstances under which all these instruments were executed.[8] On the sale of a tract of land, the purchasers paid a sum of money when the deed was executed and agreed in writing that they would pay an additional amount at a future date, for which they gave their note, or if they failed to make such payment, would rescind the contract, reconvey the property to the grantor, and receive the amount paid by them at the time of the execution of the deed. This written agreement, the court considered should be treated as part of the deed.[9] If a husband and wife desiring to vest a separate estate in each of them, convey a tract of land to a trustee, who for the purpose of carrying out the object of the parties, reconveys separate portions of such tract to the husband and to the wife, all the deeds should be considered as part of the

bins v. Webb, 68 Ala. 393. A prior unrecorded deed is not defeated by a subsequent deed of the grantor's "now remaining interest" in land, because both deeds may stand together, as the second deed is not a conveyance of anything previously conveyed: Eaton v. Trowbridge, 38 Mich. 455.

[4] Maxon v. Maxon, 16 N. Y. St. Rep. 74, 48 Hun, 416.

[5] Nye v. Lovitt, 92 Va. 710, 24 S. E. 345.

[6] Allen v. De Groodt, 105 Mo. 442, 16 S. W. 494, 1049.

[7] McCoy v. Griswold, 114 Ill. App. 556.

[8] Jack v. Hooker, 71 Kan. 652, 81 Pac. 203.

[9] Pursley v. Good, 94 Mo. App. 382, 68 S. W. 218.

same transaction and construed together.[1] While a collateral writing made at the same time as a deed may enlarge or decrease, explain or qualify the estate which the deed conveys, it will not be, where there is a repugnance, allowed to destroy the estate granted.[2] If a deed declares that it is subject to the covenants and agreements of a recorded contract, the provisions of the contract are made a part of the deed;[3] and if a deed refers to another deed with sufficient certainty, it will have the same effect as if the deed referred to was set out in full.[4] Where the parties execute a deed in the form of a grant, conveyance and sale, and four days later execute a declaration of trust making the deed subject to the provisions of the trust agreement, they both should be construed as parts of a single transaction.[5]

§ 846. **Rule in Shelley's case.**—The rule in Shelley's case has been much discussed in works treating of the law of real property. The rule is thus stated: "When the ancestor by any gift or conveyance, taketh an estate of freehold and

[1] Leach v. Rains, 149 Ind. 152, 48 N. E. 858. See, also, Early v. Douglass, 110 Ky. 813, 62 S. W. 860; Hacker v. Hoover, 66 S. W. 382.

[2] Lewis v. Curnutt, 130 Iowa, 423, 106 N. W. 914. A deed referring to a survey adopts it and both should be construed together: Heffelman v. Otsego Water Power Co., 78 Mich. 121, 43 N. W. 1096, 44 N. W. 1151; Hoffman v. City of Port Huron, 102 Mich. 417, 60 N. W. 831; Hays v. Perkins, 109 Mo. 102, 18 S. W. 1127; Preston v. Heiskell's Trustee, 32 Gratt. 48.

[3] Epworth League Training Assembly v. Olney, 136 Mich. 50, 98 N. W. 360.

[4] Jacobs v. All Persons, 12 Cal. App. 163, 106 Pac. 896; Agan v. Shannon, 103 Mo. 661, 15 S. W. 757.

[5] Younger v. Moore, 155 Cal. 767, 103 Pac. 221. If a deed refers to another instrument, the document referred to will have the same effect as if it was set out at length in the deed: Jacobs v. All Persons, 12 Cal. App. 163, 106 Pac. 896. See as to construing deeds and agreements, together: Grindle v. Grindle, 240 Ill. 143, 88 N. E. 473; Walder Meyer v. Loebig, 222 Mo. 540, 121 S. W. 75; Drake v. Russian River Land Co., 10 Cal. App. 654, 103 Pac. 167; Wecker v. Zuercher (Tex. Civ. App.) 118 S. W. 149; Hensley v. Burt etc. Lumber Co., 132 Ky. 112, 116 S. W. 316.

in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the heirs are words of limitation of the estate, and not words of purchase."[6] In Kent's Commentaries, the definition given by Mr. Preston as abridged, is said to be full and accurate: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."[7] And Kent himself says: "The word 'heirs,' or 'heirs of the body,' creates a remainder in fee or in tail, which the law to prevent an abeyance vests in the ancestor, who is tenant for life, and by the conjunction of the two estates he becomes tenant in fee or in tail; and whether the ancestor takes the freehold by express limitation, or by resulting use, or by implication of law; in either case the subsequent remainder to his heirs unites with and is executed on his estate for life. Thus where A was seised in fee, and covenanted to stand seised to the use of his heirs male, it was held that as the use during his life was undisposed of, it of course remained in him for life by implication, and the subsequent limitation to his heirs attached in him."[8] This rule has in a number of instances as to both deeds and wills, been recognized and enforced in this country as a part of the common law.[9] But in many States the rule is now abolished

[6] 1 Coke, 104.

[7] 4 Kent's Com. 215; 1 Preston on Estates, 263–419. But where this rule still prevails, courts are inclined to confine its operation within strict limits: McIlhinney v. McIlhinny, 137 Ind. 411, 24 L.R.A. 489, 45 Am. St. Rep. 186.

[8] 4 Kent's Com. 215.

[9] Ridgeway v. Lamphear, 99 Ind. 251; Payne v. Salye, 2 Dev. & B. Eq. 455; Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762; Roy v. Garnett, 2 Wash. (Va.) 9; Polk v. Faris, 9 Yerg. 209, 30 Am. Dec. 400; Simper's Lessee v. Simper, 15

by statute, and of the abolition of the rule, it is said by Kent that "in its practical operation it will, in cases where the rule would otherwise have applied, change estates in fee into contingent remainders. It sacrifices the paramount intention in all cases, and makes the heirs instead of the ancestor the *stirps* or *terminus* from which the posterity of heirs is to be deduced. It will tie up property from alienation during the lifetime of the first taker, and the minority of his heirs. But this, it may perhaps be presumed, was the actual intention of the party in every case, in which he creates an express estate for life in the first taker, for otherwise he would not have so limited it. It is just to allow individuals the liberty to make strict settlements of their property in their own discretion, provided there be nothing in such dispositions of it affecting the rights of others, nor inconsistent with public policy or the settled principles of law. But this liberty of modifying at pleasure the transmission of property is in many respects controlled, as in the instance of a devise to charity, or to aliens, or as to the creation of estates tail; and the rule in Shelley's case only operated as a check of the same kind and to a very moderate degree. Under the existence of the rule, land might be bound up from circulation for a life, and twenty one years afterward, only the settler was required to use a little more explicitness of intention and a more specific provision. The abolition of the rule facilitates such settlements, though it does not enlarge the individual capacity to make them; and it is a question for experience to decide whether this attainable advantage will overbalance the inconvenience of increasing fetters upon alienation, and shaking confidence in law, by such an entire and complete renunciation of a settled rule of property,

Md. 160; Carr v. Porter, 1 McCord Ch. 60; Dott v. Cunnington, 1 Bay, 453; 1 Am. Dec. 624; Cooper v. Cooper, 6 R. I. 261; Davidson v. Davidson, 1 Hawks, 163; Horne v. Lyeth, 4 Har. & J. 531; Kiser v. Kiser, 2 Jones Eq. 28; Hodges v. Little, 7 Jones (N. C.), 145; Lyles v. Digges, 6 Har. & J. 364, 15 Am. Dec. 281; Bishop v. Selleck, 1 Day, 299; Brant v. Gelston, 2 Johns. Cas. 384. See Green v. Green, 23 Wall. 486.

memorable for its antiquity, and for the patient cultivation and discipline which it has received." [1]

[1] 4 Kent's Com. 232. And in a note he adds: "The juridical scholar on whom his great master, Coke, has bestowed some portion of the 'gladsome light of jurisprudence,' will scarcely be able to withhold an involuntary sigh as he casts a retrospective glance over the piles of learning devoted to destruction by an edict as sweeping and unrelenting as the torch of Omar. He must bid adieu forever to the renowned discussions in Shelley's case, which were so vehement and so protracted as to rouse the sceptre of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skillful criticism, and refined distinctions which pervade the varied cases in law and equity, from those of Shelley and Archer, down to the direct collision between the courts of law and equity, in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in Perrin v. Blake, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone's illustrations, or to study and admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of Fearne, the acute and analytical essay of Preston, the neat and orderly abridgment of Cruise, and the severe and piercing criticisms of Reeves. What I have, therefore, written on this subject, may be considered, so far as my native State is concerned, as a humble monument to the memory of departed learning": 4 Kent's Com. 232. In Missouri, since the abolition of this rule, a deed to a person for life, with remainder over in fee simple to the heirs, creates simply a life estate in such person: Tesson v. Newman, 62 Mo. 198. As to the States in which this rule has been abolished, see Alabama Code, 1867, § 1574; New York, Rev. Stats. (4th ed.) pt. 2, tit. 2, art. 1, § 28; Virginia Code, 1873, c. 112, § 11; Wisconsin, Rev. Stats. 1878, § 2052; California, Civil Code, § 779; Maine, Rev. Stats. 1883, c. 73, § 6; Connecticut, Gen. Stats. 1866, p. 537, § 5; Rev. Stats. 1875, tit. 18 c. 6, § 4; Kentucky, Rev. Stats. 1852, c. 80, § 10; Massachusetts, Pub. Stats. c. 126, § 4; Michigan, Comp. Laws, 1857, c. 85, § 28; Annot. Stats. § 5544; Minnesota, Rev. Stats. c. 45, § 28; Comp. Laws, 1859, c. 31, § 28; Missouri, Rev. Stats. 1879, § 3943; New Jersey, Stats. tit. 10, c. 2, § 10; Tennessee, Code, 1858, § 2008; Mill & Vert. Code, § 2514. And see, also, Comp. Laws Kansas, 1879, c. 117, § 52; Mississippi, Code, 1880, § 1201; New Hampshire, Gen. Stats. 1867, c. 174, § 5; Gen. Laws, c. 193, § 5; New Jersey, Stats. tit. 10, c. 2, § 10; Rev. Stats. 1877, Descent, § 10; Rhode Island, Pub. Stats. 1882, c. 182, § 2; Hopper v. Demarest, 21 N. J. L. 525; Goodrich v. Lampert, 10

The rule in the states where it still prevails is considered not a rule of interpretation, but an inflexible rule of property and is not deemed a means whereby the intention may be ascertained, but one of imperative obligation.[2] The words, "heirs of his body," are deemed equivalent to the word "heirs" alone. Where a deed conveyed the property to the grantee for life, and after his death, to the heirs of his body lawfully begotten, to

Conn. 448; Dennett v. Dennett, 40 N. H. 500; Richardson v. Wheatland, 7 Met. 169; Wiliamson v. Williamson, 18 B. Mon. 329; Moore v. Littel, 40 Barb. 488; 3 Wash. Real Prop. (5th ed.) p. 657. See for decisions affecting this rule, Yarnall's Appeal, 70 Pa. St. 342; Adams v. Guerard, 29 Ga. 675; 76 Am. Dec. 624; Pierce v. Pierce, 14 R. I. 514; Hawkins v. Lee, 22 Tex. 547; Hancock v. Butler, 21 Tex. 804; Paxson v. Lefferts, 3 Rawle, 59; George v. Morgan, 16 Pa. St. 95; Powell v. Brandon, 24 Miss. 364; Ross v. Adams, 28 N. J. L. 172; Baker v. Scott, 62 Ill. 86; Steiner v. Kolb, 57 Pa. St. 123; Adams v. Ross, 30 N. J. L. 512, 82 Am. Dec. 237; Criswell's Appeal, 41 Pa. St. 290; Haldeman v. Haldeman, 40 Pa. St. 35; Halstead v. Hall, 60 Md. 209; Belslay v. Engel, 107 Ill. 182; Price v. Taylor, 28 Pa. St. 102, 70 Am. Dec. 105; Kepple's Appeal, 53 Pa. St. 211; Stump v. Jordan, 54 Md. 619; Price v. Sisson, 13 N. J. Eq. 177; Baker v. Scott, 62 Ill. 86; Bannister v. Bull, 16 S. C. 220; Brislain v. Wilson, 63 Ill. 175; Clark v. Smith, 49 Md. 106; Kleppner v. Laverty, 70 Pa. St. 73; Terrell v. Cunningham, 70 Ala. 100; May v. Ritchie, 65 Ala. 602; Flint v. Steadman, 36 Vt. 210; Oyster v. Oyster, 100 Pa. St. 538; 45 Am. Rep. 388; Warner v. Sprigg, 62 Md. 14; Adams v. Adams, 6 Q. B. 860; Pybus v. Mitford, 2 Lev. 77; Webster v. Cooper, 14 How. 500; Quillman v. Custer, 57 Pa. St. 125; Doebler's Appeal, 64 Pa. St. 17; Tyler v. Moore, 42 Pa. St. 374; Ford v. Flint, 40 Vt. 394; Lees v. Mosley, 1 Younge & C. 589; Greenwood v. Rothwell, 5 Man. & G. 628; Ridgeway v. Lamphear, 99 Ind. 251; Bagnall v. Harvey, 4 Barn. & C. 610; Abbott v. Jenkins, 10 Serg. & R. 296; Hennessy v. Patterson, 85 N. Y. 91; Ward v. Armory, 1 Curt. 419; Jones v. Miller, 13 Ind. 337; McIntyre v. McIntyre, 16 S. C. 290; Macumber v. Bradley, 28 Conn. 445; Carter v. McMichael, 10 Serg. & R. 429; George v. Morgan, 16 Pa. St. 95.

[2] Baker v. Scott, 62 Ill. 86; King v. Beck, 15 Ohio, 559; Hurst v. Wilson, 89 Tenn. 270, 14 S. W. 778; Teal v. Richardson, 160 Ind. 119, 66 N. E. 435; Burton v. Carnahan, 38 Ind. App. 612, 78 N. E. 682; Shimer v. Mann, 99 Ind. 190, 50 Am. Rep. 82; Duckett v. Butler, 67 S. C. 130, 45 S. E. 137; Crandell v. Barker, 8 N. D. 363; McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139; Lord v. Comstock, 240 Ill. 492, 83 N. E. 1012; Ewing v. Barnes, 156 Ill. 61, 40 N. E. 325; Hageman v. Hageman, 129 Ill. 164, 21 N. E. 814.

have and to hold during his natural life, and after his death to the heirs of his body lawfully begotten, the words "heirs of his body" were considered to be words of limitation.[3] The word "issue" is ambiguous in that it may mean heirs and may also mean children. It is said that if, from the connection in which it is used, it is to be taken as meaning heirs, it is a word of limitation,[4] but it is also held to be a word of purchase.[5] Courts, however, are inclined to construe the word as meaning children to carry the intention of a testator into effect.[6] Where a deed was made to the grantee for life and at his death to his "surviving" heirs, the court in a recent case in North Carolina held that the first taker acquired a fee, as the word "surviving" did not prevent the rule in Shelley's case from applying.[7] If a trust is executory the rule in Shelley's case does not apply.[8] The rule in Shelley's case is firmly established in Illinois, and Mr. Justice Dunn says: "In determining whether it is applicable in a given case, the question does not turn upon the quantity of estate intended to be given to the first taker, whether a

[3] Scott v. Brin, 48 Tex. Civ. App. 500, 107 S. W. 565. See, also, Waters v. Lyon, 141 Ind. 170, 40 N. E. 662; Wilson v. Alston, 122 Ala. 630, 25 So. 225; Manchester v. Durfee, 5 R. I. 549; Dott v. Cunnington, 1 Bay, 453, 1 Am. Dec. 624; Chamblee v. Broughton, 120 N. C. 170, 27 S. E. 11; Wilkerson v. Clark, 80 Ga. 367, 7 S. E. 319, 12 Am. St. Rep. 258; Carnes v. Baker, 100 Ga. 779, 28 S. E. 496; Perry v. Hackney, 142 N. C. 368, 55 S. E. 289, 115 Am. St. Rep. 741, 9 A. & E. Ann. Cas. 244; Lloyd v. Rambo, 35 Ala. 709; Harris v. McCann, 75 Miss. 805, 23 So. 631.

[4] Bradley v. Cartwright, 36 L. J. C. P. N. S. 218, 25 End. Rul. Cas. 661; Thomas v. Higgins, 47 Md. 439; Arnold v. Muhlenberg College, 227 Pa. 321, 76 Atl. 30.

[5] Markley v. Singletary, 11 Rich. Eq. 393; Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203.

[6] Timanus v. Harrower, 142 Pa. 432, 21 Atl. 826, 24 Am. St. Rep. 507. *Prima facie*, however, the word "issue" in a will means "heirs of the body." Shalters v. Ladd, 141 Pa. 349, 21 Atl. 596; Pierce v. Hubbard, 152 Pa. 18, 25 Atl. 231. But it will be construed as a word of purchase if it appears that the testator intended children. Taylor v. Taylor, 63 Pa. 481, 3 Am. St. Rep. 565.

[7] Price v. Griffin, 150 N. C. 523, 64 S. E. 372, 29 L.R.A.(N.S.) 935.

[8] Steele v. Smith, 84 S. C. 464, 6 S. E. 200, 29 L.R.A.(N.S.) 939.

life estate or more, but upon the nature of the estate intended to be given to the heirs, whether by inheritance or otherwise.[9]

§ 846a. **"Heirs" qualified by other words.**—Where the word "heirs" is accompanied by other words showing that the grantor intended to designate certain persons who should take upon the death of the grantee, they will take by virtue of the deed as purchasers. Thus, where a deed conveyed the property described in it to a woman for life, and at her death "to such heir or heirs as she hereafter may have," the court considered that by the use of the words "hereafter may have," the grantor intended the word "heir or heirs" to mean children who acquired title by the conveyance.[1] So, in another case where a deed conveyed the property to a woman for life with the provision that upon her death it should descend to her children, the children of her husband, the court was of the opinion that the words "children of the husband" following the word "heirs," showed that the grantor meant to describe more par-

[9] Bials v. Davis, 241 Ill. 536, 89 N. E. 706, 29 L.R.A.(N.S.) 937. See, also, Vangieson v. Henderson, 150 Ill. 119, 36 N. E. 974; Ward v. Todd, 239 Ill. 462, 88 N. E. 189, 29 L.R.A.(N.S.) 942. See for other cases in which the rule has been applied Doyle v. Andis, 127 Iowa, 36, 102 N. W. 177, 69 L.R.A. 953; Wilson v. Rusk, 103 N. W. 204; Kepler v. Larson, 131 Iowa, 438, 108 N. W. 1033, 7 L.R.A.(N.S.) 1109; Ward v. Butler, 239 Ill. 462, 88 N. E. 189; Bails v. Davis, 241 Ill. 536, 89 N. E. 706; Fountain County Coal etc. Co. v. Beckleheimer, 102 Ind. 76, 1 N. E. 202, 52 Am. Rep. 465; Taney v. Fahnley, 126 Ind. 88, 25 N. E. 882; Dawson v. Quinnerly, 118 N. C. 188, 24 S. E. 483; Marsh v. Griffin, 136 N. C. 336, 48 S. E. 735; Jones v. Ragsdale, 141 N. C. 200, 53 S. E. 842; Kennedy v. Colelough, 67 S. C. 118, 45 S. E. 139; Davenport v. Eskew, 69 S. C. 292, 48 S. E. 223, 104 Am. St. Rep. 798; Polk v. Faris, 9 Yerg. (Tenn.) 209, 30 Am. Dec. 400; Hopkins v. Hopkins, (Tex. Civ. App.) 114 S. W. 673. See, also, Teague v. Sowder, 121 Tenn. 132, 114 S. W. 484; Fullagar v. Stockdale, 138 Mich. 363, 101 N. W. 576; Edins v. Murphree, 142 Ala. 617, 38 So. 639.

[1] Duckett v. Bubler, 67 S. C. 130, 45 S. E. 137.

ticularly those who were to take after the death of the grantee named, and that the word "heirs" should be deemed one of purchase.[2] Likewise, the word "heirs" was deemed to mean "children" where the deed conveyed the land to certain persons, their heirs and assigns, and provided, "meaning and intending by this conveyance to convey to my said children the use and control of said real estate during their natural lives, and at their death to go to their children, should they die without issue to their legal representatives, to have and to hold the same together with all and singular the appurtenances and privileges thereunto belonging or in any wise appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever." [3] It was contended that this clause was a memorandum and could have no greater effect than was given to a *habendum* clause, of which it is a part. But the court answered: "Why should it not be considered a part of the deed? And why say it is a part of the *habendum* clause? It does not appear to be a part of the deed. It is in no way connected with the *habendum* except that it immediately precedes it. It is a separate, independent statement of the grantor from which it clearly appears that by the use of the word "heirs" he meant children and serves no other purpose." [4] If a donor in a deed of gift uses the words "heirs" and "children" in different parts of the conveyance, it must be presumed that he knew the difference in their legal signification.[5] Where a deed is made to a person and "then" to his heirs, it appears that the grantor employed the word "heirs" with its restricted meaning.[6] In case where a deed conveyed

[2] Hodges v. Fleetwood, 102 N. C. 122, 9 S. E. 640.

[3] Griswold v. Hicks, 132 Ill. 494, 24 N. E. 63, 22 Am. St. Rep. 549.

[4] Griswold v. Hicks, 132 Ill. 494, 24 N. E. 63, 22 Am. St. Rep. 549.

[5] Kay v. Connor, 8 Humph. 624, 49 Am. Dec. 690.

[6] Furman v. White, 14 B. Mon. 560.

property to a trustee in trust for a woman for life with the provision that the property should at her death belong "of right in fee simple to the lineal heirs" of the tenant for life forever, the court considered that the words "in fee simple forever" qualified the limitation to the lineal heirs so that an indefinite line of descent was not provided, and hence a conditional estate in fee was vested in the first taker of the estate.[7] If by express language the grantor declares that certain persons shall take as purchasers and not by inheritance, the deed will have that effect.[8] Where the deed conveys land in trust for the use of a married woman providing that upon her death the trustee shall convey the property to such person as she by her will shall direct, and in default of such direction shall convey to her heirs at law or next of kin, the married woman obtains only a life estate.[9] If a trust deed made for the benefit of the grantor's wife for her life and then to the heirs of her body authorizes the trustees to sell the land conveyed and reinvest the proceeds of sale when they consider it best for the interests of the wife and children, the word "children" is to be considered as showing that the words "heirs of the body" were employed by the grantor as words of purchase.[1] In California where the rule in Shelley's case has been abrogated by statute, a grantor executed a deed purporting to "give, grant, alien and confirm unto the said party of the second part and to his heirs (and assigns forever), all those certain lots . . . to have and to hold, all and singular, the said premises, unto the said party of the second part (heirs and assigns forever) *for and during his natural life, and to the issue and heirs of the body of the said party of the second part.*" The deed was upon a printed form and the words placed in parenthesis were erased and the words

[7] Clark v. Neves, 76 S. C. 484, 57 S. E. 614, 12 L.R.A.(N.S.) 298.

[8] Taylor v. Cleary, 29 Gratt. 448.

[9] Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203.

[1] Carrigan v. Drake, 36 S. C. 354, 15 S. E. 339. See, also, where the word "heirs" with qualifying words has been construed as meaning children: Blake v. Stone, 27 Vt. 475; Twelve v. Nevill, 39 Ala. 175.

printed in italics above were inserted, in writing. The question was whether the deed passed a fee or a life estate. The court admitted at the common law, by the rule in Shelley's case, the conveyance would have passed the grantee an estate in fee tail and declared that it would have received the same construction had it been executed prior to the adoption of the civil code.[2]

But in view of the abrogation of the rule in Shelley's case, the court held that a life estate passed only to the immediate grantee, saying, by Mr. Justice Harrison, who delivered the opinion of the court: "Taking into consideration the whole of the instrument under discussion, it is clear that it was the intention of the grantor that the *habendum* should operate as a proviso or limitation to the granting clause, and control it to the extent of limiting the estate conveyed to the plaintiff to a life estate, with a remainder to the issue and heirs of his body. The use of the word 'heirs' in the granting clause creates no repugnance between that clause and the *habendum* since the same estate would pass to the plaintiff whether this estate were inserted or omitted;[3] and the subsequent limitation in the *habendum* clause shows that the grantor did not intend by its use to create an estate in fee in the plaintiff." [4]

§ 846b. **Illustrations.**—Where a will devising certain land declares that: "The said lands heretofore given by me to my daughter Catharine are given for and during her natural life; and after her decease I do give and devise the said lands to such person or persons as shall be her heirs or heirs of land held by her in fee simple," the court said: "We are of the opinion that the testator used the words 'heir or heirs' as *designatio personarum* who should take the remainder; that those persons did not take by descent as heirs of Catharine, but by

[2] Citing Norris v. Hensley, 27 Cal. 439; Estate of Utz, 43 Cal. 200.

[3] Citing Civil Code, § 1072.

[4] Bartnett v. Bartnett, 104 Cal. 298, 37 Pac. 1049, citing Henderson v. Mack, 82 Ky. 379.

purchase from the testator; that the rule in Shelley's case does not apply, and that Catharine took an estate for life only." [5]

A deed was made by James T. Ecton and Alice Ecton, his wife, conveying to "Mrs. T. N. Sidwell, wife of R. J. Sidwell," certain land "to have and to hold unto the said Mrs. T. N. Sidwell, with its appurtenances thereunto belonging, free from any claim or debt of her husband, forever in fee simple, with a covenant of general warranty, provided, however, that should the said Mrs. T. N. Sidwell die without heir or heirs, then, in that event, the title to the above described and conveyed land, with improvements thereon, to vest in her husband, R. J. Sidwell, should he be living; should said R. J. Sidwell be dead, then a share of the land with improvements thereon, to the amount of $1,000, to vest in the legal heirs of Mrs. T. N. Sidwell, the remainder of the said property to vest in the next legal heirs of said R. J. Sidwell." The court held that the first taker acquired a conditional fee, with an absolute fee to her husband in case of her death without heirs, and that the whole estate might be conveyed by their deed, as the words "the next legal heirs" were to be considered not as words of purchase but as words of inheritance.[6] Where a will contained a devise made to a person for life, and after his death to the heirs of his body begotten in lawful wedlock and none others, the court held that the word "heirs" was to be construed as meaning "children," and, therefore, a life estate only passed to the devisee.[7] If the grantor convey property to a woman for her life, with remainder over to the issue of her body, born alive,

[5] Peer v. Hennion, 77 N. J. L. 693, 76 Atl. 1084, 29 L.R.A.(N.S.) 945. See, also, Westcott v. Meeker, (Iowa) 122 N. W. 964, 29 L.R.A.(N.S.) 947; Hall v. Gradwohl, (Md.) 77 Atl. 480, 29 L.R.A. (N.S.) 954; Kemp v. Reinhard, 228 Pa. 143, 77 Atl. 436, 29 L.R.A. (N.S.) 958.

[6] Hamelton v. Sidwell, 131 Ky. 428, 115 S. W. 204, 29 L.R.A.(N.S.) 961.

[7] Millett v. Ford, 109 Ind. 159, 8 N. E. 917. See, also, Pierce v. Hubbard, 152 Pa. 18, 25 Atl. 231, holding that only a life estate passed to the first taker under a clause in a will that in the case of the death of the life tenant "without issue or issues of her children,

and if the grantee should die without issue of her body, born alive, the remainder should pass to another person mentioned in the conveyance, the word "issue" is considered one of purchase limiting the title of the grantee to a life estate.[8]

§ 846c. "Heirs" construed as "children" to effectuate intention.—By those not familiar with the import of legal language, the word "heirs" is frequently used as though is was synonomous with the word "children." As the courts strive to give effect to the intention of the grantor, in order to make his conveyance effective, whether this can be accomplished in accordance with legal rules of construction, they will construe the word "heirs" as meaning "children," if from the language of the conveyance and the circumstances surrounding the transaction, it is evident in the mind of the grantor this word had that signification.[9] As said in a recent case: "The weight of authority and the better reason is in favor of the rule

then reversible to the testator's right consanguinary heirs."

[8] McIlhinney v. McIlhinney, 137 Ind. 411, 37 N. E. 147, 45 Am. St. Rep. 186, 24 L.R.A. 489. See for other cases in which deeds and wills have been construed: Taylor v. Taylor, 63 Pa. 481, 3 Am. Rep. 565; Helm v. Frisbie, 59 Ind. 526; O'Bryne v. Feeley, 61 Ga. 77; Kleppner v. Laverty, 70 Pa. 70; Whitworth v. Stuckey, 1 Rich. Eq. 404; Nes v. Ramsay, 155 Pa. 628, 2 Atl. 770; Leightner v. Leightner, 87 Pa. 144; Craig v. Rowland, 10 App. D. C. 402; Parkhurst v. Harrower, 142 Pa. 432, 21 Atl. 826, 24 Am. St. Rep. 507; Shalters v. Ladd, 141 Pa. 349, 21 Atl. 596; Shalters v. Ladd, 163 Pa. 509, 30 Atl. 283; Stagman v. Paxson, 221 Pa. 446, 70 Atl. 803; Carroll v. Burns, 108 Pa. 336; Hodges v. Fleetwood, 102 N. C. 122, 9 S. E. 640; Benson v. Linthicum, 75 Md. 141, 23 Atl. 133.

[9] Heath v. Hewitt, 127 N. Y. 166, 13 L.R.A. 46, 24 Am. St. Rep. 438, 27 N. E. 959; Findley v. Hill, 133 Ala. 229, 32 So. 497; Wikle v. McGraw, 91 Ala. 631, 8 So. 341; Tucker v. Tucker, 78 Ky. 503; Tinder v. Tinder, 131 Ind. 386, 30 N. E. 1077; Huss v. Stephens, 51 Pa. 282; Brasington v. Hanson, 149 Pa. 289, 24 Atl. 344; Read v. Fite, 8 Humph. 328; Seymour v. Bowles, 172 Ill. 521, 50 N. E. 122; Umfreville v. Keeler, 1 Thomp. & C. 486; Lee v. Tucker, 56 Ga. 9; Tharp v. Yarbrough, 79 Ga. 382, 11 Am. St. 439, 4 S. E. 915; Roberson v. Wampler, 104 Va. 380, 1 L.R.A.(N.S.) 318; Wood v. Taylor, 9 Misc. 640, 30 N. Y. Supp. 433.

that in deeds, as well as in wills, the intention of the maker of the instrument, as gathered from all parts, must prevail."[1] The word "heirs" is frequently used and construed as descriptive of a class whose title is directly derived from the grantor.[2] As a general proposition a deed conveying land to the heirs of a person still living, without mentioning their names, is void for uncertainty.[3] In the case of a will, where a devise was made "to my youngest daughter M., and to her children," the court held that the children of the daughter became devisees and that by this language an estate in common passed to all.[4] A limitation after the termination of the life estate in the grantees to their heirs after them forever, provided that the life tenant leaves any children, otherwise over, manifests an intention on the grantor's part to use the word "heirs" in the sense of children.[5] In a case in Iowa the deed conveyed the land to the grantee for her natural life, and to the heirs of her body begotten in fee simple, to take effect at the death of the mother; the court held that the conveyance transferred a life estate with remainder over to specific persons.[6] Mr. Fearne states that if heirs as heirs are meant, there must be a concurrence of two things: "The one is that the person to claim the inheritance after the ancestor is to claim as heir *eo nominee*, and under that description, whoever such person may be, and the other that the effect of the limitation is not confined to the person so claiming or his representatives, but directed equally through all other persons successively answering the same—relative description of heirship, general or special, to the ancestor referred to, and entitling them *eo nominee*, or in that

[1] Roberson v. Wampler, 104 Va. 380, 51 S. E. 835, 1 L.R.A.(N.S.) 318.

[2] Tinder v. Tinder, 131 Ind. 386, 30 N. E. 1077.

[3] Sec. 184 *ante:* "No case has been found to support a grant to a man's heirs, he being living at the time of the grant." Hall v. Leonard, 1 Pick. 27.

[4] Estate of Utz, 43 Cal. 200.

[5] Criswell v. Grumbling, 107 Pa. 448.

[6] Ault v. Hillyard, 115 N. W. 1030.

character only."[7] In a case in Texas, where in a deed the words "heirs," "children" and "issue" were used indiscriminately, the court said: "The legal effect of the deed depends upon the meaning of the grantor in using those words. If they meant heirs in the legal sense, that is, those appointed by law to take the inheritance from the first taker in regular succession from generation to generation, the rule in Shelly's case would apply and vest the fee in him, for no mere declaration of an intention to limit the estate to one for life could prevail over the effect given by law to the use, in its legal sense, of the technical word 'heirs.' On the other hand if that word was used as it is often used, by unskilled persons, only to designate children, or the issue who would be living at the death of the first taker, to take by purchase, as remaindermen, it expresses a perfectly lawful intent to which effect must be given." [8]

§ 846d. **Illustrations.**—The words "heirs" and "issue" are also considered as having been used in the sense of "children" where a marriage contract states that its object is to secure the property of the woman for her use and that of her heirs, and provides that, in the event the marriage shall result in issue, the property shall descend to such child or children, share and share alike, according to the law of the state.[9] So the word "heirs" is held to be equivalent to "children" where the limitation after the life estate is "to the heirs of her body begotten, in fee simple to take effect as to said heirs at the death" of the tenant for life.[1] A deed purported to be made between the grantor as the party of the first part and "the heirs of Warren Heath, of the same place, to be equally divided

[7] Fearne's Contingent Remainders, 197.

[8] Hancock v. Butler, 21 Tex. 817. See, also, as bearing on the question under consideration: Burges v. Thompson, 13 R. I. 712; Heister v. Yerger, 116 Pa. St. 445; Mills v. Thorne, 95 N. C. 362; Ebey v. Adams, 135 Ill. 80, 10 L.R.A. 162; Nes v. Ramsey, 26 Atl. 770.

[9] Aydlett v. Swope, (Tenn.) 17 S. W. 209.

[1] Ault v. Hillyard, 138 Iowa, 239, 115 N. W. 1030.

among them, of the second part." It was contended that as Warren Heath was living at the time when the deed was executed, the deed was void for uncertainty, as there were no persons in being who could take under that description, but the court did not agree with this contention, holding that the word "heirs" should be construed as meaning children.[2] So, where land was conveyed to "the heirs" of a person living at the time, the court was of the opinion that the word should not be taken in its technical sense, but should be construed as meaning children so that the deed took immediate effect.[3] If a deed grants land to A, and the heirs of B by A, his wife, the title vests immediately in A and the children then living of A and B, as the word "heirs" is to be taken as meaning the living children of the persons mentioned in the deed, rather than an indefinite line of descendants.[4]

§ 846e. Limitation to children.—The rule in Shelley's case is a technical rule of real property applicable only when the word "heirs" or a term of similar import is used. But when the remainder, after the termination of the life estate, is to pass to the children of the life tenant, the rule has no application, as the word "children" is one of purchase.[5] Where

[2] Heath v. Hewitt, 127 N. Y. 166, 24 Am. St. Rep. 438, 13 L.R.A. 436.

[3] Grimes v. Orrand, 49 Tenn. (2 Heisk.) 298.

[4] Tinder v. Tinder, 131 Ind. 381, 30 N. E. 1077. That the word heirs may be construed as meaning children, see Fullgar v. Stockdale, 138 Mich. 363, 101 N. W. 576; Findley v. Hill, 133 Ala. 229, 32 So. 497; Tucker v. Tucker, 78 Ky. 403; Cornelius v. Smith, 55 Mo. 428; Boone v. Baird, 91 Miss. 420, 44 So. 929; Smith v. Proctor, 139 N. C. 314, 51 S. E. 889, 2 L.R.A.(N.S.) 172; Rembert v. Evans, 68 S. E. 659; Hickman v. Quinn, 6 Yerg. (Tenn.) 96; Read v. Fite, 8 Humph. 328; Hopkins v. Hopkins, (Tex.) 122 S. W. 15. The words "present heirs" are a description of the persons to take: Fountain Coal Co. v. Beckleheimer, 102 Ind. 76, 1 N. E. 202, 52 Am. Rep. 645.

[5] Brown v. Brown, 125 Iowa, 218, 101 N. W. 81, 67 L.R.A. 629; Bonner v. Bonner, 28 Ind. App. 147, 62 N. E. 497; Ridgeway v. Lampshear, 99 Ind. 251; Weekinson v. Boyd, 136 N. C. 46, 48 S. E.

a deed is made to a person and after his death to the then living children of his body, he takes a life estate only.[6] In the construction of a will where property was devised to a person and the will declared that after the devisee's death "I give and devise said house and lot of ground, as above described, unto his children to have and to hold the above said described property with appurtenances unto his children, their heirs and assigns forever," the court said: " 'Children' is primarily a word of purchase, and is never to be construed otherwise except where the testator has clearly used it as a word of limitation." [7] While the word "children" may be construed as meaning "heirs," where it is clear that such was the intention of the testator,[8] yet it is never construed as a word of limitation except when the clear intention of the grantor or testator cannot be effectuated otherwise.[9] The word "heirs"

516; Mannerback's Estate, 133 Pa. 342, 19 Atl. 552; Hoover v. Strauss, 215 Pa. 130, 64 Atl. 333.

[6] Jackson v. Jackson, 127 Ind. 346, 26 N. E. 897.

[7] Hoover v. Strauss, 215 Pa. 130, 64 Atl. 333. See, also, Klein's Appeal, 125 Pa. 480, 17 Atl. 463.

[8] Hastings v. Ebgle, 217 Pa. 419, 66 Atl. 761.

[9] May v. Ritchie, 5 Ala. 602. Its ordinary construction is as a word of purchase: Brown v. Brown, 125 Iowa, 218, 101 N. W. 81, 67 L.R.A. 629; Moreland v. Hunley, 37 Ga. 642; Nelson v. Davis, 35 Ind. 474; Brumley v. Brumley, 89 S. W. 182, 28 Ky. L. R. 231; Bowe v. Richmond, 109 S. W. 359, 33 Ky. L. R. 173; Goodridge v. Goodridge, 91 Ky. 507, 16 S. W. 270, 13 Ky. L. R. 70; Bodine v. Arthur, 91 Ky. 53, 14 S. W. 904, 12 Ky. L. R. 650, 34 Am. St. Rep. 162; Davis v. Harden, 80 Ky. 672; Kinney v. Mathews, 69 Mo. 520; Williams v. Williams, 16 Lea, (Tenn.) 164; Haywood v. Moore, 2 Humph. 584; Fales v. Curruer, 55 N. H. 392. That no title passes to after born children where the deed conveys the property to a certain person and his children, see Heath v. Heath, 114 N. C. 547, 19 S. E. 155; Varner v. Young, 56 Ala. 260; Faloon v. Simshauser, 130 Ill. 649, 22 N. E. 835; Glass v. Glass, 71 Ind. 392; King v. Rea, 56 Ind. 1. But see Cessna v. Cessna, 4 Bush. (Ky.) 516. If, however, the children take by remainder after the termination of the life estate, each child in being takes and so does each child thereafter born: Coursey v. Davis, 46 Pa. St. 25, 84 Am. Dec. 519; Hague v. Hague, 161 Pa. St. 643, 29 Atl. 261, 41 Am. St. Rep. 900; Adams v. Ross, 30 N. J. L.

is necessary for the application of the rule in Shelley's case, but "the rule does not apply when the limitation is to 'children,' for such word is one of purchase." [1] Where a deed contained proper words of grant but the *habendum* clause "to have and to hold unto the said A, wife of B, and to her children by him begotten forever," it was construed as limiting a life estate to A with remainder to her children begotten by B.[1a]

§ 847. **Lawful issue.**—In connection with the rule in Shelley's case, we call the reader's attention to a peculiarly worded deed where the grant was to a person "and to his lawful issue, to go to his surviving brother or brothers and to their heirs and assigns." The *habendum* clause was to the grantee, "and to his lawful issue, to the only proper use of the said grantee, and his lawful issue (as above mentioned) forever." The deed also contained covenants of seisin, of quiet enjoyment, and against encumbrances, which were each with the grantee, "and his lawful issue." The court construed the deed as giving the grantee only a life estate.[2] The reasoning by which the court came to this conclusion is thus stated by Martin, J: "The elementary authorities uniformly hold that the word 'heirs' is indispensable to the creation by deed of an estate tail or fee simple; though it is otherwise in respect to a will. This requirement is technical; but it has always been a rule of property in this State, and must for manifest reasons be upheld. The contingent remainder is expressly limited to the brothers and their heirs. And it is plain that the word 'heirs,' found in the clause giving the remainder, cannot by construction be held to limit the estate granted, as is claimed,

505, 82 Am. Dec. 737; Greer v. Boone, 5 B. Mon. (Ky.) 554. Graham v. Houghtalin, 30 N. J. L. 552.

[1] Brown v. Brown, 125 Iowa, 218, 101 N. W. 81, 67 L.R.A. 629.

[1a] Bodine v. Arthur, 91 Ky. 53, 14 S. W. 904, 12 Ky. L. R. 650, 34 Am. St. Rep. 162.

[2] Ford v. Johnson, 41 Ohio St. 366.

to Cline's issue. Such a transposition of the word would *ab initio* frustrate the apt words of the grant in remainder; for it would be to tack a remainder to an unconditional grant in fee simple. And it will also be noticed that the word 'heirs' as a correlative to Cline or his issue is not found in the *habendum* or warranty clauses, nor elsewhere in the deed. And it is proper to add, it is not imported by reference. Hence, the estate granted is not by the words of grant, or by anything within the four corners, limited to Cline and his heirs, nor to his issue and their heirs. But it is claimed that the particular estate was not alone for Cline's life, but was also for the respective lives of the survivors of his four children who were living at the date of the deed, in September, 1824. As to this, as well as to a suggestion that might be made of a fee by implication springing from the survival of issue, it is sufficient to say that, by the obvious intent and plan of the instrument, the particular estate was ended by the death of Cline, and the fee thereupon reverted, if it did not pass in remainder to the brothers. Consequently the estate granted was a life estate to Cline for his own life. But the result would be the same if the construction were to him and his four children as tenants in common; because, even if the words of grant are not inconsistent with a right of survivorship, it is certain that the right is not given expressly, nor, as we have seen, by implication." [3] In a case in Arkansas, a deed was made to a person "and the heirs of her body that now are or may hereafter be born." The deed provided that neither the grantee nor "her husband, nor either of her children that now are or may hereafter be born, nor any other person for them, shall have any power to sell said land during my natural life, or until the youngest child" of the grantee, "now or hereafter born, shall arrive at full age." The grantee, the court decided, took a life estate and the remainder in fee upon her death became vested in her children that had survived her, and

[3] Ford v. Johnson, 41 Ohio St. 366.

in the issue of those who had died, during her lifetime, *per stirpes*. During the life of the mother the children took nothing by the deed, nor was the interest of the children such during her life that it could be transmitted to her by their death.[4]

§ 848. **Construction against grantor.**—Where the language of the deed will admit of two constructions, the one less favorable to the grantor is to be adopted.[5] The rule is not modified by the fact that the deed was given under an award requiring it.[6] "It is an old principle of law that ex-

[4] Horsley v. Hilburn, 44 Ark. 458.

[5] Vance v. Fore, 24 Cal. 435; Hager v. Spect, 52 Cal. 579; Dunn v. English, 23 N. J. L. 126; Adams v. Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Mills v. Catlin, 22 Vt. 98; Watson v. Boylston, 5 Mass. 411; Middleton v. Pritchard, 3 Scam. (4 Ill.) 510, 38 Am. Dec. 112; Cocheco Mfg. Co. v. Whittier, 10 N. H. 305; Bushnell v. Proprietors etc. 31 Conn. 150; Winslow v. Patten, 34 Me. 25; Carrington v. Goddin, 13 Gratt. 587; Charles River Bridge v. Warren Bridge, 11 Peters, 589; City of Alton v. Illinois Transportation Co., 12 Ill. 38, 52 Am. Dec. 479; Pray v. Briggs, 2 Mill Const., 98; Rung v. Shoneberger, 2 Watts, 23; 26 Am. Dec. 95; Foy v. Neal, 2 Strob. 156; Dodge v. Walley, 22 Cal. 224, 83 Am. Dec. 61; Salmon v. Wilson, 41 Cal. 595; Piper v. True, 36 Cal. 606; Pike v. Munroe, 36 Me. 309, 58 Am. Dec. 751. And see Sanborn v. Clough, 40 N. H. 330; Marshall v. Niles, 8 Conn. 369; Clough v. Bowman, 15 N. H. 504; Carroll v. Norwood, 5 Hr. & J. 155; Johnson v. McMullan, 1 Strob. 143; Jackson v. Hudson, 3 Johns. 375, 3 Am. Dec. 500; Melvin v. Proprietors of Locks etc. 5 Met. 15, 38 Am. Dec. 384; Budd v. Brooke, 3 Gill. 198, 43 Am. Dec. 321; Glen Rose Collegiate Inst. v. Glen Rose I. S. Dist. (Tex. Civ. App.) 125 S. W. 379.

[6] Bushnell v. Proprietors etc. 31 Conn. 150. In Dunn v. English, 23 N. J. L. 126, the deed conveyed to the grantee two small parcels of land, "together, also, with the privilege and common use of the wagon alley between the houses of the said English and Branin, and through the yard of the said English to the back stable lot of the said Branin, and also the further use and privilege of a two and a half feet alley, or passageway, along and around the Treaton bank lot, to and from the dwelling-house lot of the said Branin to the stable lot of the said Branin. But if at any time hereafter the said dwelling-house lot, and the said stable lot of the said Branin, above mentioned, shall be owned by different persons, then and in that case the privilege and use of the said two and a half feet alley or passageway, and also the said wagonway to the said stable lot, shall cease and become null and

ceptions in a deed and every uncertainty are to be taken favorably for the grantee."[7] But this rule is not applicable to any case but one of strict equivocation, cases where the language of the deed is susceptible of two interpretations.[8] And it has no application where the parties claim under the same deed;[9] nor to grants of the sovereign.[1] But a construction should, if possible, be adopted that will render all parts of the deed operative.[2] It is said by an English author: "This rule is often misunderstood; it does not mean that the words are

void, and to revert again to the said Joshua English, his heirs and assigns. But the privilege of the wagonway between the dwellings to remain with the front house." The court stated the only question to be the extent of the right to the use of the alley. In the language of the court: "The plaintiff claims the right to pass through the alley between the houses to a gateway leading to his own lot, immediately in the rear of his house. The defendant insists that, by the terms of the grant, the right of the plaintiff is limited to the use of so much of the alley as lies immediately between the houses; that the passageway claimed by the plaintiff beyond the line of the rear of the house is consequently *extra viam,* and that he is entitled to no damages for its obstruction." The court held that the construction put upon the language of the instrument by the plaintiff was the true one, "because a grant is always to be construed, in cases of doubt, most strongly against the grantor, and most beneficially for the grantee."

[7] Jackson v. Gardner, 8 Johns. 394, 406. See Grubb v. Grubb, 101 Pa. St. 11.

[8] Adams v. Warner, 23 Vt. 395, 412; Abbie v. Huntley, 56 Vt. 454, 458.

[9] Coleman v. Beach, 97 N. Y. 545.

[1] Willion v. Berkley, Plow. 243; Jackson v. Reeves, 3 Caines, 293. And see Stourbridge Can. Co. v. Wheeley, 2 Barn. & Adol. 792; Leeds & Liverpool Can. Co. v. Hustler, 1 Barn. & C. 424; Blakemore v. Glamorganshire Can. Nav., 1 Mylne & K. 154; Parker v. Great Western Ry. Co., 7 Man. & G. 253; Barrett v. Stockton etc. Ry. Co., 2 Man. & G. 134; Priestly v. Foulds, 2 Man. & G. 194; Mohawk Bridge Co. v. Utica & Sch. R. R. Co., 6 Paige, 554.

[2] Waterman v. Andrews, 14 R. I. 589; Watters v. Bredin, 70 Pa. St. 238; Coleman v. Bush, 97 N. Y. 545. See Bent v. Rodgers, 137 Mass. 192; Presbrey v. Presbrey, 13 Allen, 283; Shultz v. Young, 3 Ired. 385, 40 Am. Dec. 413; Haven v. Dale, 18 Cal. 359. In Waterman v. Andrews, *supra,* Matteson, J., in delivering the opinion of the court, says: "It is laid down as a rule of construction that where there are two clauses in a deed which are so repugnant that they cannot stand together, the former is to prevail

to be twisted out of their proper meanings, but only that where the words may properly bear two meanings, and where, after we have applied evidence, whether extrinsic or intrinsic, admissible under the foregoing rules, we are still unable to determine in which of these meanings they were used, we must take them in the meaning most disadvantageous to the person who uses them, unless the adoption of that meaning would work wrong."[3] Where a jury is convinced of a spoliation, they should infer everything in favor of the deed and against the spoiler.[4] As where the meaning is doubtful deeds are construed most strongly in favor of the grantee,[5] it was said

over the latter, unless there be some special reason to the contrary: Plow. 541; 1 Inst. 112*b*; Shep. Touch. 88; Broom's Legal Maxim's *580. But as Judge Metcalf remarks in 23 American Jurist, 277, the rule has very little operation in modern times, a reason to the contrary being almost always found. Nowadays, the rules of construction applied in cases of repugnancy give effect to every part of a deed, when consistent with the rules of law and the intention of the party. When this is impossible, the part which is repugnant to the intention is rejected. And whenever the language used is susceptible of more than one interpretation, the courts will look at the circumstances existing at the time of the transaction, such as the situation of the parties, the subject matter of the conveyance, the acts of the parties contemporaneous with and subsequent to the deed. To this extent extraneous evidence is admissible to aid in the construction of written contracts: Wilson v. Troup, 2 Cowen, 195, 14 Am. Dec. 458; Parkhurst v. Smith, Willes, 327, 332; Bradley v. The Washington, Alexandria & Georgetown Steam Packet Co., 13 Peters, 89, 100–103; Winnipiseogee Lake Cotton and Woolen Co. v. Perley, 46 N. H. 83, 101; Bell v. Woodward, 46 N. H. 315, 331; Gibson v. Tyson, 5 Watts, 34, 41. If, after all, the interpretation to be given to the deed remains doubtful, the court will adopt the construction which is most favorable to the grantee, because it is the fault of the grantor that he has left the matter in doubt, and he ought not to be permitted to take advantage of a difficulty which he has himself created." See Gilbert v. James, 86 N. C. 244.

[3] Elphinstone, Interpretation of Deeds, 94.

[4] Diehl v. Emig, 65 Pa. St. 320.

[5] American Unitarian Assn. v. Minot, 185 Mass. 589, 71 N. E. 551; Simonds v. Wellington, 64 Mass. (10 Cush.) 316; Morse v. Marshall, 95 Mass. (13 Allen) 291; Saltonstall v. Proprietors of Boston Pier etc., 61 Mass. (7 Cush.) 201; Cutler v. Tufts, 20 Mass. (3 Pick.) 276; Adams v. Frothingham, 3 Mass. 361, 3 Am. Dec. 151; Worth-

by Mr. Justice Denson, that if two conflicting intentions are expressed, the deed should be construed according to the well recognized rules of construction and that "one of the cardinal rules is that deeds of conveyance and sale founded upon a valuable consideration are to be construed most strongly against the grantor and in favor of the grantee." [6] If there is no ambiguity, the construction will not depend upon what the parties understood as to its terms.[7] But in the case of an ambiguity in the description, a liberal construction will be given so as to carry out, as far as possible, the intention of the parties.[8] While the intention is to be ascertained from all the parts of the deed taken as a whole,[9] and all the words are to be considered in ascertaining the intent, still, such intent cannot be allowed to override the express language used by the parties.[1] In all cases, however, as the object of construction is to ascertain the intention of the parties to the deed which is to be secured from the general purpose and scope in the light of the attendant circumstances,[2] a positive rule of law must prevail over the intent, no matter how clearly it may be manifest.[3] Nor can the effect of the deed be restricted by attempting to show that rights or property properly embraced in its

ington v. Hylyer, 4 Mass. 205; Ashley v. Pease, 35 Mass. (18 Pick.) 275; Chicago & A. R. Co. v. Hogan, 105 Ill. App. 136, affirmed 208 Ill. 161, 69 N. E. 853; Chapman v. Hamblet, 100 Me. 454, 62 Atl. 215; Bray v. Conrad, 101 Mo. 331, 13 S. W. 957; Linville v. Greer, 165 Mo. 380, 65 S. W. 579; Van Winkle v. Van Winkle, 80 N. Y. Supp. 612, 39 Misc. Rep. 593; Wilson v. Langhorne, 102 Va. 631, 47 S. E. 871; Bolio v. Marvin, 130 Mich. 82, 89 N. W. 563.

[6] Dickson v. Van Hoose, 157 Ala. 459, 19 L.R.A.(N.S.) 719, 47 So. 718, citing § 848 of the text and, also, Seay v. McCormick, 68 Ala. 549; Lamb v. Medsker, 35 Ind. App. 662, 74 N. E. 1012; Whetstone v. Hunt, 78 Ark. 230, 93 S. W. 979, 8 A. & E. Ann. Cas. 443; Budd v. Brooke, 3 Gill. 198, 43 Am. Dec. 321.

[7] Wilkins v. Young, 144 Ind. 1, 41 N. E. 68, 55 Am. St. Rep. 162.

[8] College Corner & R. G. Road v. Moss, 92 Ind. 119.

[9] Dismukes v. Wright, 20 N. C. 346.

[1] Whitmore v. Brown, 100 Me. 410, 62 Atl. 985.

[2] Lindsey v. Eckels, 99 Va. 668, 40 S. E. 23.

[3] Hogan's Heirs v. Welcker, 14 Mo. 177.

language were not in the minds of the parties at the time the sale was agreed upon.[4] Inconsistent technical rules of construction must yield to the intention of the parties as gathered from the whole instrument,[5] and unless some rule of property is violated the intent of the parties to the deed, when ascertained, will be effectuated.[6] The *habendum* clause is not conclusively controlling as the intention is to be gathered from the deed taken as a whole.[7] The principal object to be attained is the ascertainment of the intention of the parties which, if consistent with law, should be carried into effect. In arriving at this intent, the language, in case of ambiguity, will be construed most strongly against the grantor, and the court may consider the circumstances surrounding the transaction and the situation of the parties at the time at which the deed is executed as well as the state of the subject matter conveyed.[8] The intent of the grantor clearly appearing from the whole instrument cannot be defeated by the rule that the deed is to be construed most strongly against the grantor.[9] The deed must be construed against the grantor in all cases where there is uncertainty in the deed and the real intent of the parties is left in doubt,[1] and as forfeitures are not favored, any reasonable construction that will avoid such a result will be favored.[2]

§ 849. Divers estates.—From the rule stated in the preceding section, that a deed will be construed most strongly

[4] Farnam v. Brooks, 26 Mass. (9 Pick.) 212.

[5] Hall v. Wright, 121 Ky. 16, 87 S. W. 1129.

[6] Gibney v. Fitzsimmons, 45 W. Va. 334, 32 S. E. 889. The intent is to be deduced from the whole instrument and effect should be given to every part if possible. Waldron v. Toledo etc. Ry. Co., 55 Mich. 420, 21 N. W. 870.

[7] Harriot v. Harriot, 49 N. Y. Supp. 447, 25 App. Div. 245.

[8] Allemong v. Gray's Admr., 92 Va. 216, 23 S. E. 298.

[9] Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468.

[1] Cook v. Hensler, 107 Pac. 178.

[2] Glen Rose Collegiate Institute v. Glen Rose Independent School Dist. No. 1 (Tex. Civ. App.) 125 S. W. 379.

against the grantor, it results that the deed will be construed to convey to the grantee whatever interest and estate the grantor may have in the land at the time of the execution of the deed, unless the deed shows that the grantor's intention was to pass a less estate.[3] If a person has divers estates in land, as, for instance, for life and in fee, any charge or grant made by him shall bind the whole estate.[4]

§ 849a. Deed of executor passing individual interest. —Where a person has an individual interest in land, and is also authorized as executor or in some other representative capacity to convey such land, a deed made by him, purporting to convey a complete title, but not referring to his representative character or to a power to sell in a will, conveys his individual interest only.[5] In a case where this rule was enforced, Mr. Chief Justice Scates remarked: "We must read, interpret, construe, and understand the deed, by and from its language and terms."[6] Where there is no evidence to the contrary in a deed, it will be presumed to operate on the grantor's own right, if it appear that besides his own he has one in a representative character.[7]

§ 850. Construction favorable to operation of deed.— A deed should be considered as intended to have some effect, and a construction making it operative will be preferred to one rendering it void. "Some effect will, if possible, be given to the instrument, for it will not be intended that the parties meant it to be a nullity."[8] A mortgage described the land

[3] Stockett v. Goodman, 47 Md. 54.

[4] Stockett v. Goodman, 47 Md. 54.

[5] Cohea v. Hemingway, 71 Miss. 22, 42 Am. St. Rep. 449.

[6] In Davenport v. Young, 16 Ill. 548, 63 Am. Dec. 320.

[7] Coffing v. Taylor, 16 Ill. 474.

[8] Gano v. Aldridge, 27 Ind. 294; Hoffman v. Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Anderson v. Baughman, 7 Mich. 69, 74 Am. Dec. 699. See Waterman v. Andrews, 14 R. I. 589; Piper v. True, 36 Cal. 606.

affected as "lot four of block one" of a certain farm, "being now used and occupied with the steam sawmill thereon, by the parties of the first part." This portion of the farm had been platted into four lots or blocks, which had not been subdivided. The mill was situated on the one which was numbered four on the plat, while the others were fenced in, used, and occupied with the mill. The court held that the words "of block one" should be rejected, and the mortgage was held a valid lien upon lot four. Said Mr. Justice Christiancy: "It is a rule as well founded, in reason as it is supported by authority, that deeds and other written instruments should be so construed as to render them valid and effectual, rather than void, *ut res magis valeat quam pereat.* But to construe this mortgage so as to make the tracts in question *blocks* instead of *lots,* would be to violate the plain meaning of words and the clear intent of the parties, and to ignore the whole subject matter in order to lay a foundation for violating this cardinal rule of construction." [9] Only unavoidable necessity should permit a construction to be placed upon a deed which requires the rejection of an entire clause.[1] If a deed conveys land to a married woman without defining the estate, but in the *habendum* clause the estate is limited to her during her natural life, with a remainder to her husband, who is mentioned by name, and, in case he should die before his wife, then to his heirs at law, a life estate in the wife is created, and the husband takes the remainder in fee simple.[2] "The real intention

[9] Anderson v. Banghman, 7 Mich. 69, 77, 74 Am. Dec. 699.

[1] City of Alton v. Illinois Transportation Co., 12 Ill. 38, 52 Am. Dec. 479; Riggin v. Love, 72 Ill. 556. See Pool v. Blakie, 53 Ill. 495; Coleman v. Beach, 87 N. Y. 545.

[2] Riggin v. Love, 72 Ill. 553. Reservations are considered as the language of the party for whose benefit they are made: House v. Palmer, 9 Ga. 497; Cardigan v. Armitage, 2 Barn. & C. 197; Jackson v. Lawrence, 11 Johns. 191; Bullen v. Denning, 5 Barn. & C. 842. And see, Palmer v. Warren Ins. Co., 1 Story, 360; Blackett v. Royal Exch. Assn. Co., 2 Cromp. & J. 244; Hill v. Grange, Plow. 171; Donnell v. Columbian Ins. Co., 2 Sum. 366, 381; Co. Litt. 42*a*. The language

of the framer of the deed, the written declaration of whose mind it is always considered to be, is the end and object to the discovery and effectuating of which all the rules of construction, properly so called, are uniformly directed. When technical words or phrases are made use of, the strong presumption is, that the party intended to use them according to their correct technical meaning; but this is not conclusive evidence that such was his real meaning. If the technical meaning is found in the particular case to be an erroneous guide to the real one, leading to a meaning contrary to what the party intended to convey by it, it ceases to answer its purpose. The

of the acknowledgment of the payment of the consideration in a deed was: "I, the said grantor, for and in consideration of the sum of one thousand dollars, in hand before the ensealing hereof, well and truly paid by Wanton Durfee, of the city and county of Providence, *subject to the life-estate of Mary L. Greene and Almira Durfee, both of Warwick*, county of Kent, *and Susan H. Greene, of the city and county of Providence, who jointly, or the survivors of them, shall be entitled to their fourths of the annual income of said estate, the other fourth of said income to be expended on said estate in betterments*, the receipt whereof I do hereby acknowledge, and am therewith fully satisfied, contented, and paid; and thereof, and of every part and parcel thereof, do exonerate, acquit, and discharge the said Wanton Durfee, Mary L. Greene, Almira Durfee, and Susan H. Greene, their heirs, executors, and administrators forever." Mr. Chief Justice Durfee, in delivering the opinion of the court, said: "The words in italics seemed to have been designed either to qualify the estate conveyed by the succeeding words, or else to recognize or refer to some qualification otherwise existing or made, or to be made by some other instrument. We think it is clear that they cannot qualify the estate conveyed, because they are ineffectual in themselves to create, and indeed do not purport to create, any estate, and because the succeeding words, being the operative words of the deed, make no reference to them, but convey the estate described absolutely and immediately to all the grantees in fee simple. The italicized words, in fact, do not affect in any way the construction of the deed. If they are of any use in the deed, they are of use only as notice to put people on inquiry, in case the estate is qualified by some other instrument, or by equitable intendment, or as evidence of some purpose still unaccomplished": Durfee, Petitioners, 14 R. I. 47. A construction that will render a deed valid will be preferred to one that will defeat it: Maxwell v. McCall, (Iowa,) 124 N. W. 760.

deed may be drawn inartificially, from ignorance, or inadvertence, or other causes; but still, if there is enough clearly to convey information as to the real meaning, the object is attained. The mind is with certainty discovered, and being known must be the guide, or the act and deed would not be the act and deed of the party, but of the court. Because the words which are the signs of the ideas of the person using them are in general, and in the correct use of them, the signs of ideas, different from those of which in the particular case, they are found less technically and correctly, but with equal certainty to be the signs; can it follow that they are to be construed, to represent the ideas of which they are known not to be the signs, in preference to those of which they appear to be the signs? Where is the authority that compels the court to go this length in its adherence to technical meaning? The contrary has been long and universally established to be the rule by the highest authorities from the earliest period, without a single one to the contrary. Many cases may doubtless be found in which technical meaning has been allowed to prevail, notwithstanding some appearance of a contrary intent; but this has been where the manifestation of intent was not deemed sufficient to get over the presumption in favor of legal construction. The paramount regard to be had in a case circumstanced as the present, to the meaning and intention of the grantor, in preference to technical meaning, is the settled rule of construction. If the subject of the instrument on which the question arises be one that is not matter of law (over which intention has no control), but depends wholly on the will and act of the party, such as the appointment by the donor in a deed of gift of his own donee; if the words to be construed are not words of limitation (in which a stricter attention to forms may be required, especially in deeds), but words of purchase and description, made use of to designate the person of the first taker; in such case, if the meaning and intention of the grantor be clearly manifested on the face of

the instrument, as to the person or character intended to be the object of grant, and if the words that he has made use of to convey his meaning will admit of an interpretation conformable to it, though contrary to their correct technical sense, there is no case or dictum to be found which requires the court to adopt the technical sense in opposition to the actual meaning of the party; on the contrary, the authorities uniformly demand the preference to be given to intent, over technical import and form." [3] But under the strict rules applicable to the execution of deeds by attorneys in fact, a deed may be inoperative notwithstanding the intention of the parties, because it fails by a proper signature to bind the principal. A strong case illustrating the strictness of the early cases in this regard, is one where a party covenanted to sell and convey to another certain lots of land, and on the payment of the sum agreed upon to execute to him a good and sufficient deed. The agreement to sell and convey stated that it was the agreement of the principal by his attorney in fact, and that the principal covenanted to sell and convey, but the *testimonium* clause stated that the attorney, "as attorney of the party of the first part, and the said party of the second part, have hereunto set their hands and seals," etc. The court decided that as the attorney had only affixed his own name the covenant was void.[4] Wherever it is possible to do so a deed will be construed so

[3] Plumer, M. R., in Cholmondeley v. Clinton, 2 Jacob & W. 91. An instrument which states that "I, A B, warrant and defend unto C D, her heirs and assigns forever, the receipt of which is hereby acknowledged, the following real estate, on this condition: I, the said A B, is to have and hold full possession of said lands during my natural life, and to hold appurtenances unto her, her heirs, and assigns forever," although it may be assigned, sealed and acknowledged, cannot operate as an effectual transfer, because it contains no words of grant: Hummelman v. Mounts, 87 Ind. 178.

[4] Townsend v. Corning, 23 Wend. 436, and cases cited. An interesting discussion as to the signature of deeds executed by attorneys in fact will be found in Doe v. Doe, 3 Am. Jur. 52, 77. See, for a discussion of signature by attorneys in fact, vol. 1, §§ 377–381.

as to give it some effect.[5] "A deed should, if possible," says Mr. Chief Justice McBride, "be so construed that some effect will be given it. It will be assumed that the parties did not intend that it should be a nullity, and did intend that it should be operative. It will be upheld rather than defeated."[6] Respecting conveyances of real estate "courts in modern times have shown more consideration for the substance of the contract than for the shadow, for the passing of the estate according to the intention of the parties than for the manner of passing it; and whenever the rules of language and of law will permit, that construction will be adopted which will make the contract legal and operative in preference to that which would have an opposite effect."[7] If the deed is inartificially and untechnically drawn it should receive a liberal construction.[8]

§ 850a. **Merger of contract to convey in deed.**—The rule applicable to all contracts, that prior stipulations are merged in the final and formal contract executed by the parties, applies, of course, to a deed based upon a contract to convey. When a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained

[5] Haven v. Adams, 86 Mass. (4 Allen) 80; Slater v. Dudley, 35 Mass. (18 Pick.) 373; Peter v. Byrne, 175 Mo. 273, 75 S. W. 433, 97 Am. St. Rep. 576; Davenport v. Gwilliams, 133 Ind. 142, 22 L.R.A. 244, 31 N. E. 790; Thatcher v. Wardens etc. St. Andrew's Church of Ann Arbor, 37 Mich. 264; Nuckols v. Stone, 120 Ky. 631, 87 S. W. 799.

[6] Davenport v. Gwilliams, 133 Ind. 142, 22 L.R.A. 244, 31 N. E. 790.

[7] Roberts v. McIntire, 84 Me. 362, 24 Atl. 867, quoted approvingly in Peter v. Byrne, 175 Mo. 233, 75 S. W. 433, 97 Am. St. Rep. 576.

[8] Shartenberg v. Ellbey, 27 R. I. 414, 62 Atl. 979. Mr. Chief Justice Ames in Deblois v. Earle, 7 R. I. 26 said: "The cardinal rule in the interpretation of all instruments . . . is to read the writing: and taking its language in connection with the relative position and general purpose of the parties, to gather from it, if you can the intent in the questionable particular.

in the contract, still the deed must be looked to alone to determine the rights of the parties. "No rule of law is better settled than that where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio,* and the rights of the parties rest thereafter solely on the deed." [9] A vendor, in a contract to sell, agreed to convey a good title, and subsequently executed a deed, which the vendee accepted in performance of the contract, knowing when he accepted the deed that the title to a part of the land was in the United States. It was decided that the previous contract was merged in the deed, and that the rights of the vendee must depend on the deed and not on the contract.[1] Where a lease is executed containing certain conditions, and the lessor, before its expiration, conveys the land by deed to the lessee, reciting the lease, but omitting all reference to the conditions, the lease is merged in the conveyance, and the title of the grantee is not encumbered with the conditions contained in the lease.[2] The acceptance by the vendee of a deed is considered as a full compliance with the contract to convey, and as annulling it.[3] When the transaction has been fully closed, no allowance can be made because the quantity of land may be greater or less than that provided for in the prior contract.[4] So, it has been held, that if in the contract of sale the vendor reserves the timber growing on the land to be conveyed, and stipulates for the right to remove it within a specified time, but within the time so limited executes a warranty deed to the vendee, but fails to provide for the reservation, the vendee obtains the right to the timber.[5] An oral agreement, made prior to the sale, to secure an out-

[9] Slocum v. Bracy, 55 Minn. 249, 43 Am. St. Rep. 499, per Mitchell, J.

[1] Bryan v. Swain, 56 Cal. 616.

[2] St. Philip's Church v. Zion Presbyterian Church, 23 S. C. 297.

[3] Carter v. Beck, 40 Ala. 599.

[4] Cronister v. Cronister, 1 Watts & S. 442.

[5] Clifton v. Jackson Iron Co., 74 Mich. 183, 16 Am. St. Rep. 621. Said the court per Campbell, J.: "Had no deed been made, it is agreed that the reservation would

standing title is merged in the covenants of the deed.[6] A deed also merges all representations of freedom from encumbrance in the absence of fraud and of express or implied covenants.[7] The acceptance of the deed is, in the absence of fraud or mistake, considered the consummation of the contract between the parties, and therefore conclusive evidence of their agreement.[8] All inconsistencies that may exist between the contract

have prevailed. But a previous contract cannot contradict or control the operation of a deed. It was competent for defendant to relinquish any contract reservation, and a deed which grants and warrants without any reservation has that effect. We do not hold that if the deed were so made by some mistake within the cognizance of equity, the mistake might not be corrected. Neither need we consider whether, after such a deed, there might not be such dealings as to render such timber cutting lawful by license, express or implied. In this case there was no testimony tending to show that the deed was not supposed and intended to close up all the rights of the parties."

[6] Coleman v. Hart, 25 Ind. 256.

[7] Fritz v. McGill, 31 Minn. 536. See for other cases relating to the particular circumstances where this rule has been enforced, Carter v. Beck, 40 Ala. 599; Gibson v. Richart, 83 Ind. 313; Davenport v. Whisler, 46 Iowa, 287; Jones v. Wood, 16 Pa. St. 25; Frederick v. Youngblood, 19 Ala. 680, 54 Am. Dec. 209; Houghtaling v. Davis, 10 Johns. 297; Davis v. Clark, 47 N. J. L. 338; Timms v. Shannon, 19 Md. 296, 81 Am. Dec. 632; Kerr v. Calvit, Walker, 115, 12 Am. Dec. 537; Williams v. Hathaway, 19 Pick. 387; Howes v. Barker, 3 Johns. 506, 3 Am. Dec. 526; Hunt v. Amidon, 4 Hill, 345, 40 Am. Dec. 283; Shontz v. Brown, 27 Pa. St. 123; Savage v. Canthorn, 109 Va. 694, 64 S. E. 1052.

[8] Jones v. Wood, 16 Pa. St. 25, and cases cited under the various notes to this section. But in Houghtaling v. Lewis, 10 Johns. 298, the court say: "Articles of agreement for the conveyance of land are, in their nature, executory, and the acceptance of a deed, in pursuance thereof, is to be deemed, *prima facie*, an execution of the contract, and the agreement thereby becomes void, and of no further effect. Parties may, no doubt, enter into covenants collateral to the deed, or cases may be supposed when the deed would be deemed only a part execution of the contract, for the provisions in the two instruments clearly manifested such to have been the intention of the parties. But the *prima facie* presumption of law arising from the acceptance of a deed, is that it is an execution of the whole contract; and the rights and remedies of the parties, in relation to such contract, are to be determined by such deed, and the original agreement becomes null and void." But inasmuch as in that case the

of sale and the deed are to be determined by the deed alone.[9] The prior oral negotiations cannot be set up for the purpose of contradicting the deed.[1] After the execution of the deed, the grantee cannot, in the absence of actual fraud recover for any misrepresentation relating to the title, not covered by the covenants of the deed [2] as the deed is considered to be a complete relinquishment of all conflicting claims in the preceding contract of sale.[3] But if the contract of sale provides that the grantor shall deliver a deed which shall contain full covenants of warranty for conveying the property together with "gas fixtures, ranges, heating and hot water apparatus," this covenant is not merged in a deed failing to mention the fixtures, and the vendor will be obliged to compensate the vendee for their loss if the ranges are removed by a third person.[4] A verbal reservation that is equivalent to an exception or defeasance and that is repugnant to the legal effect of the deed will be treated as void.[5] A deed introduced in evidence of title shows conclusively compliance with all the conditions of a

court held that the proof was conclusive that the deed was accepted in full satisfaction of the agreement, the language quoted can scarcely be taken as making the decision an exception to the rule stated in the text. It was held in Speed's Executors v. Hann, 1 T. B. Mon. 16, 15 Am. Dec. 78, in conflict with the general rule, that articles of agreement did not become merged in a deed executed subsequently. Attention should also be called to the case of Donlon v. Evans, 40 Minn. 501, but this case is explained and distinguished in the later decision by the same court of Slocum v. Brady, 55 Minn. 249, 43 Am. St. Rep. 499. See, also, Porter v. Noyes, 2 Greenl. 22, 11 Am. Dec. 30. Parol evidence is inadmissible to show conversations between the parties prior to the execution of the deed: Smith v. Fitzgerald, 59 Vt. 451, 9 Atl. Rep. 604. See, also, Carr v. Hays, 110 Ind. 408, 11 N. E. Rep. 25.

[9] Smith v. McClain, 146 Ind. 77, 45 N. E. 41; Turner v. Cool, 23 Ind. 56, 85 Am. Dec. 449.

[1] Beasley v. Phillips, 20 Ind. App. 182, 50 N. E. 488.

[2] Brauckmann v. Leighton, 67 Mo. App. 245.

[3] Horner v. Lowe, 159 Ind. 406, 64 N. E. 218; Hampe v. Higgins, 74 Kan. 296, 85 Pac. 1019.

[4] Wynne v. Friedman, 96 N. Y. Supp. 883, 49 Misc. Rep. 616.

[5] Chapman v. Long, 10 Ind. 465.

precedent bond.[6] But if during the pendency of a suit, involving title to land, a person who is not a party to the suit, yet who has a bond for title, accepts a deed to the property from the grantor under the bond, who was a party to the suit, a merger of the bond and deed is not thereby created. A notice of *lis pendens* filed in the suit, while applying to the deed, will not apply to the bond.[7]

§ 850b. **Stipulation surviving the deed.**—There may be cases where the stipulation instead of becoming merged in the deed, survives it and confers an independent cause of action. Still, such cases come very closely to the border line of contradicting the general rule stated in the preceding section. A case where such stipulation is clearly not merged in the deed is that of a parol contract made by the vendor to refund the purchase money on failure of the vendee to acquire under the deed a good title to the property sold. Such an agreement is for indemnity against the consequences of the taking of the title that the deed may convey, and is therefore independent of the deed.[8] So it has been held, that if the grantor in a warranty deed promises to indemnify the grantee for any improvements that he may make in case the title should prove worthless, his promise is enforceable.[9] The purpose for which a deed was executed may be shown. Thus, where a

[6] Manspeaker v. Pipher, 5 Kan. App. 879, 48 Pac. 868; affirmed Henting v. Pipher, 58 Kan. 788, 51 Pac. 229.

[7] Wille v. Ellis, 22 Tex. Civ. App. 462, 54 S. W. 922.

[8] Close v. Zell, 141 Pa. St. 390, 23 Am. St. Rep. 296.

[9] Richardson v Gosser, 26 Pa. St. 335. In answer to the argument that the contract concerning improvements became merged in the deed, the court said: "But to us it appears that the contract on which this suit is founded has no such relation to the deed referred to. it does not concern the sale or the transfer of the title. It is a promise to do another thing." For other cases on the same point see Drinker v. Byers, 2 Penr. & W. 528; Anderson v. Washabaugh, 43 Pa. St. 115; Robinson v. Bakewell, 25 Pa. St. 424; Brown v. Moorhead, 8 S. & R. 569; Walker v. France, 112 Pa. St. 203; Frederick v. Campbell, 13 S. & R. 136; Cox v. Henry, 32 Pa. St. 18.

railroad company represented that a right of way was designed for the main line and not for sidetracks, and the right of way is subsequently used for sidetrack purposes, the purpose for which the deed was executed may be shown by parol evidence. In such a case, however, its use will not be enjoined, but the grantor may recover damages for any excessive injury sustained over that which would arise from the use represented.[1] Where, as a part of the consideration of the sale, a parol agreement is made restricting the use of the land in some particular for a specified time, it is not merged in the deed. The title is not affected by it, and such an agreement may be proven by parol evidence.[2] If an owner agrees orally at the time of the sale of a tract of land, that he will not sell any of the residue except for a specified price per front foot, he will be bound by his agreement. It is not void on the ground that it is against public policy because it may remove a large tract from sale for an indefinite time. A construction will be placed upon such an agreement in the light of the surrounding circumstances, and as no limitation is fixed, it will be considered as operative for a reasonable length of time.[3] Such an agreement is not merged in the deed because it does not contradict anything contained in the deed, but it is a collateral agreement on another subject, and hence may be established by parol.[4] Where in a contract for the purchase of land, there was a provision that if the purchaser did not build a factory on the land he should reconvey to the vendor and the purchaser, entered into possession of the land, made the payments as they were required by the contract of purchase, obtained a deed but failed to construct the factory in accordance with the terms of the contract, the provision relating to the

[1] Donisthorpe v. Fremont etc. R. Co., 30 Neb. 142, 27 Am. St. Rep. 387.

[2] Hall v. Solomon, 61 Conn. 476, 29 Am. St. Rep. 218.

[3] Rackemann v. Riverbank Improvement Co., 167 Mass. 1, 57 Am. St. Rep. 427.

[4] Rackemann v. Riverbank Improvement Co., 167 Mass. 1, 57 Am. St. Rep. 427.

construction of the factory was considered to be independent and collateral and not such a preliminary agreement as would merge in the deed.[5]

§ 850c. **Deed correcting prior deed.**—The rule prevailing with reference to contracts to convey, that all prior stipulations of the parties are merged in the deed finally delivered and accepted, also prevails where a second deed has been executed as a substitute for, and a correction of, a prior deed.[6] If the deed delivered as a substitute omits lands contained in the prior conveyance, the grantee and his heirs are estopped from claiming them.[7] Where a subsequent deed has been executed in place of a prior deed misdescribing the land intended to be conveyed, the possession by the grantor of the land first conveyed is adverse to the grantees.[8] If a grantee accepts a deed of correction in lieu of a prior deed executed by the grantor, and the grantee sells the land conveyed to him by the subsequent deed, he is estopped from claiming title to the land conveyed by the prior deed. His acceptance of the second deed constitutes an election to take the land conveyed by the corrected deed, and operates as a relinquishment of title to the land conveyed by the first deed, as one who accepts the benefits of a conveyance must adopt the whole of it.[9]

§ 851. **Contemporaneous exposition.**—A deed should receive a fair and reasonable construction which will effectuate the intention of the parties, and a contemporaneous exposition of the deed is always entitled to the greatest consider-

[5] Doty v. Sandusky Cement Co. of Ohio, (Ind. App.), 91 N. E. 569.

[6] Chloupek v. Perotka, 89 Wis. 551, 46 Am. St. Rep. 858; Emeric v Alvarado, 64 Cal. 529. And see Hutchinson v. Chicago etc. Ry. Co., 41 Wis. 541.

[7] Chloupek v. Perotka, 89 Wis. 551; 46 Am. St. Rep. 858.

[8] Fox v. Windes, 127 Mo. 502, 48 Am. St. Rep. 648.

[9] Fox v. Windes, 127 Mo. 502, 48 Am. St. Rep. 648.

ation.[1] Unless a contrary intent is manifest, a deed should be construed in all its parts with respect to the actual, rightful state of the property at the time at which the deed is executed.[2] A deed will not be declared void for uncertainty until it has been examined in the light of contemporaneous facts. When from these facts a clear intention can be gathered, and the words of the instrument by fair interpretation are susceptible of a construction to uphold such intention, the words will be so construed, and the instrument enforced.[3] Where a deed purporting to convey a strip of land of a specified width along a line already designated does not give the lateral boundaries, and fails to designate the particular part of such strip traversed by such line, and the grantee enters into possession under the deed, and marks the lateral boundaries by the erection of fences, and retains possession for several years, with the grantor's consent and acquiescence, the parties thus place a practical construction upon the deed, and this construction binds both the parties and those claiming under them.[4] The construction of the deed given to it by the parties, as manifested by these acts and omissions will be considered the proper construction of the conveyance unless it can be clearly shown

[1] Connery v. Brooke, 73 Pa. St. 80. See Winnipiseogee v. Perley, 44 N. H. 83; Putzel v. Van Brunt, 40 N. Y. Sup. Ct. 501; Hamm v. San Francisco, 17 Fed. Rep. 119; Stone v. Clark, 1 Met. 378, 35 Am. Dec. 370.

[2] Pollard v. Maddox, 28 Ala. 325; Richardson v. Palmer, 38 N. H. 218; Dunklee v. Wilton R. R. Co., 24 N. H. 489; Moore v. Griffin, 22 Me. 350; Abbott v. Abbott, 51 Me. 581; Commonwealth v. Roxbury, 9 Gray, 493; Stanley v. Green, 12 Cal. 148. And see Adams v. Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Lane v. Thompson, 43 N. N. 324; Rider v. Thompson, 23 Me. 244; Karmuller v. Krotz, 18 Iowa, 352; Commonwealth v. Roxbury, 9 Gray, 493, and n. 525; Hall v. Lund, 1 Hurl. & C. 684; Roberts v. Roberts, 55 N. Y. 275.

[3] Stanley v. Green, 12 Cal. 148.

[4] Messer v. Oestreich, 52 Wis. 684. See, also, Whitney v. Robinson, 53 Wis. 309. A deed which exhibits on its face its own invalidity cannot be made the basis of an action: Welton v. Palmer 39 Cal. 456.

that a contrary construction should be given.[5] If it appears that the parties to a deed have considered that a permanent easement of a private way was granted to the owner of a tract of land, and such a construction is consistent with the terms of the deed, that construction will be followed.[6] Not only may the court consider the condition of the parties at the time the deed was executed, but even more strongly may take into consideration what the parties themselves, subsequently to the conveyance, have done for the purpose of carrying out the contract as they understood it,[7] and the best test of the intention of the parties may be supplied by the construction which they have placed on the restrictions in a deed by their conduct and acquiescence.[8] Contemporaneous construction may determine the intent of the parties as to the boundaries of the land conveyed.[9] But such construction is available only in case of doubtful provisions and cannot be used to defeat the definite and certain language of the deed, or in cases where settled rules of construction would be disregarded.[1] The principle of estoppel is often associated with that of practical construction as where a railway company having a deed for a right of way took possession of a strip of land as such right

[5] Dakin v. Savage, 172 Mass. 23, 51 N. E. 186; Stevenson v. Erskine, 99 Mass. 367; Inhabitants of Cambridge v. Inhabitants of Lexington, 34 Mass. (17 Pick.) 222; Stone v. Clark, 42 Mass. (1 Met.) 378, 35 Am. Dec. 370; Mann v. Dunham, 71 Mass. (5 Gray) 511; Lovejoy v. Lovett, 124 Mass. 270; Neff v. Pennsylvania R. Co., 202 Pa. 371, 51 Atl. 1038; Wolfe v. Dyer, 95 Mo. 545, 8 S. W. 551; Creed v. Henkel, 18 Ohio Cir. C. 883; Gibney v. Fitzsimmons, 45 W. Va. 334, 32 S. E. 189; Montfort v. Stevens, 68 Mich. 61, 35 N. W. 827; Oakland Woolen Co. v. Union Gas & Electric Co., 101 Me. 198, 63 Atl. 915; Fullagar v. Stockdale, 138 Mich. 363, 101 N. W. 576; Jacoby v. Nichols, 23 Ky. L. Rep. 205, 62 S. W. 734; Hoag v. Place, 93 Mich. 450, 18 L.R.A. 39, 53 N. W. 617.

[6] Neff v. Pennsylvania R. Co., 202 Pa. 371, 51 Atl. 1038.

[7] Carter v. Foster, 145 Mo. 383, 47 S. W. 6.

[8] Murray v. Weston, 51 N. Y. Supp. 1006, 23 App. Div. 623.

[9] Town of Como v. Pointer, 87 Miss. 712, 40 So. 260.

[1] Oakland Woolen Co. v. Union Gas & Electric Co., 101 Me. 198, 63 Atl. 915.

of way and with the owner's knowledge and acquiescence constructed its road. In such a case a practical construction was given to the grant by the election of the railway company and the acquiescence of the grantor, and where the railroad had been in operation for several years on the line selected, this construction should not be disregarded.[2] But, where a city executes a deed containing a special covenant that if it should fail to give title and possession to the whole of the land conveyed, the grantee within the limitation of a year might reconvey and be entitled to a return of the purchase price, the fact, that the grantee had conferred with the city officials concerning the nature of the property for the purposes of taxation, and as to street crossings, and also with a railroad company that had tracks over the land, all these negotiations, however, failing, did not give the deed such a practical construction as to make the property conveyed subject to the rights of the railroad company or on account of these rights, to waive the grantee's rights under the covenants in the deed.[3]

§ 852. **Election of grantee.**—Where a deed may operate in two different ways, the grantee may elect as to which one of the ways it shall operate. This is but the statement in another form that the deed shall be construed most strongly against the grantor, or at least a consequence of this rule. "Where a deed may inure in different ways, the grantee shall have his election which way to take it. An exception in a deed is always to be taken most favorably for the grantee; and if it be not set down and described with certainty, the grantee shall

[2] Deckson v. St. Louis & K. R. Co., 168 Mo. 90, 67 S. W. 642. For other cases involving practical construction, see Farnham v. Thompkins, 171 Ill. 519, 49 N. E. 568; Kamer v. Bryant, 103 Ky. 723, 46 S. W. 14; Usher v. Raymond Skale Co., 163 Mass. 1, 39 N. E. 416.

[3] Pryor v. City of New York, 197 N. Y. 123, 90 N. E. 423. The contemporaneous construction of the parties as shown by the giving and taking of possession will show their intent. In re City of Seattle, 52 Wash. 588, 100 Pac. 1013.

have the benefit of the defect."[4] "The general rule is, that of everything uncertain which is granted, election remains to him to whose benefit the grant was made to make the same certain."[5] But where a grantor conveyed "a certain lot of land situate on my home farm in Winslow, and on the west side of the road leading to Augusta, to be selected by said Grover (the grantee) or his assigns, anywhere on my said farm west of said road, and if the location of the lot of land should be at a distance from said road, a good and sufficient passageway from said road to the place where said lot may be selected, and never obstructed by me or my heirs or assigns, the said lot to contain one acre in such shape as said Grover or his assigns may choose, all to be according to my bond to John Reed, of Clinton, dated Oct., 1836, reference thereto being had, will fully appear, said one acres is supposed to contain a ledge of limestone or marble," and at the time of the execution of the deed, there was upon the land a ledge of limestone or marble, and at a distance from the ledge, a dwelling house, barn, and other buildings, it was held that the grantee was not entitled to locate his acre in such a manner as to include a ledge of limestone or marble, and thence to run a narrow strip of land to the buildings, and embrace within his acre lot the land on which the buildings were erected.[6]

[4] Jackson v. Myers, 3 Johns. 388, 3 Am. Dec. 500, per Kent, C. J. See, also, Esty v. Baker, 50 Me. 331, 79 Am. Dec. 616; Melvin v. Proprietors of Locks, 5 Met. 27, 38 Am. Dec. 384.

[5] Armstrong v. Mudd, 10 Mon. B. 144, 50 Am. Dec. 545; Vin. Abr. vol. 14, p. 49. See, also, Jackson v. Blodgett, 16 Johns. 172; Jackson v. Gardner, 8 Johns. 394; 2 Hilliard on Real Prop. (2d ed.) 327; 2 Greenl. Cruise on Real Prop. 605; Willard on Real Estate and Conveyancing, 403; Pollard v. Maddox, 28 Ala. 321.

[6] Grover v. Drummond, 25 Me. 185. A deed is conclusive evidence of the contract, so far as the instrument is intended to pass or extinguish a right, and concludes the parties; but the deed is not conclusive evidence as to facts acknowledged, such as the date, payment of consideration, etc.: Rhine v. Ellen, 36 Cal. 362. The recital of collateral facts in a deed not essential to its validity does not estop a

§ 853. **Passing present interest with other provisions to take effect upon death of grantor.**—We have already discussed very fully the effect of instruments in the form of absolute deeds which were not to take effect until after the death of the grantor.[7] But the deed may pass a present interest in the land to the grantee for life, and may also contain provisions to take effect by way of contingent remainder, upon the grantor's death, during the life of the grantee. In such a case the question would arise whether the instrument is to be considered as a conveyance, or is to be deemed of a testamentary character only. The rule is, that where the deed passes a present interest, such contingent provisions do not convert it into a will. The grantor cannot revoke such limitations, nor do they become void by his subsequent marriage.[8] Where land is conveyed to a person, the deed containing the clause, "but should he die without a wife, or children, or child, then said land shall pass according to the statutes of descent and distribution of the State," then in force, those who are the surviving heirs of the grantee, in case he dies without having married, take by purchase under the deed and not by descent or inheritance from him.[9] Where a person intends

party from denying them: Ingersoll v. Truebody, 40 Cal. 603. Parties exchanged lands, and executed deeds. Each deed contained a clause of general warranty, and also a stipulation that in case the grantee was ousted, the deed should be void, and he should have the right to re-enter, possess, and own the land given in exchange. It was held that when a party was ousted, he had the right to elect whether he would re-enter or rely on his warranty: Pugh v. Mays, 60 Tex. 191.

[7] See §§ 279–283.

[8] Brown v. Mattocks, 103 Pa. St. 16. "Many deeds," said Mr. Justice Paxton, "conveying and settling property contains provisions which become operative only after the death of the grantor or settler, but where a present interest passes to a trustee or the grantee, it has never been supposed that such instruments were of a testamentary character:" Brown v. Mattocks, 103 Pa. St. 16. And see Chandler v. Chandler, 55 Cal. 267; Rexford v. Marquis, 7 Lans. 248.

[9] Robinson v. Le Grand, 65 Ala. 111; Phillips v. Thomas Lumber Co., 94 Ky. 445, 42 Am. St. Rep. 367; Cable v. Cable, 146 Pa. St. 451; Seals v. Pierce, 83 Ga. 787,

that a deed shall take effect on execution, adopting that mode of distributing his property rather than by will, the deed is an effectual conveyance.[1]

§ 854. **No present interest passing.**—But where no present interest passes by the deed, the rule is altogether different. The instrument then, while in form a deed, is in substance a will, possessing all the incidents of a will. Thus, a deed in the usual form, containing the clauses, "to commence after the death of both of said grantors," and also, "it is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises as long as the grantors or either of them shall live," does not create a present interest to commence at a future day, but is testamentary in character. Notwithstanding the payment of a valuable consideration, the grantors have the right of revocation at their option.[2] So, a deed made upon the express con-

20 Am. St. Rep. 344; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147; White v. Hopkins, 80 Ga. 154.

[1] Brown v. Atwater, 25 Minn. 520. But where he reserves the power to reinvest the title in himself at his pleasure, there is really no delivery, and the deed does not pass title: Miller v. Lullman, 81 Mo. 311. But a *habendum* clause may have the effect of limiting the estate conveyed so that the title shall revert to the grantor in case he survives the grantee, and shall vest absolutely in the grantee in the event of the grantor's prior death: Bassett v. Budlong, 77 Mich. 338, 18 Am. St. Rep. 404. See section 215, *ante*.

[2] Leaver v. Gauss, 62 Iowa, 314. Said the court, per Adams, J: "We do not forget that the statute provides that 'estates may be created to commence at a future day:' Code, § 1933. But we have to say, that any language employed by the grantor, which would be sufficient to create an estate to commence at a future day, would, in the nature of the case, give a present interest in the property. The estate would stand created, and the enjoyment postponed. A declaration that the grantee takes no interest during the life of the grantor is equivalent, we think, to a declaration that no estate is created. The instrument, it is true, evinces an intention favorable to the grantee, but that intention is, in substance, only testamentary, and is, of course, subject to revocation, if, indeed, a revocation is needed to prevent it from becoming operative. The object of the defendant's averment that a valua-

dition that "the conveyance of land herein named shall be and continue the property of the first party during his lifetime, and the remainder to said second party immediately at the death of said first party, but in the event of the death of the second party before the said first party, then the estate herein shall go to said first party as before," is a mere devise, which may be revoked at will, and conveys no title.[3] And if, in such a case, the grantor promise to pay the grantee a sum of money to reconvey the land, the promise is without consideration.[4]

§ 854a. Application of the principle.—A present interest must pass by the deed, to render it operative as a conveyance, although the possession or enjoyment of the estate may be postponed.[5] If a deed contains a clause that "in no event is this deed to go into effect until after my death" it is not operative as a deed.[6] So a deed which declares "said deed

ble consideration passed, was to give the instrument a present operation as binding the property. It was of no consequence in any other respect. If the court below had held that it was proper to plead and prove such fact, it would have held, virtually, that an express provision of the instrument could be overturned. We can conceive that a valuable consideration might pass as an inducement to the person receiving it to make a devise. If a devise in form should be made under such inducement, the instrument by which it should be made would still be testamentary, and being such, would be revocable."

[3] Bigley v. Sonvey, 45 Mich. 370.

[4] Bigley v. Souvey, 45 Mich. 370. For cases where the question arose whether an instrument should be treated as a deed or a will, see §§ 309, 309a, and notes *ante*.

[5] McGarigle v. R. C. Orphan Asylum, 145 Cal. 695, 1 L.R.A.(N.S.) 315. In that case, the deed conveyed a life estate to the grantee and after the description of the property conveyed contained this clause: "It is the purpose of the party of the first part by this deed, that after the death of the said party of the second part, the said described lands shall become and be the property of the Roman Catholic Girls' Orphan Asylum of San Francisco, State of California." The court held that the deed contained no operative words of grant to the asylum and that as the reversion remained in the grantor, a transfer to the orphan asylum would require either a future conveyance or a testamentary disposition.

[6] Donald v. Nesbit, 89 Ga. 290, 15 S. E. 367. But if the *habendum* clause is to hold the property de-

of gift to be of full effect at my death," is to be treated as a testamentary disposition, notwithstanding, it may possess the general form of a deed.[7] So, is an instrument to be deemed testamentary in character which states that the grantee shall hold the lands described, and also certain personal property after the grantor's death, after the payment of the debts of the grantor and his burial expenses, and which also states that all the other property of the grantor shall be divided among others described as "heirs."[8] Still, it may be observed that a conveyance which declares that it shall take effect and be in full force after the grantor's death has been held operative as a deed.[9] A present interest is conveyed by a deed in which the maker declares that he excepts and reserves from the grant "all the estate in said lands, and the use and occupation, rents and proceeds thereof, unto himself during his natural life."[1] Although a deed may contain a declaration that it is not to become effective until the death of the grantor, yet if it contains words of present grant it operates as a present conveyance.[2] A present estate is likewise conveyed by a deed although accompanied by an agreement, that all of the property conveyed should be under the control and direction of the grantor during his life, that without his written consent the grantees should not sell during his lifetime any portion of the property described; that the grantor should retain the right to sell and convey as if the deed had not been executed and that when requested by the grantor, the grantee should sign all deeds for the property.[3] An instrument cannot be said to be a deed in which the grantor makes his wife,

scribed to the grantee "his heirs and assigns to be his at my death, and the death of my wife," the conveyance is operative to convey title: Wynn v. Wynn, 112 Ga. 214, 37 S. E. 378.

[7] Sperber v. Balster, 66 Ga. 317.

[8] Barnes v. Stephenson, 107 Ga. 441, 33 S. E. 399.

[9] Kelley v. Shimmer, 152 Ind. 290, 53 N. E. 253.

[1] Cates v. Cates, 135 Ind. 277, 34 N. E. 957.

[2] Hunt v. Hunt, 119 Ky. 39, 26 Ky. L. Rep. 973, 68 L.R.A. 180, 82 S. W. 998.

[3] Durand v. Higgins, 67 Kan. 110, 72 Pac. 567.

the sole owner in her own right "of all of our property, whether real or personal or wheresoever situated that we may be possessed of," and in which the grantor declares that he invests her "with full powers and rights to receive, receipt for, sell, dispose of, and give title to as valid as if done by both of us" in the grantor's lifetime.[4] A present title, however, passes by a deed providing that during the grantor's life he should remain in full possession and control of the property, that an annuity should be paid by the grantee to the grantor, and that upon the grantor's death, "the title shall be and is hereby declared to be" in the grantee.[5] So does a deed pass a present estate which declares it to be a condition of the deed that as to the party of the second part "this land shall not be encumbered in any way or this deed shall be void" and further that the grantor "is to hold said property his lifetime."[6] But no present estate passes by a conveyance declaring that it is "to take effect and be in full force from and after my death."[7] A reservation in a deed of conditions affecting the use of the property during the lifetime of the grantor will not render an instrument testamentary if it contains words of present grant.[8] If on the other hand, the deed contains a condition that the grantor shall retain it in his possession until his death, it does not convey a present estate.[9] Nor, will an instrument be considered a deed, although it may be in the form of one, if it provides that it shall not take effect until after the grantor's death and contains a direction that the grantee should pay

[4] Tuttle v. Raish, 116 Iowa, 331, 90 N. W. 66. An instrument is of a testamentary character which provides that after the grantor's death the title to the land shall vest in the grantee. Reel v. Hazelton, 37 Kan. 321, 15 Pac. 177.

[5] Hitchcock v. Simpkins, 99 Mich. 198, 58 N. W. 47.

[6] Bevins v. Phillips, 6 Kan. App. 324, 51 Pac. 59.

[7] Pinkham v. Pinkham, 55 Neb. 729, 76 N. W. 441. See, also, Murphy v. Gabbert, 166 Mo. 596, 89 Am. St. Rep. 736, 66 S. W. 536.

[8] Kelly v. Parker, 181 Ill. 49, 54 N. E. 615.

[9] Griffin v. McIntosh, 176 Mo. 392, 75 S. W. 677.

all of the debts of the grantor and should receive only the remainder of the latter's property.[1] But the fact that an instrument conveying land to persons as tenants in common, contains a clause that the land is to be equally divided among them upon the grantor's death "and after the payment of all my funeral and burial expenses by them fully settled, and they are to pay all taxes and other expenses of repairs and improvements on the same during my natural life and then the title to vest in them absolutely," will not prevent it from operating as a deed conveying title.[2] A deed is effective to convey a present interest although it provides that the grantee is to live on the land conveyed and have control of it until her death when the property is to pass to others, and although it provides that it is not to take effect until the grantor's death, and he "is to have and keep full possession of said farm during his life, and to have all proceeds of said farm until his death," and if the remainderman "should get into debt, or anything that would sell the land, then at the time of sale it is to go to his children."[3] A present interest is conveyed by a deed which provides that the grantor shall have the use of the land during his natural life although it contains the clause, "the intention being that this deed shall not be in force or take effect until after the death of the grantor."[4]

§ 855. Tendency to uphold deed.[5]—It seems to be impossible to lay down an invariable rule which will apply to all cases. There is, it is to be observed, however, a tendency in the modern decisions to uphold conveyances when not clearly repugnant to some well-defined rule of law. Some cases occur

[1] Cunningham v. Davis, 62 Miss. 366.

[2] Spencer v. Robbins, 106 Ind. 584, 5 N. E. 726.

[3] Phillips v. Thomas Lumber Co., 94 Ky. 445, 42 Am. St. 367, 22 S. W. 652.

[4] Saunders v. Saunders, 115 Iowa, 275, 88 N. W. 329.

[5] This section is cited with approval in Faivre v. Daley, 93 Cal. 671.

when the mind may incline to one side or to the other. As illustrating this tendency to effectuate the intention of a grantor, we may select an instance where a deed, after granting certain land to the grantor's wife, thus proceeded: "This deed is not to take effect and operate as a conveyance until my decease, and in case I shall survive my said wife, this deed is not to be operative as a conveyance, it being the sole purpose and object of this deed to make a provision for the support of my said wife if she shall survive me, and if she shall survive me, then, and in that event only, this deed shall be operative to convey to my said wife said premises in fee simple. Neither I, the grantor, nor the said Clarissa B. Abbott, the grantee, shall convey the above premises, while we both live, without our mutual consent. If I, the grantor, shall abandon or desert my said wife, then she shall have the sole use and income and control of said premises during her life." Then followed the usual *habendum,* and also covenants of seisin against encumbrances and warranty. The court decided that the deed should be upheld as creating a feoffment to commence *in futuro;* that it was more than a devise in a will because it conveyed to the grantee a contingent right, which could not be taken from him.[6] It was contended in the case just cited that to recognize the validity of the deed would be to contravene principles of public policy, because, it was claimed, the deed was an attempt to evade the statutes regulating the making and execution of wills. To this argument, Mr. Justice Barrows, in delivering the opinion of the court, made this answer: "But the instrument was duly executed by the defendant's testator, a man capable of contracting, and having an absolute power of disposition over his homestead farm, subject only to the rights of his existing creditors. It was duly recorded, so that all the world might know what disposition he had made of a certain interest in it, and what was left in himself. If operative at all, it operated differently from a will. A will is ambulatory,

[6] Abbott v. Holway, 72 Me. 298.

revocable. Whatever passed to the wife by this instrument became irrevocably hers. We fail to perceive that any principle of public policy, or anything in the statute of wills, calls upon us to restrict the power of the owner of property, unencumbered by debt, to make gifts of the same, and to qualify those gifts as he pleases, so far as the nature and extent of them are concerned. Public policy, in this country, has been supposed rather to favor the facilitation of transfers of title, and the alienation of estates, and the exercise of the most ample power over property by its owner that is consistent with good faith and fair dealing. The selfish principle may fairly be supposed to be, in all but exceptional cases, strong enough to prevent too lavish a distribution of a man's property by way of gift." [7] Another instance indicating the same tendency may be given. A father gave and granted to his daughter, in consideration of love and affection, "all that tract of land constituting his residence in said county, to have and to hold the aforesaid premises after his death, during her natural life." The grantor reserved the right of controlling the premises during his lifetime, and stated in the instrument his desire that at his daughter's death the property should be "sold and divided between the balance of his children." The court said that it did not know what the instrument was, but finally held it to be a

[7] Abbott v. Holway, 72 Me. 298, 304. See as to effect of the statute of uses upon the statute regulating conveyances of real estate in Maine, Wyman v. Brown, 50 Me. 139. An instrument declaring that it is a will, but containing words indicating an intention to transfer the estate of the grantor, and containing the names of the parties, description of the property and other formal essentials of a deed, is a sufficient conveyance: Evenson v. Webster, 3 S. Dak. 382, 44 Am. St. Rep. 802. If a sister, after the execution of such an instrument, signs a document to the effect that she will not make any claim on the property, she is estopped from subsequently asserting any claim thereto: Evenson v. Webster, 3 S. Dak. 382, 44 Am. St. Rep. 802. Where the intention of the parties appears upon the face of the deed, effect should be given to it regardless of technical rules of construction: Faivre v. Daley, 93 Cal. 664.

deed.[8] Its language on the construction of the instrument was: "It is not easy to say what this instrument is. It has the form and general requisites of a deed, including attestation. Construed as a deed, it would have validity, and take effect; construed as a will, it would be a nullity, as it has but two witnesses, and the law requires three. We do not certainly know what it is. Its construction is very doubtful. Taking all its terms together, it would seem that the grantor intended to pass something presently, for he defines what it was his purpose to reserve, namely, the control during his own life. By control he most probably meant possession, use, and enjoyment; not absolute title, with power of disposition beyond the term of his own life. To hold the instrument to be a will would be to make the reservation altogether idle and useless. By holding it to be a deed, effect can be given to the reservation as a part of the instrument to all the words, without rejecting any as superfluous. This, we think, is the safer and better construction."[9] It has been held, however, that a grantor may in his deed reserve the power to revoke the grant. Such a condition is not contrary to public policy. The deed gives notice to the creditors of the grantee of the reservation of the power of revocation, and it cannot be attacked on the ground that it enables the parties to defeat the rights of the creditors.[1] If the grantor has presented as a part of the mode of revocation some formality not recognized by law as essen-

[8] Dismukes v. Parrott, 56 Ga. 513.

[9] Dismukes v. Parrott, *supra*. That the expressions of the grantor's motive cannot control the legal effect of a deed, see § 838, and notes, *ante*. So in Cross v. Weare Commission Co., 153 Ill. 499, 46 Am. St. Rep. 902, it was held that where a conveyance cannot operate as the kind intended, it may operate in some other form so as to effectuate the purpose, which, considering the whole instrument and the circumstances and condition of the title, appears to have been the intention of the parties.

[1] Ricketts v. Louisville etc. Ry. Co., 91 Ky. 221, 11 L.R.A. 422, 34 Am. St. Rep. 178. See, also, Nichols v. Emery, 109 Cal. 323.

tial, the power is not to be deemed impossible if executed for that reason.[2]

§ 855a. **Deed or will—Some illustrations.**—We have, in the preceding sections, stated the general principles by which it may be determined whether an instrument is a deed or a will. We have, in another place, discussed the question of the effect that delivery will have in deciding whether an instrument should be treated as a deed or a will.[3] But it must be confessed that the rules, as they are applied by the courts, are rather shadowy, and it is almost impossible to lay down a rule with which some well-considered case will not be found to be in conflict. Mr. Chief Justice Stone has expressed the confused condition of the law very aptly when he says: "There are few, if any, questions less clearly defined in the law-books than an intelligible, uniform test by which to determine when a given paper is a deed and when it is a will. Deeds, once executed, are irrevocable, unless such power is reserved in the instrument. Wills are always revocable so long as the testator lives and retains testamentary capacity. Deeds take effect by delivery, and are operative and binding during the life of the grantor. Wills are ambulatory during the life of the testator, and have no effect until his death. Out of this has grown one of the tests of testamentary purpose—namely, that its operation shall be posthumous. If this distinction were carried into uniform, complete effect, and if it were invariably ruled that instruments which confer no actual use, possession, enjoyment, or usufruct on the donee or grantee during the life of the maker, are always wills, and never deeds, this would seem to be a simple rule and easy of application. The corollary would also appear to result naturally and necessarily, that

[2] Ricketts v. Louisville etc. Ry. Co., 91 Ky. 221, 11 L.R.A. 422, 34 Am. St. Rep. 176. See, also, Bassett v. Budlong, 77 Mich. 338, 18 Am. St. Rep. 404, and § 215 *ante*.

[3] §§ 309, 309a. See, also, §§ 279–283.

if the instrument, during the lifetime of the maker, secured to the grantee any actual use, possession, enjoyment, or usufruct of the property, this would stamp it irrefutably as a deed. The authorities, however, will not permit us to declare such inflexible rule." [4] The language just quoted correctly describes the contrariety that prevails among the decisions. The importance of the subject, however, will justify us in calling to the reader's mind some of the cases in which the question whether an instrument is a deed or a will was before the court for determination. Where a deed provided that it should go into full force and effect at the grantor's death, it was held to be a valid deed, which conveyed a present title to the grantee, but postponed the right of possession and use of the property until the grantor's death.[5] So, where the grantor reserves and excepts from the grant "all the estate in said lands, and the use, occupation, rents, and proceeds thereof, unto himself during his natural life," a present interest is conveyed, and the deed is effectual.[6] A grantor declared in his deed that it was not to take effect until after his death, and was "not to be recorded until after my decease," but the court decreed it was a valid conveyance, and was not testamentary in character.[7]

§ 855b. **Same subject—Further illustrations.**—An instrument will be declared to be a deed where it contains all the terms and provisions of one, although it may contain a clause that the grantor and his wife are to retain the use, benefit, and control of the land conveyed during their natural lives.[8] Land was conveyed by the owner to one of his sons as trustee, upon trust to sell it within a specified time, and, after the grantor's death, to divide the proceeds in certain designated

[4] Sharp v. Hall, 86 Ala. 110, 11 Am. St. Rep. 28. The learned justice cites section 983 of this treatise, and also many cases bearing upon the question before the court.

[5] Bunch v. Nicks, 50 Ark. 367.

[6] Cates v. Cates, 135 Ind. 272.

[7] Shackelton v. Sebree, 86 Ill. 616.

[8] Bass v. Bass, 52 Ga. 531.

proportions to the grantor's children, and to invest the remaining part for the benefit of another child of the grantor. The grantor, in the deed, reserved a power of revoking the trust, but remained in possession of the land during his life without exercising the power of revocation. The conveyance, it was decided, passed immediately a vested interest to the trustee, in whom was placed the whole estate necessary for the trust. The grantor, in effect, retained the equivalent of a life estate during his own life, which entitled him to remain in possession of the land, or to lease it and retain the profits. Its character as a deed was not changed or destroyed by the power of revocation, nor did this power operate to convert it into a testamentary disposition of property.[9] A clause that "the condition of this deed is such that I hereby reserve all my right, title, and interest in the aforesaid described pieces of land, with all the buildings thereon during my natural life," is to be considered as a reservation creating a life estate, and not as impairing the efficacy of the instrument as a conveyance of title.[1] A conveyance is not converted into a will because it contains a clause that "this conveyance to be put to record, but not to take effect so as to give possession until after my death."[2] Although the deed may be a voluntary conveyance, yet if it conveys to the grantee a present interest, but postpones the enjoyment of possession, the grantor cannot, after its execution, defeat the title of the grantee.[3] Such deeds reserving a life estate in the grantor are irrevocable after execution.[4] A deed reciting that "the above obligation to be of no more effect until after the death of" the grantor and his wife, "then to be in full force," passes a present interest in the land, and will not be treated as a will.[5] So, language in a deed that

[9] Nichols v. Emery, 109 Cal. 323.

[1] Graves v. Atwood, 52 Conn. 512, 52 Am. Dec. 610.

[2] Rawlings v. McRoberts, 95 Ky. 346.

[3] McDaniels v. Johns, 45 Miss. 632; Mattocks v. Brown, 103 Pa. St. 16.

[4] White v. Hopkins, 80 Ga. 154.

[5] Wilson v. Carrico, 140 Ind. 533, 49 Am. St. Rep. 533.

it is to take after the grantor's death, and not before, will not change its nature, but will be construed as a declaration that the grantee's use and enjoyment are to be postponed until the grantor's death.[6] The essential characteristic of a will is that it becomes effective only upon the death of the maker, and that by it he has divested himself of no part of his estate, and no title has become vested in any other person. To render the instrument a deed some interest must pass immediately, but an immediate enjoyment of the interest conveyed is not necessary. The commencement of the future enjoyment may be made dependent upon the ending of an existing life or lives, or upon the termination of some intermediate estate.[7] A deed is valid which is made upon the express provision that the grantors may have and retain the entire use and control of the premises so long as they, or either of them, may live.[8] The rule is that a present interest must pass. A vested right must be created, but the postponement of the use or enjoyment of this vested right will not affect the deed as a valid conveyance.[9]

§ 855c. **When a will.**—But to have the effect of a deed, the instrument must convey a present interest. If it states that the grantee shall have no interest in the property so long as the grantor shall live, this essential is wanting, and

[6] Owen v. Williams, 114 Ind. 179.

[7] Nichols v. Emery, 109 Cal. 332.

[8] Chandler v. Chandler, 55 Cal. 267.

[9] Moye v. Kittrell, 29 Ga. 677; Wilson v. Carrico, 140 Ind. 533, 49 Am. St. Rep. 213; Wyman v. Brown, 50 Me. 139; Dreisbach v. Serfass, 126 Pa. St. 32, 3 L.R.A. 836; Brown v. Atwater, 25 Minn. 520; Webster v. Webster, 33 N. H. 18, 66 Am. Dec. 705; Watson v. Watson, 22 Ga. 460; Johnson v. Hines, 31 Ga. 720; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147; Abbott v. Holway, 72 Me. 98; Swails v. Bushart, 2 Head, 560; Blanchard v. Morey, 56 Vt. 170; Owen v. Williams, 114 Ind. 179; Meek v. Holton, 22 Ga. 491; Bunn v. Bunn, 22 Ga. 472; Dismukes v. Parrott, 56 Ga. 513; Jenkins v. Adcock, 5 Tex. Civ. App. 466; Mitchell v. Mitchell, 108 N. C. 542; Gorham v. Daniels, 23 Vt. 600.

it becomes testamentary in character and may be revoked by the grantor.[1] An instrument directing the beneficiary to pay the maker's debts and to retain the residue left after this is done, and providing that it is not to take effect until the grantor's death, although it may, by its own language, be characterized as a deed, and may be acknowledged as such, will be treated as a testamentary disposition of property, because it passes no present interest in the property.[2] If a grantor, in an instrument purporting to be a deed, reserves "all the within-named estate, both real and personal, during his natural life," and it appears that the intention of the maker was that it should become operative only on his death, it cannot take effect as a deed, but must be considered a testamentary disposition of the property.[3] If the grantor retains the right of ownership until his death, and declares in the instrument that upon his death the deed shall take effect, it is not valid as a deed, but must be treated as a will.[4] Although the deed may contain present words of gift, yet if it contains other clauses showing that a life estate is reserved, and that the gift is not to take effect until the grantor's death, it may be converted into a will. Thus, where a husband and wife made such a deed of the wife's separate estate to their children, and it was provided that the gift was to take effect at her death, and that her husband, as her executor, should keep the property for a specified time for the beenfit of the children until the estate could be wound up, when the gifts were to be distributed, these clauses convert it into a will and destroy its character as a deed.[5] If the instrument contain a condition, performance of which will cause the property to revert to the grantor, and provides that after his death it shall be divided share and share

[1] Leaver v. Gauss, 62 Iowa, 314; Bigley v. Souvey, 45 Mich. 370.

[2] Cunningham v. Davis, 62 Miss. 636.

[3] Carlton v. Cameron, 54 Tex. 72, 38 Am. Rep. 620.

[4] Walker v. Jones, 23 Ala. 448; Bigley v. Souvey, 45 Mich. 370.

[5] Mosser v. Mosser, 32 Ala. 551.

alike between designated relatives, it is invalid as a deed.[6] The rule to be deduced from the authorities may be stated to be that where no present interest becomes vested by the instrument, but it directs what is to be done after the maker's death, or becomes operative only in that event, it is to be considered a testamentary disposition of property, notwithstanding the intention of the parties was to execute a deed.[7]

§ 856. **Conveyance of estate not owned by grantor.**— While on this subject, we may consider the effect of a conveyance of land owned by the grantor at the time of his death, but not owned at the time of the execution of the deed. A case in Maine will illustrate the construction to be placed upon deeds of this character. Four years before the grantor's death he executed a deed conveying "all the estate, wherever situated, that I now own, or may own at the time of my decease." The deed also contained the clauses: "A list of the several pieces or lots of land will be found with my papers. This deed to have full effect immediately before my decease." The deed, the court held, conveyed only such of the land owned by the grantor at the date of the deed as he continued to own when it took effect, and it did not convey any real estate acquired by the grantor after the execution of the conveyance.[8] "It is a cardinal rule," said Mr. Justice Dickerson, "that deeds are to be so construed as to give effect to the intention of the parties. The intention must be intelligible and consistent with the rules of law. If an instrument in writing upon its face purports to pass the title to land in such manner and form as

[6] Mallery v. Dudley, 4 Ga. 32.

[7] Millican v. Millican, 24 Tex. 427; Babb v. Harrison, 9 Rich. Eq. 111, 70 Am. Dec. 203; Gage v. Gage, 12 N. H. 371; Brewer v. Baxter, 41 Ga. 212, 5 Am. Rep. 530; Turner v. Scott, 51 Pa. St. 126; Watkins v. Dean, 10 Yerg. 320, 31 Am. Dec. 583; Hall v. Bragg, 28 Ga. 330; Symmes v. Arnold, 10 Ga. 506; Shepherd v. Nabors, 6 Ala. 631; Frederick's Appeal, 52 Pa. St. 338, 91 Am. Dec. 159; Dunne v. Bank of Mobile, 2 Ala. 152.

[8] Libby v. Thornton, 64 Me. 479.

by the rules of law can only be done by will, it cannot be sustained as a deed. A deed given to take effect *in futuro,* upon its subsequent delivery, or some future contingency, may not convey the same property that a deed having the same description conveys, when it takes effect at the time of its execution. Between the time of execution and the time of taking effect, the grantor may have conveyed a part or the whole of the property intended to be conveyed to a *bona fide* purchaser, who holds it under a recorded deed; or it may have been taken on execution. In such cases, the grantee acquires title to such part of the land only as remains the property of the grantor when the deed takes effect. The intention to be regarded must be one existing in the minds of the parties when the deed is executed. When the question arises with respect to what particular land the deed conveys, the inquiry is, What did the grantor intend to convey and the grantee to receive? Their intention in this respect is to be ascertained from the description in the deed. If the subject of the grant cannot be identified from that, the grant becomes void for uncertainty." The justice observed that it was unnecessary to determine whether the deed took effect on delivery or immediately before the death of the grantor, because it did not appear that the grantor had made or received any conveyances between the time of the delivery of the deed and the grantor's death. It also became unnecessary, said the justice, to determine whether the description "all the real estate, wherever situated, that I now own," was sufficient to pass the title to the land owned by the grantor when the deed was executed, "inasmuch as this description is aided by being coupled with 'a list of the several pieces or lots of land,' found among the grantor's papers, and referred to in the deed. These clauses together clearly show that the grantor had a legal and intelligible intention to convey, and the grantees to receive, by the deed, title to 'the several pieces or lots' described in the memoranda thus referred to. It follows, from the principles before stated, that, though

the deed was intended to take effect *in futuro,* it operated to convey the grantor's title to such parts of 'the several pieces or lots of land,' referred to in the deed, as he continued to own when the deed took effect." As to the effect of the deed as a conveyance of title to real estate acquired by the grantor after the deed was executed, and remaining in him when the deed took effect, the justice continued: "The language of the description in the deed is, 'all the real estate, wherever situated, that I now own or may own at the time of my decease.' The latter clause in the description is not aided by the subsequent reference in the deed to 'the several pieces or lots of land,' as that relates to real estate owned by him when the deed was executed. Real estate acquired by the grantor subsequently to the execution of the deed, was not *in esse* with respect to him when he signed the deed. Neither he nor his grantors could then have had any rational or intelligible intention with regard to the location, quantity, number of parcels, value, and the like, of the real estate he might thus acquire. He might take conveyances of property that would increase the value of the estate he owned when the deed was executed an hundred fold, and might dispose of it all before, or retain the whole or a part of it when the deed should take effect. Upon all these matters the deed is silent, though it is to the description in the deed that we are to look, in order to ascertain what particular real estate was designed to be conveyed by this clause in the deed. The subject of the grant under this clause cannot be ascertained from the description, and the grant is necessarily void for uncertainty. Moreover, the deed cannot be held to pass the grantor's title to real estate acquired by him subsequently to its execution, without abolishing the distinction between the formalities required by the statute of wills, and those necessary to convey real estate by deed." [9] To the general rule that an after-acquired title passes to the grantee is the exception that, if the grantor executes to his

[9] In Libby v. Thornton, 64 Me. 479.

grantor a mortgage to secure the purchase money on the premises subsequently acquired, the rights of the mortgagee are not affected by the prior conveyance.[1]

§ 857. Conveyance in fee with condition upon a right of possession in the grantors.—Where the parties clearly express their intention, there can be little, if any room, for construction. In a case in Vermont, where a deed in the usual form of a conveyance of a present fee simple, but with conditions, came before the court for construction, Mr. Justice Veazey commenced with the observation, so often well founded: "The unskillfulness and ignorance of the draftsman in such matters have as usual caused difficulty." The deed made by a man and his wife to two of his children, in its granting part purported to convey a present estate in fee simple, but contained the condition that the grantees "are not to have any right or title whatever to the above-described premises, so long as we, or either of us, live; and the above deed is not to be binding upon us, or either of us, if in any case we should want or need to sell a part or all of said real estate in order to maintain us, and the above deed is to be null and void in such case, and we are to have the entire control of the above premises during our natural lives." The construction placed upon this condition is best given in the language of the court: "If the part of the condition to the effect that the grantees are not to have any right or title whatever, so long as either of the grantors live, constituted the whole of the condition, it would be difficult to construe it as compatible with an estate what-

[1] Morgan v. Graham, 35 Iowa, 213. It was said by Deady, J., in Lamb v. Kamm, 1 Saw. 238, 241: "But a mere expectation or belief that a party will at some future time acquire an interest in certain property, is not itself an estate or interest of any kind, and cannot be conveyed by deed. For instance, a son who is heir apparent to his father, may reasonably expect to inherit the latter's property, but an expectation or hope not being an interest in the property, it is well settled that the deed of the heir under such circumstances conveys nothing and is inoperative."

ever *in presenti*. Its import seems to be not to limit, explain, or qualify the grant, but in express terms to nullify and destroy it. Where the two parts of a deed are irreconcilable, one of them must fail; and of the two the condition should fail and the absolute part of the conveyance stand. . . . But a deed should be interpreted most favorably for its own validity, and for the effectuation of the design of the grantors, where that is plainly expressed, or can be collected, or ascertained from the deed, unless it is in conflict with some rule of law. The intent is to be derived upon view and comparison of the whole instrument. We think the grantors' intent in this deed, though clumsily expressed, yet fairly collectible, and ascertainable from it as a whole, was to convey the premises in fee, conditioned upon a right of possession and use in the grantors, and the survivor of them during life, and of being supported, so far as needed, in addition and suitable to their condition in life, by the grantees; with the further right in the grantors to sell and convey for their necessities, in case of failure to receive support from the grantees. The right to support and to sell for their necessities, was a provision in the nature of a condition of absolute defeasance. If the grantees wished the conveyance to become absolute, they were bound to see that no occasion should arise for the grantors to sell for their necessities." [2] Where a father executes to his son a deed of real and personal property, with the condition that the grantor and his wife shall enjoy the use and possession of the property during their lives, and that at their death, and not before, the grantee shall have possession, the deed is to be considered as a grant upon condition subsequent.[3] In an earlier case, however, in Vermont, where a deed reserved an estate during the lives of the grantor and his wife, the latter not being a party to the deed, it was decided, that upon the death of the husband the estate descends to his personal

[2] Blanchard v. Morey, 56 Vt. 170, and cases cited.

[3] Sherman, Administrator v. Estate of Dodge, 28 Vt. 26.

representatives, and the wife is entitled to dower.[4] "The granting of an estate in fee, to take effect after a particular estate reserved as an estate for life, or lives, is not inconsistent with the law of England. And if it were, it could have no application here; for under our statute of conveyancing, there being no livery of seisin in fact necessary to invest the grantee with the title, but only the seisin resulting from the due execution and recording of the deed, there is no objection whatever to the creating of a freehold estate, in terms, to take effect in future. This has been expressly decided in some of our American States, and we see no valid objection to holding the same under our statute."[5] As illustrating the impossibility of formulating any but the most general rules of construction, is the observation of Mr. Justice Redfield, that "it is not uncommon for instruments quite as similar as these to receive different interpretations by the same court."[6]

§ 858. **Limited estates.**—Whether a life estate or an estate in fee is conveyed must be determined by considering the deed as a whole. Some instances, where deeds came before the court for construction as to the estate conveyed, may be cited. In one, a father conveyed to his daughter, who was a married woman, a piece of property in consideration of natural love and affection, "and for settling and assuring the premises for such purposes, and upon such conditions as are hereinafter expressed;" the *habendum* clause was to have and to hold the property "unto the said grantee, her heirs and assigns, forever, to the end and intent that the same shall and

[4] Gorham v. Daniels, 23 Vt. 600. Where a husband has conveyed land to a trustee for the use of his wife and her children by him, born and to be born, with a condition in the *habendum* that in case of him surviving her, the property should revert to him free from the trust, the title is in the trustee defeasible on the contingency, on the happening of which the title revests in the husband: Woods v. Woods, 87 Ga. 562.

[5] Gorham v. Daniels, 23 Vt. 600, 611, per Redfield, J.

[6] Sherman Administrator v. Estate of Dodge, 28 Vt. 26, 30.

may be for her sole and separate use, benefit, behoof, and disposal, notwithstanding her present or future coverture, for and clear of and from interruption, intervention, and control of her husband, or any future husband she may have, and without being in any way or manner subject, responsible, or liable to or for the existing or future contracts, debts, liabilities, or engagements of her present husband, or any future husband she may have." The court decided that under this instrument the grantee took an estate of inheritance in fee, and not an estate for life merely.[7] In another case a person in consideration of marriage executed a deed by which he conveyed a tract of land to the grantee, "and to her heirs and assigns; to hold the same during her lifetime, and then said land to revert to my heirs, both of her and my former wife; provided that she shall have all she makes as her own each year, to dispose of as she sees fit, and to hold said land in any manner belonging as aforesaid." The court held that by a fair and liberal interpretation of the whole deed it was the intention of the grantor to convey only a life estate, and not a fee simple.[8] A deed was made to a person upon condition that he should take "the possession, care, and custody of the said premises, for and during the term of his natural life, to let or lease the same, collect all rents and incomes to be derived therefrom, and to pay all taxes, insurance, repairs, and incidental expenses that may accrue on said premises, and the balance appropriate to his own use if he choose so to do, or to such uses and purposes in the exercise of his judgment as he may see fit, but said income not in any ways liable for his debts or liabilities, or be accountable to any person therefor; and at any time he may desire or deem expedient, relinquish the possession of the said premises" to the children of the grantee. The court decided that if he accepted the conveyance, he acquired a life estate which might be taken on exe-

[7] Pool v. Blakie, 53 Ill. 495.

[8] Caldwell v. Hammons, 40 Ga. 345.

cution by his creditors.[9] Real estate was conveyed to a husband "and his heirs and assigns forever." The deed further provided that the property was to be held by the grantee "for and during his natural life," and to his wife "if she be living at the death" of the grantee, and if she was not living at the death of the grantee, then to his heirs and assigns forever. The husband devised the land to his wife and to his children by her. Subsequently he died, and his death was followed by that of his wife. The children of the marriage between the grantee and his wife instituted an action against the children of the wife by another marriage, claiming the whole of the land. The court, determined, however, that the husband acquired an estate which terminated on his death, leaving his wife surviving him; that at his death she became entitled to the whole estate, and that on her death, intestate, the children by both marriages became entitled to the land. The court were also further of the opinion, that if the husband had survived the wife, the title to the whole estate would have vested in him.[1]

§ 859. **Same subject—Continued.**—A deed was made to a husband in trust for the sole and separate use of his wife, "for and during the term of her natural life, free from the debts, liabilities, or contracts of her present or any future husband, with remainder at her death to her children then in life," by her husband begotten. The deed also provided that if she should die leaving no child or issue of a child by her husband, the trustee, begotten, the remainder should be to him and his heirs in fee simple; it also contained a proviso that the trustee for the time being might at any time in a deed in which she would voluntarily join, convey, mortgage, or exchange the property, reinvesting the proceeds of such sale subject to the same trust. The wife, the court held, had only a life estate

[9] Wellington v. Janvrin, 60 N. H. 174.

[1] Carson v. McCaslin, 60 Ind. 334.

in the property.[2] The legal effect of a deed conveying lands to a person, to use the grantor's language, "at my death," is that the grantor has reserved a life estate to himself, and cove-

[2] In Matter of Chisolm, 8 Ben. C. C. 242. See, also, as to construction of peculiar deeds, and as to estate conveyed, Seaman v. Harvey, 16 Hun, 71; Johnson v. Leonard, 68 Me. 237; Gilkey v. Shephard, 51 Vt. 546; Winter v. Gorsuch, 51 Md. 180; Thompson v. Carl, 51 Vt. 408; Preston v. Heiskell, 32 Gratt. 48; Vinson v. Vinson, 4 Ill. App. 138; Daniels v. Citizens' Savings Institution, 127 Mass. 534; Clayton v. Henry, 32 Gratt. 565; Phinizy v. Clark, 62 Ga. 623; Cribb v. Rogers, 12 S. C. 564, 32 Am. Rep. 511; Hemstreet v. Burdick, 90 Ill. 444; Braswell v. Suber, 61 Ga. 398; Tremmel v. Kleiboldt, 6 Mo. App. 549; Taylor v. Cleary, 29 Gratt. 448; Wayne v. Lawrence, 58 Ga. 15; Mowry v. Bradley, 11 R. I. 370; Waugh v. Waugh, 84 Pa. St. 350, 24 Am. Rep. 191; Long v. Swindell, 77 N. C. 176; Jackson v. Hodges, 2 Tenn. Ch. 276; Hurd v. French, 2 Tenn. Ch. 350; Reaves v. Ore Knob Copper Co., 76 N. C. 593; Waugh v. Miller, 75 N. C. 127; Allen v. Bowen, 73 N. C. 155; McEachern v. Gilchrist, 75 N. C. 196; Hawkins v. Parham, 75 N. C. 259; Indiana Central Canal Co. v. State, 53 Ind. 575; Forest v. Jackson, 56 N. H. 357; Holt v. Somerville, 121 Mass. 574; Heermans v. Robertson, 64 N. Y. 332; Pierce v. Gardner, 83 Pa. St. 211; Phillips v. Thompson, 73 N. C. 543; Hutchinson v. Chicago etc. R. R. Co., 37 Wis. 582; Hurst v. Hurst, 7 W. Va. 289; Ochiltree v. McClung, 7 W. Va. 232; Taggart v. Risley, 4 Or. 235; Tesson v. Newman, 62 Mo. 198; Goodel v. Hibbard, 32 Mich. 47; Pittman v. Corniff, 52 Ala. 83; Lawe v. Hyde, 39 Wis. 345; Lerned v. Saltonstall, 114 Mass. 407; Ingalls v. Newhall, 139 Mass. 268; Hastings v. Merriam, 117 Mass. 245; Broadstone v. Brown, 24 Ohio St. 430; Board of Education v. Trustees of First Baptist Church, 63 Ill. 304; Sheridan v. House, 4 Abb. N. Y. App. 218; Marvin v. Brewster Iron Mining Co., 55 N. Y. 538, 14 Am. Rep. 322; Chase v. Dix, 46 Vt. 642; Monroe v. Bowen, 26 Mich. 523; Hawkins v. Chapman. 36 Md. 83; Dubois v. Campau, 24 Mich. 360; Attwood v. Kittell, 9 Ben. C. C. 473; Powell v. Morrissey, 84 N. C. 421; Watson v. Priest, 9 Mo. App. 263; Robinson v. Payne, 58 Miss. 690; Hewitt's Appeal, 55 Md. 509; Peoria v. Darst, 101 Ill. 609; Doe v. Pickett, 65 Ala. 487; Holmes v. Holmes, 86 N. C. 205; Smith v. Rice, 130 Mass. 441; Bratton v. Massey, 15 S. C. 277; Cannon v. Barry, 59 Miss. 289; Green Bay & Mississippi Canal Co. v. Hewett, 55 Wis. 96, 42 Am. Rep. 701; Currier v. Janvrin, 58 N. H. 374; Franks v. Berkner, 67 Ga. 264; Mackall v. Richards, 1 Mackey (D. C.), 444; Mendenhall v. Mower, 16 S. C. 303; Brown v. Brown, 68 Ala. 114; Burnett v. Burnett, 17 S. C. 545; Commonwealth v. Hackett, 102 Pa. St. 505; Hanks v. Folsom, 11 Lea (Tenn.), 555; Lindley v. Crom-

nanted to stand seised to the use of the grantee at the grantor's death.[3] A deed conveyed land to a woman during her natural life, and after her death to her children by her then husband, "during the natural life of each of said children, and after their death" to her husband in fee, and "to his heirs and assigns forever." The tenure in the *habendum* clause was to the mother "during her natural life, and after her death to the said surviving children," and after the death of each of the children to the husband "in fee, and to his heirs and assigns forever." The court construed the deed as giving the children an interest contingent upon their surviving their mother; only such of the children as survive her could take the estate, and the interest of the husband was held to be a vested remainder in fee, subject to the intervening contingent estate of the children.[4] Where a deed contains the condition that a person not named as grantee "is to have the privilege of a support off of said lands during his lifetime, without encumbrance," such person has a life estate. The words "without encumbrance" mean without impediment to the rights of the life tenant.[5] "He could not have his support off the land without the use and occupation of it. The right to such support from the land involves the use and occupation, as without the use and occupation he could not derive his support from it. And it seems to us that a life estate was as effectually conveyed to him as if the deed had provided that he should have the use and occupation, or the rents and profits of the land for life."[6] The obligation to support, when a condition in a

bie, 31 Minn. 232; Edwards v. McClurg, 39 Ohio St. 41; Kemp v. Bradford, 61 Md. 330; O'Brien v. Brice, 21 W. Va. 704; Grubb v. Grubb, 101 Pa. St. 11; Fletcher v. Fletcher, 88 Ind. 418; Lorick v. McCreery, 20 S. C. 424; Louisville & Nashville R. R. Co. v. Boykin, 76 Ala. 560; Monmouth v. Plimpton, 77 Me. 556; Zittle v. Weller, 63 Md. 190; Wilder v. Wheeler, 60 N. H. 351; Creswell v. Grumbling, 107 Pa. St. 408.

[3] Vinson v. Vinson, 4 Bradw. (Ill. App.) 138.

[4] Smith v. Block, 29 Ohio St. 488.

[5] Stout v. Dunning, 72 Ind. 343.

[6] Stout v. Dunning, 72 Ind. 343,

deed, is generally regarded as a personal duty, which cannot be transferred to another.[7]

§ 860. **Conveyance to wife and children.**—A conveyance to a woman and her children makes them joint tenants or tenants in common.[8] Thus, where a deed is made to a woman and her children "to have and to hold said tract of land to the parties of the second part, their heirs and assigns forever," the mother and children take an undivided estate in fee simple.[9] "If others were named in such a grant than the children," said the court, "there then would be no room for a contention, and because the word 'children' is used, affords no reason for inferring an intention on the part of the grantor

346, on petition for rehearing by Worden, J.

[7] Eastman v. Batchelder, 36 N. H. 141, 72 Am. Dec. 295; Flanders v. Lamphear, 9 N. H. 201. For cases in which instruments conveying a limited or unqualified estate, on the condition that the grantee shall support the grantor, have come before the courts, see Bryant v. Erskine, 55 Me. 153; Jenkins v. Stetson, 9 Allen, 128; Marsh v. Austin, 1 Allen, 235; Hawkins v. Clermont, 15 Mich. 511; Hubbard v. Hubbard, 12 Allen, 586; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Hoyt v. Bradley, 27 Me. 242; Rhoades v. Parker, 10 N. H. 83; Brown v. Leach, 35 Me. 41; Austin v. Austin, 9 Vt. 420; Soper v. Guernsey, 71 Pa. St. 219; Dearborn v. Dearborn, 9 N. H. 117; Henry v. Tupper, 29 Vt. 358; Wilder v. Whittemore, 15 Mass. 263; Pettee v. Case, 2 Allen, 546; Thayer v. Richards, 19 Pick. 398; Fiske v. Fiske, 20 Pick. 499; Gibson v. Taylor, 6 Gray, 310; Dunklee v. Adams, 20 Vt. 415, 50 Am. Dec. 44; Hill v. More, 40 Me. 515; Gilson v. Gilson, 2 Allen, 115; Daniels v. Eisenlord, 10 Mich. 454; Tucker v. Tucker, 24 Mich. 426, 35 Mich. 365; Lanfair v. Lanfair, 18 Pick. 299; Hobby v. Bunch, 83 Ga. 1, 20 Am. St. Rep. 301.

[8] Brenham v. Davidson, 51 Cal. 352; Jackson v. Coggins, 29 Ga. 403; Estate of Utz, 43 Cal. 200; Powell v. Powell, 5 Bush, 619, 96 Am. Dec. 372; Mason v. Clarke, 17 Beav. 126; Bustard v. Saunders, 7 Beav. 92; Eagles v. Le Breton, Law R. 15 Eq. 148; Newell v. Newell, Law R. 7 Ch. 253; Hoyle v. Jones, 35 Ga. 40, 89 Am. Dec. 273; Webb v. Byng, 2 Kay & J. 669; De Witte v. De Witte, 11 Sim. 41; Crockett v. Crockett, 2 Phill. Ch. 553; Morgan v. Britten, Law R. 13 Eq. 28; Freeman on Cotenancy and Partition. § 26. See McCall v. McCall, 1 Tenn. Ch. 504; Doty v. Wray, 66 Ga. 153.

[9] Bullock v. Caldwell, 81 Ky. 566.

to make a different disposition of the estate than the plain language of the instrument indicated, and then to reverse the rule when applied to strangers for the reason that such a conveyance is susceptible of but one construction. Nor is there any reason to suppose that the draftsman would employ such language in a conveyance when the grantor's purpose is to give or grant the estate to the daughter for life, and the remainder to her children. No one competent to reduce to writing the substance of an ordinary business transaction between parties would overlook the wishes of the grantor in using the language found in this deed, if his purpose was to create a life estate in the daughter, with a remainder to her children. The object of construing instruments of writing like this, whether in a grant or devise, is to ascertain the intention of the party making, and while the words 'for life' may not be used in the conveyance, there may be other words or expressions, or such relation between the parties as would indicate a plain intent to limit the interest conveyed, or to grant to one in the same instrument a less estate than to another." The court said, however, that in the case before it, the conveyance was to the woman and her children, "with the terminous clause 'to them and their heirs forever;' so there is nothing on the face of the deed to indicate a purpose to convey any other than a joint estate to the parties of the second part." [1] But in a former case in Kentucky, while the rule was recognized that a father making provision for his child and that child's children, may be supposed to have intended them to take a joint estate, yet, where he makes provision for his wife and children, it should be presumed he intended to give the whole to the wife for life, and the remainder to the children, unless the terms of the provision, or the circumstances attending it, showed a contrary intention.[2] The reason that led the court to draw the distinction was, that when a deed was made to a man's child and that child's children, "they are all of his blood, and the

[1] In Bullock v. Caldwell, 81 Ky. 566.

natural objects of his bounty; but when a husband makes a conveyance to his wife and *their* children, there is less reason to suppose that he intended they should take as joint tenants, whereby his bounty may, by her death, pass into the hands of a stranger, even as against himself." The court continued, that no doubt the grantor "desired and intended that his wife should enjoy the property equally with their children, but it would be unnatural to suppose that he intended to invest her with an estate which might pass from her to strangers to his blood. This case serves to illustrate the utter unreasonableness of applying to every deed or will the same rule of construction with a view to ascertain the intention of the grantor." [3] A conveyance to a woman "and all the children she now has or ever will have," was construed in Missouri as vesting a life estate in the mother, with remainder to the children.[4] In Georgia, where a deed conveyed property for the use of a woman and "the children she now has, and those she may hereafter have by her present husband, free from the control or disposition of her present husband," the *habendum* clause stating that the conveyance was to her and her assigns, the court held that she took a joint interest with her children.[5] Where a deed is made by a person in trust for his married daughter "and the heirs of her body, for their support and the support of her children, and at the lawful age of her youngest child, after her death, then the property to be equally divided among her children," the deed creates, in Alabama, a life estate in the daughter with remainder to her children as purchasers.[6]

[3] Davis v. Hardin, 80 Ky. 672.

[4] Kinney v. Mathews, 69 Mo. 520. But in this case, Henry, J., dissented, being of the opinion that all of the estate of the grantor passed out of him and vested in the mother and her children then living.

[5] Lee v. Tucker, 56 Ga. 9.

[6] May v. Ritchie, 65 Ala. 602. "The whole structure of the deed," said Mr. Chief Justice Brickell, "clearly indicates that it was drawn by one not skilled in drawing such instruments, unacquainted with their forms, and unacquainted with the meaning—the technical meaning

§ 861. Relation from re-execution of lost deed.—Where a deed once executed has been lost and the grantor executes a second deed, it may, in some instances, become necessary, when the rights of intervening creditors are involved, to determine whether the second deed takes effect from the date of its execution, or whether it relates back to the time of the first deed. Such a case arose in North Carolina. A father executed deeds of gift to A and B, his two sons. The deed made to A was lost before it was registered. Sub-

and force—of the expressions employed. The indiscriminate use of the words 'heirs of the body,' and of the word 'children,' to designate the same class of persons is a marked manifestation of unskillfulness, and the want of knowledge of the difference in the legal meaning of the terms. The words 'heirs of the body,' unexplained, unrestricted, certainly created an estate tail at common law. They were the appropriate words for the creation of that estate, limited to lineal descendants generally, as was the general term 'heirs,' to the creation of a fee simple, a pure inheritance, clear of qualification or condition, to which whoever was the heir of the first taker at the time of his death, whether lineal or collateral, would succeed. But whenever it was apparent on the face of the instrument creating an estate that either of these terms, 'heirs,' or 'heirs of the body,' was employed, not as words of limitation, but as words of purchase, as words designating a particular class, who were to take, not from or through an ancestor, but from the grantor or devisor, they did not create either a fee simple or a fee tail. The grantor gives the daughter an estate for life only in express terms. It was not intended that she should have or take any greater estate or interest. But under the operation of the rule in Shelley's case, of force when the deed was executed, a gift to one for life, and then to the 'heirs of his body,' would create an estate tail; the words 'heirs of the body' being, in their natural and ordinary signification, words of limitation and not of purchase. The word 'children,' however, is as essentially a word of purchase, and never construed as a word of limitation, unless absolutely necessary to give effect to the clear intention of the grantor or devisor: Dunn v. Davis, 12 Ala. 135; Scott v. Nelson, 3 Port. 452, 29 Am. Dec. 266. And whenever the word 'children,' and 'heirs of the body,' are indiscriminately used to designate remaindermen, they have been regarded as words of purchase, designating a class of persons who were to take on the expiration of the particular estate, not from the tenant of that estate, but from the donor, a different intention not being clearly indicated: Dunn v. Davis, 12 Ala. 135; Shepherd v.

sequently B conveyed his land to A, and the father executed a deed to B for the land which had originally been conveyed to A in substitution for the deed which had been lost. In this second deed he provided that he was to retain "possession of the above described lands and premises during his natural life, or so long as he may desire it for his own use and benefit." The court decided that if the original deeds to A and B were valid as to creditors when they were executed, no subsequent exchange between them affected the rights of creditors; and although the last deed contained a reservation of a life estate, that it related back to the date of the lost deed.[7] The reasoning of the court was that if the grantee in the last deed could set up the lost deed in a court of equity, and compel the grantor to execute another deed, the grantor might voluntarily do what in equity he could be forced to do.

§ 862. **Water power.**—A peculiar case, involving the rights of different parties to determinable portions of water used for propelling machinery, may be selected as illustrating the observation that each case must, in a great measure, be decided by itself. In the case referred to, the owner of property on which were two mills, propelled by power obtained from the water of a contiguous river, sold a portion of the property on which was situated one of the mills. The deed, after describing the property, granted the right to use water

Nabors, 6 Ala. 631; Twelves v. Nevill, 39 Ala. 175; Robertson v. Johnson, 30 Ala. 197; Williamson v. McConico, 36 Ala. 22. If the estate for life, expressly given to the daughter, were enlarged into an estate tail, converted by the statute into a fee simple, it is apparent the intention of the donor, which ought to prevail, so far as it is not offensive to law, would be disappointed and defeated. The gift over to the children, the division of the property among them, after the death of the mother, when the youngest became of age, would fail. We cannot doubt that the words 'heirs of the body' were used as the synonym of 'children'; and being so used, the first taker had but a life estate, with remainder to her children."

[7] Hodges v. Spicer, 79 N. C. 223.

by this clause: "Together with the right to use water to the amount of the issue of the wheel now in said sawmill, supposed to be six hundred inches, more or less, of water, being hereby intended to grant or convey so much of the water of the Wapsipinicon river as above mentioned." The construction put upon this deed was that the amount of water to which the grantee was entitled was to be measured by the capacity of the wheel in the mill at the time of the conveyance; that the quantity of water mentioned in the deed was used by way of description, and not of limitation; and that the grantee might put in operation as many wheels as he desired, so long as he did not use in the aggregate more water than the issue of one wheel originally in the mill.[8] A deed conveying

[8] Doan v. Metcalf, 46 Iowa, 120. The opinion of the court was delivered by Mr. Justice Beck. As the case is a peculiar one, we quote his language so far as it relates to the construction of the deed: "It is obvious that it was intended to convey sufficient water to propel the wheel described, when used in driving the machinery which it had the capacity to run. The dimension and structure of the wheel were such that, with a sufficient supply of water, it had capacity to propel a known quantity of machinery, or, rather, a quantity that may be determined under the laws of dynamics. It was not the intention of the parties that the wheel should be run without machinery attached thereto, nor that it should be run with less machinery than it had capacity to propel, when used to the extent of the right conveyed by the deed. The defendants, then, took by the grant the right to a stream of water sufficient to propel the quantity of machinery which could, in its proper operation, be moved by the wheel in use at the date of the deed. The wheel thus becomes the instrument for measuring the quantity of water to which defendants are entitled. It is very plain that this quantity is not to be limited to six hundred inches, for the very language of the instrument exhibits uncertainty in the minds of the contracting parties as to that number, which was used simply in description of the wheel which was to be the measure of the water granted. If this description be incorrect or fail, the thing meant, the wheel, if it can be identified, will control as to its capacity, rather than words clearly used with the understanding and admission on the part of both parties, of their uncertainty. We are not required here to determine upon the methods and formulas of machinists, whereby they measure water power by superficial inches, or to make any inquiry upon that subject. Such methods and formulas,

a quarter interest in a sawmill and a "quarter of the privileges and appurtenances thereunto belonging," conveys, also as much

it appears by the evidence, are used. It is quite apparent that a water wheel of given dimension, propelling its proper quantity of machinery, will use a determinable quantity of water, all necessary conditions, as the height of the head of water, etc., being known. This water issues from the wheel, and is, therefore, aptly called in the deed 'the issue of the wheel.' A great deal of learning and experience were exhibited by the witnesses at the trial, upon the subject of the methods and formulas to be adopted in determining the quantity of water used by wheels of different constructions. We may be permitted to say that some of the methods explained in the testimony were rather arbitrary than based upon scientific principles. This remark, we think, will be justified, when we call attention to the fact that by some of them the quantity is indicated by superficial inches, without taking note of time or the velocity of the water. But we are satisfied, and this conclusion is drawn from the evidence in this case, that the issue of water from a wheel may be determined, proximately at least, with sufficient accuracy for practical purposes. Experience and mechanical skill, aided by the laws of hydraulics, may reach such result. We are not required, in view of the disposition we shall make of the case, to determine now the manner or methods to be adopted in ascertaining the issue of the wheel which is made the measure of the quantity of water granted to defendants. Those charged with the duty of setting apart, or otherwise prescribing the quantity of water to which the defendants are entitled, will do this. We make one suggestion that readily occurs to the mind in considering the provisions of the grant. The defendants, as we have said, are entitled to a sufficient supply of water to run the wheel with the proper quantity of machinery attached thereto. This quantity may vary with the head of water in the flume or dam, and, consequently, with the, variation of water in the stream. If this be so, due account must be made of the fact, so that defendants, at all times, when, under the contract, they are entitled to the full quantity of water, may use the amount necessary to propel the machinery. If, therefore, the water for defendants' mill be set apart by gates or bulkheads in the flume, due arrangements must be provided to meet this condition. But, in our judgment, the just and more simple manner of partitioning the water is by means of the water wheels used by defendants. Let the quantity of water issued by the old wheel be determined; the water issued by the wheels in use by defendants must be no more, and the wheels to be used by defendants must require no more water than did the old wheel. Defendants may desire to use machinery which would require the construction of other water wheels

land as may be required for the use of the mill.[9] If the grantee is entitled to the privilege of drawing water from other portions of the grantor's land, which were then in use, as appurtenant to the land, and if water is conveyed in an aqueduct from a spring upon another part of the grantor's land to the land embraced in the deed, and there used at the time at which the deed was executed, the grantor cannot divert the water, although he does so upon a part of his land not conveyed by the deed; such a diversion would be a disturbance of the grantee's right, for which he can bring an action.[1] It is no defense in such a case that the grantee did not desire to use the water, or that by the diversion he has suffered no actual damage.[2] If a deed makes no mention of appurtenant water rights which the grantor had utilized, this omission will not justify a finding that the grantor did not intend to transfer such rights as the question of their conveyance, is one of

than those he is now using. There can be no objection to his doing so, but he can use at no time a greater quantity of water than indicated. Therefore, he will not be permitted to run wheels at the same time which actually use a greater quantity. Wheels may be idle when not used as directed by those rules."

[9] Madox v. Goddard, 15 Me. 218, 33 Am. Dec. 604; Hutchinson v. Chicago Ry. Co., 37 Wis. 582; Sabine v. Johnson, 35 Wis. 185.

[1] Vermont Central R. R. Co. v. Estate of Hills, 23 Vt. 681.

[2] Vermont Central R. R. Co. v. Estate of Hills, 23 Vt. 681. For other cases involving water rights, see Barber v. Nye, 65 N. Y. 211; Canal Co. v. Hill, 15 Wall. 94, 21 L. ed. 64; Taylor v. St. Helens, 6 Chip. D. 264; Robinson v. Imperial Silver Min. Co., 5 Nev. 44; Kilgore v. Hascall, 21 Mich. 502; De Witt v. Harvey, 4 Gray, 486; Schuylkill Navigation Co. v. Moore, 2 Whart. 477; Mayor v. Commissioners, 7 Pa. St. 348; Society v. Holsman, 1 Halst. Ch. 126; Williams v. Baker, 41 Md. 523; Ashby v. Eastern R. R. Co. 5 Met. 368, 38 Am. Dec. 426; Johnson v. Rayner, 6 Gray, 107; Pratt v. Lamson, 2 Allen, 275; Bardwell v. Ames, 22 Pick. 333; Woodcock v. Estey, 43 Vt. 515 Jamaic Pond Aqueduct v. Chandler, 9 Allen, 159; Owen v. Field, 102 Mass. 90; Jackson v. Halstead, 5 Cowen, 216; Mixer v. Reed, 25 Vt. 254; Sheets v. Selden, 2 Wall. 177, 17 L. ed. 822; Wiswall v. Hall, 3 Paige, 313. See, also, Egremont v. Williams, 11 Q. B. 707; Buszard v. Capel, 8 Barn. & C. 141; Smith v. New York, 68 N. Y. 552; Goodrich v. Eastern R. R. Co., 37 N. H. 149.

intention, which is to be arrived by a consideration of all the circumstances attending the execution of the deed.[3]

§ 862a. **Right to rent.**—Where land is in possession of a tenant, the grantor is entitled to collect all the rent that is past due at the time of the sale, and the grantee is entitled to collect all that subsequently falls due.[4] The title to rent is dependent on that of the property and, therefore a sale of leased land passes the right to the accruing rent,[5] and as the grantee is entitled to the rent falling due after the purchase, his right is not defeated by a transfer of a note for such rent.[6] If the grantor seeks to enforce his lien for the unpaid purchase money, he is not entitled to the back rent,[7] nor can a purchaser from the grantee be charged with rents received upon a bill to enforce the equitable lien of the vendor.[8] The rent is incident to the reversion,[9] and passes to a grantee of the reversion.[1] But if a note is given for the rent it effects a severance of it so that it will not pass to the grantee by the deed.[2] Rent in arrear does not pass,[3] and if the grantor conveys by a warranty deed without reserving the rent subsequently to become due, he cannot recover such rent from the lessee.[4] The rule that a deed carries with it the rents subsequently accruing will not necessarily be applied unless the payment of the purchase money accompanies the execution of the deed.[5] In equity a purchaser is entitled to the rent

[3] Daum v. Conley, 27 Colo. 56, 59 Pac. 753.

[4] Page v. Lashley, 15 Ind. 152.

[5] Dixon v. Nicolls, 39 Ill. 372, 89 Am. Dec. 312; Chisholm v. Spullock, 87 Ga. 665, 13 S. E. 571.

[6] Kessee v. Sloan, 69 Miss. 369, 11 So. 631.

[7] Medley v. Davis, 24 Tenn. (5 Humph.) 387.

[8] Kerskey v. Mitchell, 8 Ala. 402.

[9] Stout v. Kean, 3 Har. (Del.) 82.

[1] Kimball v. Walker, 71 Ill. App. 309.

[2] Kimball v. Walker, 71 Ill. App. 309.

[3] Damren v. American Light & Power Co., 91 Me. 334, 40 Atl. 63.

[4] Allen v. Hall, 66 Neb. 84, 92 N. W. 171, reversing 64 Neb. 256, 89 N. W. 803.

[5] Eirick v. Leitschuh, 81 Ill. App. 573.

and profits, from the time fixed for the completion of the contract of sale, whether he takes possession at that time or not.[6] Title to rents accruing before the execution of the deed does not pass by the words of the *habendum*—to have and to hold

[6] Atchison T. & S. F. R. Co. v. Chicago & W. I. R. Co., 162 Ill. 332, 44 N. E. 823, 35 L.R.A. 167, reversing 54 Ill. App. 395. The court said that from apparently diverse and conflicting authorities where a bill is filed for specific performance, the following principles might be deduced: "(1) Where the contract contains no provision as to possession or interest, if the vendee takes possession he must pay interest from that date: Calcraft v. Roebuck, 1 Ves. Jr. 221; Fludyer v. Cocker, 12 Ves. Jr. 25, 27; Powell v. Martyr, 8 Ves. Jr., 146; Ballard v. Shutt, L. R. 15 Ch. Div. 122, 124; Atty. Gen. v. Christ Church, 13 Sim. 214, 217; Rutledge v. Smith, 1 McCord, Eq. 399; Wilson v. Herbert, 76 Md. 489; Bostwick v. Beach, 103 N. Y. 414, 423; Boyle v. Rowand, 3 Desauss, Eq., 555; Phillips v. South Park Comrs. 119 Ill. 626; Steenrod v. Wheeling, P. & B. R. Co., 27 W. Va. 1; Stevenson v. Maxwell, 2 N. Y. 408; Binks v. Lord Rokeby, 2 Swanst. 222, 226; Gibson v. Clarke, 1 Ves. & B. 500; Rhys v. Dare Valley R. Co., L. R. 19 Eq. 93; Paton v. Rogers, 6 Madd. & G. 256; Blount v. Blount, 3 Atk. 636; Land v. Moole, 31 N. J. Eq., 413; Phillips v. Silvester, L. R. 8 Ch. 173; Monro v. Taylor, 8 Hare, 51; Cleveland v. Burrill, 25 Barb. 532; Hundley v. Lyons, 5 Munf. 342, 7 Am. Dec. 685; Wilson v. Herbert, 76 Md. 489; Philadelphia W. & B. R. Co. v. Gesner, 20 Pa. 240, 242, Pom. Cont. Sec. 430. (2) Where the contract contains no provision as to possession, but provides a date for performance, and for the payment of interest thereafter, if either party is in wilful default equity will refuse to enforce the terms of the agreement for the benefit of the defaulting party: De Visme v. De Visme, 1 Macn. & G. 336, 347; Lombard v. Chicago Sinai Congregation, 64 Ill. 477, 486, 75 Ill. 271, 274; Jones v. Mudd, 4 Russ. Ch. 122; Monk v. Huskisson, Id. 123, note a (1 Sim. 280); Leggott v. Metropolitan R. Co., L. R. 5 Ch. 716; Winterbottom v. Ingham, 14 L. J. Q. B. N. S. 298, 300; Lofland v. Maull, 1 Del. Ch. 359, 12 Am. Dec. 106; Tewart v. Lawson, 3 Smale & G. 307, 312; King v. Ruckman, 24 N. J. Eq. 556; Re Riley to Streatfield (1886) L. R. 34 Ch. Div. 388. (3) Where the contract provides a time for performance, with a provision for prior possession, and an express agreement for interest from a day named, and the vendor merely neglects or is unable to perform, in such case the vendee shall have the rents and profits, and pay interest, from the time fixed by the contract: Birch v. Joy, 3 H. L. Cas. 565, 603; Brockenbrough v. Blythe, 3 Leigh, 619; McKay v. Melvin, 1 Ired. Eq. 73; Cowpe v. Bakewell, 13 Beav. 421, 422; Baxter v. Brand, 6 Dana, 296."

the land with the rents and profits.[7] Where an agreement was made by a son with his widowed mother that he should take possession of a tract of land, in which she retained a homestead and dower interest and should, as rent, pay to her one third of the crops produced, and she, by a quitclaim deed, subsequently conveyed her interest to another, the latter was held entitled to the rents. The deed operated as an assignment of the rent and enabled the grantee to maintain *assumpsit*.[8] If there are no stipulations to the contrary, a grantee—where the deed and contract are placed in escrow—who pays the purchase price and interest from the date of the contract, has the right to the rent from such date.[9] An action for the rent cannot be defeated by either the tenant or the vendor by showing that the vendee was in default when he has taken possession under his contract.[1] If a purchaser refuses to consummate the purchase and is sued by the assignee of the vendor, who recovers the amount of the purchase price and interest from the date named in the contract as the time at which payment was to be made, the commencement of the action is an affirmance of the sale by the assignee and enables the purchaser to have an accounting of the rents and profits from such date during the assignee's possession.[2] A deed conveying land with the remainder, reversion, "rents, issues and profits" thereof confers upon the grantee the right to collect the rent subsequently accruing, and his right to recover cannot be defeated by the refusal of the tenant to attorn.[3]

[7] Jolly v. Bryan, 86 N. C. 457.

[8] Graham v. Le Sourd, 99 Ill. App. 223.

[9] Scott v. Sloan, 72 Kan. 545, 84 Pac. 117.

[1] Nearing v. Coop, 6 N. D. 345, 70 N. W. 1044.

[2] Ferguson v. Epperly, 127 Iowa, 214, 103 N. W. 94.

[3] Perrin v. Lepper, 34 Mich. 292, See for other cases bearing upon the question of the purchaser's rights to rent: Burden v. Thayer, 44 Mass. (3 Metc.) 76; Warner v. Bacon, 74 Mass. (8 Gray) 408, 69 Am. Dec. 253; Massachusetts Hospital Life Ins. Co. v. Wilson, 51 Mass. (10 Met.) 127; Buffum v. Deane, 70 Mass. (4 Gray) 393; Winestine v. Ziglatzki-Marks Co., 77 Conn. 404, 59 Atl. 496; Parsons v. Lunsford, 55 S. W. 885, 21 Ky.

§ 862b. **Deed on last day of rent term.**—Where the owner of land conveys it before the accrual of rent, he cannot recover the proportionate amount that would be due at the time of the delivery of the deed. Even if a conveyance is made in the afternoon of the last day of a monthly term, the rule will apply, for although the rent may accrue on the last day of the term, it does not accrue until that day is ended, and fractions of a day will not be considered.[4] The rent for a period of time is considered an indivisible item and this is the rule although there has been no eviction by the holder of the new title or an attornment to him.[5]

§ 862c. **Right to rent when vendor retains possession.**—A person who has contracted to sell land, but who retains the title and possession is held to the same liability for rents and profits as a mortgagee in possession.[6] If a vendor refuses to

Law Rep. 1536; Bourne v. Bourne, 12 Ky. Law Rep. (abstract) 467; Henshaw v. Bell, 10 Ky. Law Rep. 444; Dixon v. Smith, 181 Mass. 218, 63 N. E. 419; Fitch v. Windram, 184 Mass. 68, 67 N. E. 965; Williams v. Williams, 118 Mich. 477, 76 N. W. 1039; Holyoke Envelope Co. v. United States Envelope Co., 186 Mass. 498, 72 N. E. 58; Kyles v. Tait's Admr., 6 Gratt. (Va.) 44; Hereford Cattle Co. v. Powell, 13 Tex. Civ. App. 496, 36 S. W. 1033; Kirksey v. Mitchell, 8 Ala. 402; Castleman v. Belt, 41 Ky. (2 B. Mon.) 157; Ladd v. Lilly, 69 Ga. 395; Medley v. Davis, 24 Tenn. (5 Humph.) 387; Eisley v. Spooner, 23 Neb. 470, 36 N. W. 659, 8 Am. St. Rep. 128; Lombard v. Chicago Sinai Congregation, 75 Ill. 271; Owings v. Norton, 8 Ky. (1 A. K. Marsh) 573; Miller v. Stayner, 42 Ky. (3 B. Mon.) 58, 38 Am. Dec. 178; Page v. Lashley, 15 Ind. 152; Matthews v. Alsworth, 45 La. Ann. 465, 12 So. 518; Muir v. Bozarth, 44 Iowa, 499; Bartlett v. Jones, 60 Me. 246; Picot v. Douglass, 46 Mo. 497; Patrick v. Roach, 21 Tex. 251; Hundley v. Lyons, 5 Munf. (Va.) 342, 7 Am. Dec. 685; Van Wagner v. Van Nostrand, 19 Iowa, 422; Winslow v. Rand, 29 Me. 362.

[4] Hammond v. Thompson, 168 Mass. 531, 47 N. E. 137.

[5] Dexter v. Phillips, 121 Mass. 178; Fuller v. Sweet, 6 Allen, 219; Eames v. Feeley, 132 Mass. 346; O'Brien v. Ball, 119 Mass. 128; See, also, Cameron v. Little, 62 Me. 250; Robinson v. Deering, 56 Me. 357.

[6] Ashurst v. Peck, 101 Ala. 499, 14 So. 541.

perform his contract to convey, retaining possession of the land, and the amount of the rent and profits is less than the amount due for interest on the purchase price, such interest will not be allowed to him, but he will be entitled to receive the rents and profits.[7] Where the vendor has surrendered possession, and afterwards, without the purchaser's consent, retakes the possession, he is liable to the purchaser for any rents received by him while so in possession.[8] Mr. Justice Wright states the rule to be that whether the vendor would be liable for rent, if let into possession would depend entirely upon circumstances. "Thus, if he took possession without the consent of the vendee, and held the same either by himself or tenant, against the will of the vendee, he could not, in the absence of agreement, use the same without actual liability to account, and also be entitled to the purchase money. If, on the other hand, by reason of the long delay in the payment of the purchase money, the supposed inability of the estate to finally redeem the property, the condition of the property and the need of some one to take it in charge or the like, the defendant was allowed to enter under such circumstances as would rebut the presumption of any agreement that he was to account, then he would not be liable. But, inasmuch, as a rule, the vendor or mortgagee is entitled alone to his purchase or redemption money, with interest and is bound to apply to the extinguishment of his debt any rents received by him, it would follow, nothing being shown to the contrary, that he would be held for the rents,—especially if he once surrendered possession, or never had it, and subsequently took the same without the vendee's or mortgagor's consent." [9]

[7] Crockett v. Gray, 39 Kan. 659, 18 Pac. 595.

[8] Shawhan v. Long, 26 Iowa, 488, 96 Am. Dec. 164.

[9] Shawhan v. Long, 26 Iowa, 488, 96 Am. Dec. 164. For other cases as to the liability for rents of vendor retaining possession, see Siemers v. Hunt, 28 Tex. Civ. App. 44, 66 S. W. 115; James v. Burbridge, 33 W. Va. 272, 10 S. E. 396; Tremont & Windsor Hotel Co., v. Gammon, 41 Tex. Civ. App. 1, 91 S. W. 337; Hibbard v. Smith,

§ 862d. **Liability for rent of purchaser in possession.**—A purchaser who takes possession but is subsequently ousted on account of the inability of the vendor to convey a title is not responsible for rent.[1] The relation of landlord and tenant does not exist where possession is taken by the purchaser.[2] If by mistake, the seller puts the purchaser into possession of more land than he has bought, and which does not belong to the seller, the purchaser is not obligated to pay rent for the same for the period during which he was so in possession.[3] Where a purchaser continues in possession, however, after the title of his vendor had been extinguished, he is accountable to the real owner for rent.[4] So, where the purchaser has taken taken possession under a contract of purchase and has failed to make any payment, it is proper to enter judgment for rents and profits accruing after demand for possession by the vendor.[5] If the purchaser is evicted in an action of ejectment the interest on the purchase price and the mesne profits are considered as equaling each other.[6]

§ 863. **Appurtenances and incidents.**—The grant of "a well" includes the land occupied by it.[7] The grant of a tract

56 Ky. (17 B. Mon.) 52; Jones v. Jones, 49 Tex. 683; Wykoff v. Wykoff, 3 Watts & S. 481.

[1] Wellborn v. Simonton, 88 N. C. 266.

[2] Fall v. Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278.

[3] Nelson v. Suddarth, 1 Hen. & M. (Va.) 350.

[4] Webb v. Conn, 11 Ky. (1 Litt.) 82, 13 Am. Dec. 225.

[5] Hannan v. McNickle, 82 Cal. 122, 23 Pac. 271.

[6] White v. Tucker, 52 Miss. 145. For other cases as to liability of purchaser in possession, see, Carter v. Walters, 91 Iowa, 727, 59 N. W. 201; Bartlett v. Blanton, 27 Ky. (4 J. J. Marsh) 426; Morton's Heirs v. Ridgeway, 26 Ky. (3 J. J. Marsh) 254; Hook v. Fentress, 62 N. C. 229; Thompson v. Bower, 60 Barb. 463; Bangs v. Barrett, 16 R. I. 615, 18 Atl. 250; Prater v. Miller, 10 N. C. 628; Blackwell v. Ryan, 21 S. C. 112; Harkness v. McIntire, 76 Me. 201.

[7] Mixer v. Reed, 25 Vt. 254. See in the case of a grant of a "pool" or a "pit," Whitney v. Olney, 3 Mason, 282; Johnson v. Rayner, 6 Gray, 107; Wooley v. Groton, 2 Cush. 305.

of land passes everything standing or growing upon the land.[8] Other land cannot be considered as appurtenant to the land granted.[9] The grant of a sawmill with appurtenances passes the machinery in the mill.[1] In brief, a deed in general terms passes everything which is a constituent part of the thing granted.[2] A water right will pass as appurtenant to the land.[3] A right of way passes when the land conveyed is surrounded by other lands of the grantor.[4] But in order that the grantee may have this right of way, the way must be one of necessity and not of convenience.[5] A grant of a house includes the

[8] Cook v. Whiting, 16 Ill. 481; Brackett v. Goddard, 54 Me. 313; Goodrich v. Jones, 2 Hill, 142. See, also, Mott v. Palmer, 1 N. Y. 364; Terhune v. Elberson, 2 N. J. L. 726; McIlvane v. Harris, 20 Mo. 457, 64 Am. Dec. 196; Foote v. Colvin, 3 Johns. 216, 3 Am. Dec. 478; Chapman v. Long, 10 Ind. 465; Kittredge v. Woods, 3 N. H. 503, 4 Am. Dec. 393.

[9] Jackson d. Yates v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263; Leonard v. White, 7 Mass. 6, 5 Am. Dec. 19; Riddle v. Littlefield, 53 N. H. 503, 16 Am. Rep. 388; Harris v. Elliott, 10 Peters, 25, 9 L. ed. 333; Blaine v. Chambers, 1 Serg. & R. 169; Ammidon v. Granite Bank, 8 Allen, 293; Tyler v. Hammond, 11 Pick. 193.

[1] Farrar v. Stackpole, 6 Me. 154, 19 Am. Dec. 201. See Sparks v. Hess, 15 Cal. 186.

[2] Wilson v. Hunter, 14 Wis. 684, 80 Am. Dec. 795; Cave v. Crafts, 53 Cal. 135; Farrar v. Stackpole, 6 Me. 154, 19 Am. Dec. 201. See Elliott v. Carter, 12 Pick. 436; James v. Plant, 5 Ad. & E. 479; McDonald v. McElroy, 60 Cal. 484; Sparks v. Hess, 15 Cal. 186.

[3] Farmer v. Ukiah Water Co., 56 Cal. 11. Riparian rights are appurtenant to land: Alta Land etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217. Where the right to the use of a ditch and water exists in favor of land, is an essential part of the value of the land(and perhaps is the sole inducement to purchase, it passes by the deed whether the word "appurtenances" be used or not: Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727. A water right acquired and used for a beneficial purpose in connection with land is an appurtenance and is transferred by the deed unless reserved: Sweetland v. Olson, 11 Mont. 27; Crooker v. Benton, 93 Cal. 365.

[4] Collins v. Prentice, 15 Conn. 39, 38 Am. Dec. 61; Taylor v. Warnaky, 55 Cal. 350. See Regan v. Boston Gaslight Co., 137 Mass. 37; Haven v. Seeley, 59 Cal. 494; Reed v. Spicer, 27 Cal. 27. See as to dedication of road, Deacons v. Doyle, 75 Va. 258; Patton v. Quarrier, 18 W. Va. 447.

[5] Nichols v. Luce, 24 Pick. 102, 35 Am. Dec. 302; Carey v. Rae, 58 Cal. 160. If the way already ex-

land under it.[6] A grant or reservation "of the whole of a ciderhouse and cidermill standing on land, so long as the said cider house shall stand thereon, and no longer," passes a freehold in the land on which the building stands, even though it has ceased to be used as a ciderhouse.[7] "The general rule of law is, that when a house or store is conveyed by the owner thereof, everything then belonging to, and in use for the house or store, as an incident or appurtenance, passes by the grant. It is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner, and with the same beneficial rights, as were then in use and belonged to it. The question does not turn upon any point as to the extinguishment of any pre-existing rights by unity of possession. But it is strictly a question, what passes by the grant. Thus, if a man sells a mill, which at the time has a particular stream of water flowing to it, the right to the water passes as an appurtenance, although the grantor was, at the time of the grant, the owner of all the stream above and below the mill. And it will make no difference that the mill was once another person's, and that the adverse right to use the stream had been acquired by the former owner, and might have been afterward extinguished by unity of possession in the grantor. The law gives a reasonable intendment in all such cases to the grant; and passes with the property all those easements and privileges which at the time belong to it, and are in use as appurte-

ists, it will pass as an appurtenant easement: Murphy v. Campbell, 4 Pa. St. 484; Pope v. O'Hara, 48 N. Y. 455; Harris v. Elliott 10 Peters, 25, 9 L. ed. 333.

[6] Allen v. Scott 21 Pick. 25, 32 Am. Dec. 238; Bacon v. Bowdoin, 22 Pick. 410; Stockwell v. Hunter, 11 Met. 455, 45 Am. Dec. 220. And see Johnson v. Raynor, 6 Gray, 110; Crawfordsville v. Boots 76 Ind. 32. See Endsley v. State, 76 Ind. 467.

[7] Esty v. Currier, 98 Mass. 500. All parts of a deed should be considered so that every part may have effect: Herrick v. Hopkins, 23 Me. 217; Thrall v. Newell, 19 Vt. 202, 47 Am. Dec. 682; Richardson v. Palmer, 38 N. H. 212; Foy v. Neal, 2 Strob. 156; Byrd v. Ludlow, 77 Va. 483.

nances." [8] Still, land does not pass as a mere appurtenance to other land,[9] nor does a deed convey personal property situated on the land conveyed unless it is mentioned in the deed.[1] Unless the deed clearly manifests a severance, a conveyance of a building annexed to the soil passes the land on which the building stands,[2] and hence, in the absence of proof to the contrary, it is presumed that buildings pass with a deed of the land.[3] Unless there is an express reservation, a deed of a hotel will carry with it as an appurtenance, the hotel sign and post notwithstanding that they are set in the street some feet in front of the hotel. This will be the construction placed upon the deed especially where no claim had been made by the grantor for a considerable period of time and the grantee had detached the sign from the post.[4] A sale of land will pass an inchoate right of protection from overflow by water.[5] By the term "appurtenances" is meant only incorporeal easements which are necessary to the proper enjoyment of the estate conveyed.[6] A grant carries with it what is necessary to the enjoyment of the grant,[7] and, therefore, an incident or appurtenance pass by a deed of the land whether specified in the deed or not.[8] Where a deed describes the property conveyed as "all the house and premises situated on" a certain lot together with the tenements and hereditaments thereto belonging, the title to the lot will pass to the grantee as well as that of the house.[9] As a deed of land conveys the buildings

[8] In United States v. Appleton, 1 Sum. 492, 500.

[9] Cole v. Haynes, 22 Vt. 588.

[1] Taylor v. Plunkett, 4 Pennewill (Del.) 56 Atl. 384.

[2] Wade v. Odle, 21 Tex. Civ. App. 656, 54 S. W. 786.

[3] Tharp v. Allen, 46 Mich. 389, 9 N. W. 443.

[4] Redlon v. Barker 4 Kan. 445, 96 Am. Dec. 180.

[5] Mathewson v. Hoffman, 77 Mich. 420, 6 L.R.A. 349, 43 N. W. 879.

[6] Whyte v. Builders' League of New York, 164 N. Y. 429, 58 N. E. 517, 52 N. Y. S. 65, 23 Misc. Rep. 385, 54 N. Y. S. 822, 35 App. Div. 480.

[7] Ingle v. Bottoms, 160 Ind. 73, 66 N. E. 160.

[8] Ray v. Nally, 89 S. W. 486, 28 Ky. Law Rep. 421.

[9] Bawden v. Hunt, 123 Mich. 295,

thereon, evidence of the intention of the grantor is inadmissible.[1]

§ 864. **Construction of particular words.**—Manifestly, no general rule can be laid down as to the construction of particular words. The primary object courts have in view is to carry out the intention of the parties. But in this connection it may not be unprofitable to mention some instances in which certain words have been construed. The words "or" and "and" have sometimes been construed so as to give to one its opposite meaning.[2] The word "appurtenances" refers

82 N. W. 52. For other cases as to what pass or do not pass as appurtenances, see Omaha Bridge & Terminal Ry. Co. v. Whitney, 68 Neb. 389, 94 N. W. 513, modified on rehearing in 68 Neb. 389, 99 N. W. 525; Evans v. Welch, 29 Colo. 355, 68 Pac. 776; Holderman v. Miller, 102 Ind. 356, 1 N. E. 719; Van Husan v. Omaha Bridge & Terminal Ry. Co., 118 Iowa, 366, 92 N. W. 47; Bagley v. Rose Hill Sugar Co., 111 La. 249, 35 So. 539; Hastings v. Grimshaw, 153 Mass. 497, 12 L.R.A. 617, 27 N. E. 521; Stone v. Stone, 116 Mass. 279; Hammond v. Abbott, 166 Mass. 517, 44 N. E. 620; Peters v. Worth, 164 Mo. 431, 64 S. W. 490; Mulrooney v. O'Bear, 80 Mo. App. 471.

[1] Isham v. Morgan, 9 Conn. 374, 23 Am. Dec. 361.

[2] Jackson v. Topping, 1 Wend. 388, 19 Am. Dec. 515; Price v. Hart, Pol. 645; White v. Crawford, 10 Mass. 183. See, also, Will d. Burrill v. Kemp, 3 Term. Rep. 470; Brittain v. Mitchell, 4 Ark. 92; Chapman v. Dalton, Plow. 289; Parker v. Carson, 64 N. C. 563. But see Dumont v. United States, 98 U. S. 143, 25 L. ed. 65; Thomas v. Perry, Peters C. C. 56. These words are often interchanged in the construction of wills. See Miles v. Dyer, 5 Sim. 435; China v. White, 5 Rich. Eq. 426; Kindig v. Deardorff, 39 Ill. 300; Welsh v. Elliott, 7 Serg. & R. 279; Johnson v. Simcox, 31 Law J. Ex. 38; 6 Hurl. & N. 6, 7 Jur., N. S., 349; Brewer v. Opie, 1 Call, 212; Den d Dickenson v. Jordan, 1 Murph. 380; Parker v. Parker, 5 Met. 134; Tennell v. Ford, 30 Ga. 707; Holcomb v. Lake, 24 N. J. L. 686; Brooke v. Croxton, 2 Gratt. 506; Bostick v. Lawton, 1 Spear, 258; Thompson v. Teulon, 22 L. J. Ch. 243; Weddell v. Mundy, 6 Ves. 341; Richardson v. Spraag, 1 P. Wms. 434; Parkin v. Knight, 15 Sim. 83; Montagu v. Nucella, 1 Russ. 165; Harris v. Davis, 1 Coll. 416; Maynard v. Wright, 26 Beav. 285; Long v. Dennis, 4 Burr. 2052; Den d. Brown v. Mugway, 15 N. J. L. 330; Green v. Harvey, 1 Hare, 428; Greated v. Greated, 26 Beav. 621; Law v. Thorp, 25 Law J. Ch. 75, 1 Jur., N.

to things incidental to the land conveyed. It does not include other land.[3] In the premises of a deed, the word "also" signifies "likewise; in like manner; in addition to; denotes that something is added to what precedes it."[4] The words "have granted" are equivalent in signification to the words "do hereby grant."[5] If the expression "from" or "to" an object is used, the terminus is not included.[6] Where a deed is made to a person, her heirs and assigns, with a *habendum* to her sole and separate use, free from the control or interference of any husband she may have, and to the use of "*heir* heirs and assigns forever," the word "heir" will be taken as a clerical mistake for "her."[7] The term "sedge flat" imports a tract of land below highwater mark.[8] If a grantor uses the words "reversion and remainder" in a grant of land for a public highway, he retains nothing which he can afterward convey, the grantee taking the reversionary right.[9] By a grant "of the use of the timber," an incorporeal right to use the timber only is conveyed. Title to the soil does not pass.[1] The word

S., 1082; Bently v. Meech, 25 Beav. 197. So in the case of statutes, see Commonwealth v. Griffin, 105 Mass. 185; O'Connell v. Gillespie, 17 Ind. 459; Hughes v. Smith, 64 N. C. 494; State v. Pool, 74 N. C. 402; Boag v. Lewis, 1 Up. Can. Q. B. 357; Streeter v. People, 59 Ill. 595; Boyles v. McMurphy, 55 Ill. 236; Townsend v. Read, 10 Com. B., N. S., 308; People v. Sweetser, 1 Dakota, 308; State v. Myers, 10 Iowa, 448; State v. Brandt, 41 Iowa, 593; Eisfield v. Kenworth, 50 Iowa, 389; Sparrow v. Davidson College, 77 N. C. 35; Porter v. State, 58 Ala. 66; Ferrell v. Lamar, 1 Wis. 19.

[3] Otis v. Smith, 9 Pick. 293; Helme v. Guy, 2 Murph. 341. See Hill v. West, 4 Yeates, 142; Harris v. Elliott, 10 Peters, 25, 9 L. ed. 333; Worthington v. Gimson, 2 El. & E. 618; Plant v. James, 2 Nev. & M. 517, 6 Nev. & M. 282, 4 Ad. & E. 749, 5 Barn. & Adol. 791; Evans v. Angell, 26 Beav. 205; Barlow v. Rhodes, 1 Cromp. & M. 205.

[4] Panton v. Tefft, 22 Ill. 366.

[5] Pierson v. Armstrong, 1 Iowa, 282, 63 Am. Dec. 440.

[6] Bonney v. Morrill, 52 Me. 252. By the expression "from a street," is not necessarily meant from its nearest line: Pittsburg v. Cluley, 74 Pa. St. 259.

[7] Huntington v. Lyman, 138 Mass. 205.

[8] Church v. Meeker, 34 Conn. 421.

[9] Vaughn v. Stuzaker, 16 Ind. 338.

[1] Clark v. Way, 11 Rich. 621.

"adjacent" signifies "in the neighborhood of."[2] "All the property I possess," used in a conveyance, includes all the property owned by the grantor, in remainder as well as in immediate occupation.[3] The word "convey," in a deed, will pass the title. It is equivalent to a grant.[4] By the use of the term "ropewalk," such land as is exclusively devoted to a ropewalk will pass.[5] Where land is conveyed "with all the buildings, ways, privileges, and appurtenances to the same belonging," any easement or appurtenances already existing and belonging to the land will pass.[6] But this is not appropriate language to create a new appurtenance or easement.[7] Title to property will pass by the use of the words "go to" in a conveyance.[8] The word "quit" is equivalent in legal effect to "sell" or "release."[9] The word "by," used descriptively, means "near" to the object to which it relates, and not "in immediate contact with," and "near" is a relative term.[1] The *termini* are not included when the word "between" is used.[2] A freehold may be conveyed by the use of the words "assign and make over."[3] If, by a deed, a trust is created for the benefit "of the present as well as the future heirs" of a person, the word "heirs" will be taken to mean "children," as there can be no heirs of a person until after his death.[4] Where a deed is

[2] Henderson v. Long, Cooke, 128.

[3] Brantly v. Kee, 5 Jones Eq. 332.

[4] Patterson v. Carneal, 3 Marsh. A. K., 618, 13 Am. Dec. 208; Lambert v. Smith, 9 Or. 185.

[5] Davis v. Handy, 37 N. H. 65.

[6] Kenyon v. Nichols, 1 R. I. 411.

[7] Kenyon v. Nichols, *supra*.

[8] Folk v. Varn, 9 Rich. Eq. 303.

[9] Gordon v. Haywood, 2 N. H. 402.

[1] Wilson v. Inloes, 6 Gill, 121.

[2] Revere v. Leonard, 1 Mass. 91.

[3] Hutchins v. Carleton, 19 N. H. 487. Said the court: "'Assign and make over' are as effectual, when a good consideration is expressed, as 'quit my claim,' or many other forms that have been sanctioned as sufficient to raise a use or pass an estate": See Jackson v. Alexander, 3 Johns. 484, 3 Am. Dec. 517.

[4] Read v. Fite, 8 Humph. 328. See Tucker v. Tucker, 78 Ky. 503; Twelves v. Nevill, 39 Ala. 175. For instances in which the courts have said that the word "heirs" was necesasry to create a fee, or have construed the term, see Jarvis v. Quigley, 10 Mon. B. 104; Cromwell v. Winchester, 2 Head, 389; Duffum v. Hutchinson, 1 Allen, 58:

made to A, "and to the children of said A, and assigns forever," the children of the grantee, born subsequently to the execution of the deed do not take an interest in the land.[5] The words "all mineral or magnesia" of any kind, occurring in a reservation in a deed, include chromate of iron subsequently found upon the land.[6] The water power appurtenant to a mill will pass under the term "appurtenances." It is not necessary to use the word "privilege," although it may have been used in the precedent contract of sale.[7] But an entire railroad will not pass to another railroad by the use of the word "appurtenance" only.[8] The words "and all the buildings thereon," occurring in a conveyance of land, are superfluous, and have no legal operation.[9] Concerning the word

Baker v. Hunt, 40 Ill. 264, 89 Am. Dec. 346; Williams v. Allen, 17 Ga. 81; Calmes v. Buck, 4 Bibb, 453; Kay v. Connor, 8 Humph. 624, 49 Am. Dec. 690; Leitensdorfer v. Delphy, 15 Mo. 160, 55 Am. Dec. 137; Young v. Marshall, Hill & D. Sup. 93; Roberts v. Forsyth, 3 Dev. 26. For cases in which the words "more or less" have been construed, see Tyson v. Hardesty, 29 Md. 305; Blaney v. Rice, 20 Pick. 62, 32 Am. Dec. 204; Brady v. Hennion, 8 Bosw. 528; Phipps v. Tarpley, 24 Miss. 597; Gentry v. Hamilton, 3 Ired. Eq. 376; Hoffman v. Johnson, 1 Bland, 103; Baynard v. Eddings, 2 Strob. 374; Hunt v. Stull, 3 Md. Ch. 24; Sullivan v. Ferguson, 40 Mo. 79; Nelson v. Mathews, 2 Hen. & M. 164, 3 Am. Dec. 620; Poague v. Allen, 3 Marsh. J. J. 421; Davis v. Sherman, 7 Gray, 291; Ship v. Swan, 2 Bibb, 82. If it appears, from the terms of the deed, and the circumstances connected with its execution, that the grantor meant children, although he used the word "heirs," effect will be given to it accordingly, and the deed will not be defeated by the general rule that a conveyance to the heirs of a living person is void: Heath v. Hewitt, 127 N. Y. 166, 13 L.R.A. 46, 24 Am. St. Rep. 438. See, also, Vickars v. Leigh, 104 N. C. 248; Griswold v. Hicks, 132 Ill. 494, 22 Am. St. Rep. 549; Broliar v. Marquis, 80 Iowa, 49. The term "heirs at law" may be construed as children or grandchildren, where such a construction will effectuate the grantor's intention, and is consistent with legal principles: Waddell v. Waddell, 99 Mo. 338, 17 Am. St. Rep. 575. See § 846c, *ante*.

[5] Glass v. Glass, 71 Ind. 392.

[6] Gibson v. Tyson, 5 Watts, 34.

[7] Pickler v. Stapler, 5 Serg. & R. 109.

[8] Philadelphia v. Philadelphia etc. R. R. Co., 58 Pa. St. 253.

[9] Crosby v. Parker, 4 Mass. 110.

"about," in describing the length of a line, Weston, J., said: "By the use of the term 'about,' it may be understood that direct precision in the length of line was not intended." "The use of the word 'about' indicated that the parties only contracted for a number of feet that would be a near approximation to those mentioned, and negatives the conclusion that entire precision was intended." [2] If, however, the place of the monument by which the distance was controlled and determined cannot be ascertained, the right of the grantee is confined to the number of rods or feet given. But the original location, in such a case, may be shown by evidence of continued possession.[3] The words "to her and her representatives," in a limitation by deed, can signify no more than her executors and administrators. Having no legal effect, these words should be regarded as superfluous.[4] Real estate will not pass by granting, assigning, bargaining, and selling to A "all and all manner of goods, chattels, debts, moneys, and all other things of me whatsoever, as well real as personal, of

[1] Cutts v. King, 5 Me. (5 Greenl.) 482.

[2] Maryland Construction Co. v. Kuper, 90 Md. 529, 45 Atl. 197. In Co-operative Bld'g Bank v. Hawkins, 30 R. I. 171, 73 Atl. 617, the court through Mr. Justice Sweetland says: "The use of this word in descriptions as in ordinary use, indicates that exactness is not attempted, and that an estimate is intended to be given, rather than a precise measurement, that the parties are trying to provide that their main intention as to the grant shall not be defeated, by a precise description in some particular wherein precision is not then possible to them. When the word appears in a description, as in that under consideraton, it is notice to all, that to carry out the intention of the parties an elasticity may be given to the call in regard to which the parties have not considered it advisable to be exact. In the construction of such a description the main intention of the parties should be sought, and if the intention can be discovered, and it is not in conflict with the express language of the description, such construction within reasonable limits, should be given to the estimated measurement as will carry out the intention of the parties."

[3] Cutts v. King, 5 Me. (5 Greenl.) 482. See Purinton v. Sedgley, 4 Me. (4 Greenl.) 286.

[4] McLaurin v. Fairly, 6 Jones Eq. 375.

what kind, nature, and quality soever," "to have and to hold the same and every part and parcel thereof, unto the said A, his executors, administrators, and assigns forever." [5] An instrument, although in form a deed, is testamentary in its character if the grantor in it declares that it is made on the condition that "I reserve the right to alter, change, or entirely abolish this deed if I so desire during my life, and that I retain all of the said property during my life, and have the control of the same, and that this deed do not take effect until after my death." [6]

[5] Ingell v. Nooney, 2 Pick. 362, 13 Am. Dec. 434.

[6] Cunningham v. Davis, 62 Miss. 366. See for a similar case, Leaver v. Gauss, 62 Iowa, 314. A wife's inchoate right of dower is released by a clause in a deed signed by husband and wife, stating that: "We hereby release and relinquish all right, claim, and interest whatever, in and to said lot of ground which is given by, or results from all laws of this State, pertaining to the exemption of homestead or dower": Attwater v. Butler, 9 Baxt. (Tenn.) 299. But by a clause, "and in the event of sale, we waive all equity of redemption and repurchase and homestead in said property," only the right of homestead, and not dower, is conveyed: McKinley v. Kuntz, 9 Baxt. (Tenn.) 299. A deed conveying a building, and "all fixtures of every description attached to said building," will not be construed as conveying fixtures not attached to the building: Stettauer v. Hamlin, 97 Ill. 312. In a deed conveying several tracts of land, the grantor reserved "all the pine timber on said tracts, together with the right and privilege to cut, remove, take, and carry away the same, or any part thereof, at any and all times; also the right of ingress and egress at any and all times for the space of twelve years from the date above written, for the purpose so as aforesaid." The court held that the parties having determined their own time for the removal of the timber, the right of entry, as well as the right of entry therein, fell when that time expired: Saltonstall v. Little, 90 Pa. St. 422, 35 Am. Rep. 683. For other cases in which particular words and clauses have been construed, see Bellamy v. Bellamy, Adm. 6 Fla. 62; Mundy v. Vawter, 3 Gratt. 518; Hall v. Thayer, 5 Gray, 523; Barton v. Morris, 15 Ohio, 408; Peaks v. Blethen, 77 Me. 510; Sowle v. Sowle, 10 Pick. 376; Dennison v. Ely, 1 Barb. 610; Brantly v. Kee, 5 Jones Eq. 332; Harris v. Elliott, 10 Peters, 25, 9 L. ed. 333; Hutchins v. Carleton, 19 N. H. 487; Braman v. Dowse, 12 Cush. 227; Melsheimer v. Gross, 58 Pa. St. 412; Smith v. Read, 51 Conn. 10; Perry v. Calhoun, 8 Humph. 551; Hawk v. McCullough, 21 Ill. 220; Mulford v. Le Franc, 26 Cal. 88; McLeroy v. Duckworth, 13 La.

PART II.

COMMUNITY PROPERTY.

§ 865. Community property—In what States exists.—It may be proper in this place to note some of the rules governing community property. At common law the husband and wife did not by virtue of that relation hold property in

Ann. 410; Brackett v. Bidlon, 54 Me. 426; Blossom v. Van Court, 34 Mo. 390, 86 Am. Dec. 114; King v. Gilson, 32 Ill. 348, 83 Am. Dec. 269; Schenley v. Pittsburgh, 104 Pa. St. 472; Claunch v. Allen, 12 Ala. 159; Muller v. Boggs, 25 Cal. 175; Roebuck v. Duprey, 2 Ala. 535; Brenham v. Davidson, 51 Cal. 352; Powell v. Lyles, 1 Murph. 348; Rickets v. Dickens, 1 Murphy. 343, 4 Am. Dec. 555; Williams v. Allen, 17 Ga. 81; Cromwell v. Winchester, 2 Head, 389; Adams v. Marshall, 138 Mass. 228, 52 Am. Rep. 271; Hartman v. Read, 50 Cal. 485; Latham v. Morgan, 1 Smedes & M. 611; Carter v. Soulard, 1 Mo. 576; Gratz v. Ewalt, 2 Binn. 95; Whitehill v. Gotwalt, 3 Pa. 113; Prettyman v. Wilkey, 19 Ill. 235; Seitzinger v. Weaver, 1 Rawle, 377; Freeman v. Pennock, 3 Pa. 313; Calmes v. Buck, 4 Bibb, 453; Fratt v. Toomes, 48 Cal. 28; Hartwell v. Camman, 10 N. J. Eq. (2 Stockt. Ch.) 128, 64 Am. Dec. 448; Jarvis v. Quigley, 10 Mon. B. 104; Leitensdorfer v. Delphy, 15 Mo. 160, 55 Am. Dec. 137; Young v. Marshall, Hill & D. Sup. 93; Roberts v. Forsyth, 3 Dev. 26; Kirkendall v. Mitchell, 3 McLean, 144; American Academy of Music v. Smith, 54 Pa. St. 130; Newmarket v. Smart, 45 N. H. 87; Congregational Society v. Stark, 34 Vt. 243; Bradley v. Rice, 13 Me. 198, 29 Am. Dec. 501; Gambril v. Doe, 8 Blackf. 140, 44 Am. Dec. 760; Slosson v. Lynch, 43 Barb. 147; Swiney v. Swiney, 14 Lea (Tenn.), 316; Close v. Burlington, Cedar Rapids etc. Ry. Co., 64 Iowa, 149; Wallace v. Miller, 52 Cal. 665; Montgomery v. Sturdivant, 41 Cal. 290; Talbert v. Hopper, 42 Cal. 397; Vance v. Peña, 33 Cal. 631; Stafford v. Lick, 10 Cal. 12; Chapman v. Excelsior Canal Co., 17 Cal. 231; Stanway v. Rubio, 31 Cal. 41; Peaks v. Blethen, 77 Me. 510; Adams v. Marshall, 138 Mass. 228, 52 Am. Rep. 271; Kemp v. Bradford, 61 Md. 330; Pugh v. Mays, 60 Tex. 191; Warner v. Sandusky, Mansfield etc. R. R. Co., 39 Ohio St. 70; Hummelman v. Mounts, 87 Ind. 178; Weir v. Simmons, 55 Wis. 637; Maker v. Maker, 74 Me. 104. See, also, Arnold v. Hymer, 2 McCrary, C. C. 631; Cannon v. Barry, 59 Miss. 289; Steuart v. Gage, 59 Miss. 558; Bailey v. Willis, 56 Tex. 212; Little v. Allen, 56 Tex. 133; Lunt v. Lunt, 71 Me. 377; Powers v. Patten, 71 Me. 583; Bronson v. Lane, 91 Pa. St. 153; Tifft v. Buffalo, 82 N. Y. 204; Blair v. Osborne, 84 N. C. 417; Jeffrey v. Hursh, 42 Mich.

joint ownership. We shall not stop here to consider the property rights of husband and wife as they existed at common law, but pass to the consideration of what, in some of the States of the Union, is made, by statutory provisions, community property. The statutes of California may be selected as an example. In that State, the Code provides: "All property of the wife, owned by her before marriage, and that acquired afterward by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband convey her separate property." [7] "All property owned by the husband before marriage, and that acquired afterward by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." [8] "All other property acquired after marriage by either husband or wife, or both, is community property." [9] In other States, where earnings subsequent to marriage are made community property, similar statutes exist. In Texas, it is provided: "All the effects which both husband and wife reciprocally possess at the time of the marriage may be dissolved, and shall be regarded as common effects or gains, unless the contrary be satisfactorily proved." [1] "All property, both real and personal, of the husband, owned or claimed by him before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of lands, or slaves thus acquired, shall be his separate property. All property, both real and personal, of the wife owned or claimed by her before marriage and that acquired by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife." [2] "All property acquired by either

563; Look v. Kenney, 128 Mass. 284; Eysaman v. Eysaman, 24 Hun, 430; Hinkle v. Hinkle, 69 Ind. 134; Atkinson v. Dixon, 70 Mo. 381; Gilkey v. Shepard, 51 Vt. 546; Bouknight v. Epting, 11 S. C. 71; Rankin v. Warner, 2 Lea (Tenn.), 301; Newman v. Ashe, 9 Baxt. (Tenn.) 380.

[7] Civil Code Cal. § 162.

[8] Civil Code Cal. § 163.

[9] Civil Code Cal. § 164.

[1] Paschal's Tex. Dig. art. 4638.

[2] Paschal's Tex. Dig. art. 4641.

husband or wife during the marriage, except that which is acquired in the manner specified in the preceding section, is common property." [3] Statutes to the same effect exist in Louisiana, Nevada, Idaho, Arizona, New Mexico and Washington,[4] and also in Porto Rico.[5]

§ 866. The civil law.—The rule as to the property rights of husband and wife in the civil law, is thus stated by Mr. Burge: "There is a marked distinction between the civil law and other systems of jurisprudence in the civil rights and capacities of the husband and wife. It does not recognize in the husband and wife that union of persons, by which the rights of the wife were incorporated and consolidated during the coverture with those of the husband. It does not, therefore, subject her to those civil disabilities which must have resulted from that union. The husband and wife are regarded as distinct persons, with separate rights, and capable of hold-

[3] Paschal's Tex. Dig. art. 4642.

[4] Louisiana Civil Code, § 2371; Comp. Laws of Nevada, p. 56, §§ 151, 152; Comp. Laws of Arizona, ed. 1877, p. 328, §§ 1967–1969; Laws of Idaho, Session 1866–67, p. 65, §§ 1, 2; Code of Washington Ty., ed. 1881, §§ 2400–2411. See generally on the question of community property, Rich v. Tubbs, 41 Cal. 34; Le Blanc v. Le Blanc, 20 La. Ann. 207; Dunham v. Chatham, 21 Tex. 247, 73 Am. Dec. 228; Brown v. Cobbs, 10 La. 181; Rice v. Rice, 21 Tex. 66; Hughey v. Barrow, 4 La. Ann. 249; Comeau v. Fontenot, 19 La. 407; Menchaca v. Field, 62 Tex. 135; Cannon v. Murphy, 31 Tex. 407; Pancoast v. Pancoast, 57 Tex. 1320; Porter v. Chronister, 58 Tex. 53; Simeon v. Perrodin, 35 La. Ann. 931; Lake v. Lake, 52 Cal. 428; Sexton v. McGill, 2 La. Ann. 190; Morris v. Covington, 2 La. Ann. 259; Lawson v. Ripley, 17 La. 251; Denegre v. Denegre, 30 La. Ann. pt. 1, 275; Lewis v. Lewis, 18 Cal. 659; Howard v. York, 20 Tex. 670; George v. Ransom, 15 Cal. 323, 76 Am. Dec. 490; De Blane v. Hynch, 23 Tex. 28; Cartwright v. Cartwright, 18 Tex. 296; Spear v. Ward, 20 Tex. 674; Forbes v. Dunham, 24 Tex. 611; Bateman v. Bateman, 25 Tex. 270; Bonner v. Gill, 5 La. Ann. 630; Ducrest v. Bijeau, 8 Martin, N. S., 198; Love v. Robertson, 6 Tex. 6, 56 Am. Dec. 41; Pearce v. Jackson, 61 Tex. 642; Johnson v. Burford, 39 Tex. 242; Claiborne v. Tanner, 18 Tex. 72; McAllister v. Farley, 39 Tex. 552.

[5] Rev. St. & Codes (1902) §§ 1310–1347.

ing distinct and separate estates. The wife was alone responsible for and might be sued and was competent to sue, on her own contracts and engagements, and the husband could not subject her or her property to any liability for his debts or engagements. The *communio bonorum,* which is to be found in so many systems of jurisprudence, might have been part of the Roman law at an earlier period of its history, but it had long before the compilation of the digest fallen into disuse. The parties might, by their nuptial agreement, adopt it, but it had then ceased to be a provision of the law. The peculiarities of the civil law in these respects, may be referred to the disuse into which the formal rites of marriage, *per confarreationem et coemptionem,* had fallen. Marriages celebrated according to those rites, gave to the husband and wife a community of interest in the property of each other. By the marriage *per coemptionem,* the husband was considered to have purchased his wife. She ceased to be under her parental power, and became subject to the power of her husband. All her property belonged to him, and she succeeded to it on his death. Long before the reign of Justinian, marriages *per usum,* that is by cohabitation as man and wife, had superseded the more formal marriages. The marriage *per usum* did not alter the status of the female, nor subject her to the marital power, but she still remained under that of her father." [6] The *dos* was the property brought by the wife at the marriage, contributed either by herself, or by some other person for her benefit. The husband contributed his *donatio propter nuptias,* or *antidos,* but in all other property they each retained the same rights as they would have if unmarried.[7] "The husband acquires a *dominium* in the dotal property, which is determinable on the dissolution of the marriage, unless he has become the purchaser of it at an estimated value. In that case, although it is not determinable, it is competent for the

[6] 1 Burge, Colonial and Foreign Laws, 263, 264.

[7] 1 Burge, Colonial and Foreign Laws, 264.

wife, if he be insolvent, to recover so much of the dotal property as still remains in his possession. The husband, in respect of his *dominium,* may recover in his own name any part of it which is withheld. He may even institute an action against his wife, if she has withdrawn any part of it. He has the administration and management of the dotal property, and receives for his own use its annual fruits, rents, and profits, in consideration of which he sustains the expenses incident to the marriage. If a debt owing by him to his wife be the subject of *dos,* he is not chargeable with interest on it during the coverture. He has the power of alienating such part of the dotal property as is personal, but he cannot, even with her consent, alienate or subject to any charge or encumbrance any part of it which is immovable or real, unless he had become the purchaser of it at an estimated price. An alienation or a charge on the dotal immovable property is, *ipso jure,* void. But it may be sustained, if the wife has for two years after the alienation consented to it, or the price for which it has been sold has been invested in the purchase of real property, or equally advantageous." [8]

§ 867. **In other countries.**—According to the Code Napoleon, the community is composed actively: "1st. Of all the movable property which the married parties possessed at the time of the celebration of the marriage, together with all movable property which falls to them during the marriage, by title of succession, or even of donation, if the donor have not expressed himself to the contrary. 2d. Of all the fruits, revenues, interests, and arrears, of what nature soever they may be, fallen due or received during the marriage, and arising from the property which belonged to the married persons at the time of the celebration, or from such as have fallen to them during the marriage by any title whatsoever. 3d. Of all the immovables which are acquired during the marriage." [9]

[8] Burge, Colonial and Foreign Laws, 269, 270.

[9] Code Napoleon, Richards' Translation, § 1401.

"Every immovable is reputed to have been acquired in community, unless it be proved that one of the married parties had the property or legal possession thereof at a period anterior to the marriage, or that it has fallen to such party since, by title of succession or donation." [1] "The immovables which married persons possess on the day of the celebration of the marriage, or which fall to them during its continuance by title of succession, do not enter into community. Nevertheless, if one of the married persons have acquired an immovable subsequently to the contract of marriage containing condition of community, but before the celebration of the marriage, the immovable acquired in such interval shall enter into community, unless the acquisition have been made in the execution of some article of marriage; in which case it shall be regulated according to the agreement." [2] "Donations of immovables which are made during marriage to one only of the married parties, do not fall into community, but belong to the donee only, unless the donation expressly declare that the thing given shall belong to both in community." [3] "An immovable, abandoned or ceded by the father, mother, or other ancestor to one of the two married parties, either to satisfy what shall be owing to such party, or on condition of paying debts due from the donor to strangers, does not enter into community, saving compensation, or indemnity." [4] "An immovable acquired during marriage, by title of exchange for an immovable belonging to one of the two married parties, does not enter into community, but is substituted instead and in place of that which was alienated, saving recompense if there be any difference of value." [5] The civil law with modifications also pre-

[1] Code Napoleon, § 1402.
[2] Code Napoleon, § 1404.
[3] Code Napoleon, § 1405.
[4] Code Napoleon, § 1406.
[5] Code Napoleon, § 1407. See Code of Lower Canada, §§ 1268, 1269, 1270, 1384. The community is composed passively: 1st. Of all personal debts which the married parties were encumbered on the day of the celebration of their marriage, or with which those successions were charged, which fell to them during the marriage, saving

vails in Holland and in Spain.[6]

compensation for those relating to immovables proper to one or the other of the married parties. 2d. Of debts, as well in capital sums as in arrears of interest, contracted by the husband during the community, or by the wife with her husband's consent, saving compensation in cases where there is ground for it. 3d. Of those arrears and interest only of rents or debts due to others which are personal to the two married parties. 4th. Of usufructuary repairs of immovables which do not enter into community. 5th. Of alimony of married persons, of the education and maintenance of children, and of every other charge of marriage."

[6] Mr. Burge says concerning the law of Holland: "The provisions of the civil law, which establish the *dos* and *aitidos*, and allow the husband and wife to retain the separate and absolute ownership of the rest of their property, might be adopted by parties in their nuptial contracts, but they formed no part of the law of Holland. The property of the husband and wife, and their rights and interests, *stante matrimonio*, are subject either to the disposition which they have themselves made by contract on their marriage, or to that which the law makes. . . . By the law of Holland, the *communio bonorum* took place as the immediate consequence of marriage, and commenced from the moment of its celebration, either in *facie ecclesiæ*, or before the magistrate. But according to some codes the title to it was not complete, unless there had been an *ingressusthori*, whilst others required that there should have been *annua cohabitatio et convictus*. The *communio bonorum* prevails, unless the husband and wife have, by an antenuptial contract, excluded it. They may exclude it wholly or in part. Thus, the *communio questuum* may be retained, and the other excluded. The exclusion may be made in express terms, or implied from the dispositions which are contained in the antenuptial contract:" Colonial and Foreign Laws, vol. 1, pp. 276, 278. Concerning the law of Spain, Mr. Burge says: "The law of Spain does not recognize the general *communio bonorum*, which prevailed in Holland, but admits only the *communio questuum*. The latter is constituted between the husband and wife as the legal and necessary effect of their marriage. The property of which it consists is termed *ganancial, bienes gananciales*. . . . The community silently and imperceptibly acquired a place among the usages of Spain. It was first recognized in El Fuero Juzgo. The property of which it is formed belongs in common to the two consorts, and on the dissolution of the marriage, is divisible between them in equal shares. It is confined to their future acquisitions, *durante el matrimonio*. The property belonging to either at the time of the marriage, by whatever title it was acquired, *patrimonium et capitale*,

§ 868. Presumption of community property.—It may be observed, in considering the effect given to these statutes, that all property acquired by either party after marriage is presumed to be community property. "Property acquired by purchase during coverture, by either party, is presumed to be community property, whether the consideration was services rendered or money paid by either party."[7] So, therefore, a party who asserts that property acquired during the life of the wife, or with funds in his hands at the time of her death, is his separate property, has the burden of proof.[8] Mr. Justice Field, in a case in California, speaking of the law of California as regards community property, said: "These provisions are borrowed from the Spanish law, and there is hardly any

forms no part of it. But its *fructus*, or rents and profits, are included in it, and are therefore *ganancial*. The acquisitions during the marriage by a common title, whether it be lucrative or onerous, will form part of the community. Thus, a donation made to *both* consorts will be *ganancial*, but a donation made to either, although it be made to the wife by the husband's relations, or to the husband by the wife's relations, will be the separate and exclusive property of such donee, and form no part of the community. The title under which property acquired by the one consort can become *ganancial* must be that which is onerous. An estate, therefore, which was purchased by either consort will be *ganancial*. All property is *prima facie* presumed to be *ganancial* which is not proved to be *proprium* or *patrimonium*:" Colonial and Foreign Laws vol. 1, pp. 418, 419.

[7] Chapman v. Allen, 15 Tex. 278, 283. See, also, Biggi v. Biggi, 98 Cal. 33; Althof v. Conheim, 38 Cal. 230, 99 Am. Dec. 363; Morgan v. Lones, 78 Cal. 58; Burton v. Lies, 21 Cal. 87; Smith v. Smith, 12 Cal. 216, 73 Am. Dec. 533; Tolman v. Smith, 85 Cal. 280; Ingersoll v. Truebody, 40 Cal. 603; Ramsdell v. Fuller, 28 Cal. 37, 87 Am. Dec. 103; McDonald v. Badger, 23 Cal. 393, 83 Am. Dec. 123; Pixley v. Huggins, 15 Cal. 127; Schuyler v. Broughton, 70 Cal. 282; Landers v. Bolton, 26 Cal. 393; Moore v. Jones, 63 Cal. 12; Adams v. Knowlton, 22 Cal. 283; Jordan v. Fay, 98 Cal. 264; Dimmick v. Dimmick, 95 Cal. 323; Peck v. Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538.

[8] Osborn v. Osborn, 62 Tex. 495. See, also, Dimmick v. Dimmick, 95 Cal. 323; Peck v. Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538; Estate of Bauer, 79 Cal. 304; Tolman v. Smith, 85 Cal. 280; McComb v. Spangler, 71 Cal. 418.

analogy between them and the doctrine of the common law in respect to the rights of property consequent upon marriage. The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer or mere intent of parties can overcome this positive rule of law. All property is common property, except that owned previous to marriage, or subsequently acquired in a particular way. The presumption, therefore, attending the possession of property by either, is that it belongs to the community; exceptions to the rule must be proved. . . . This invariable presumption which attends the possession of property by either spouse during the existence of the community, can only be overcome by clear and certain proof that it was owned by the claimant before marriage, or acquired afterward in one of the particular ways specified in the statute, or that it is property taken in exchange for, or in the investment, or as the price of property so originally owned or acquired. The burden of proof must rest with the claimant of the separate estate. Any other rule would lead to infinite embarrassment, confusion, and fraud. In vain would creditors or purchasers attempt to show that the particular property seized, or bought, was *not* owned by the claimant before marriage, and was *not* acquired by gift, bequest, devise, or descent, or was *not* such property under a new form consequent upon some exchange, sale, or investment. In vain would they essay to trace through its various changes, the disposition of any separate estate of the wife, so as to exclude any blending of it with the particular property which might be the subject of consideration." [9] Where there is no evi-

[9] In Meyer v. Kinzer, 12 Cal. 247, 251, 73 Am. Dec. 538.

dence that the purchase price came from the community funds, it is presumed, where the statute does not otherwise provide, that, whether the deed is made to the husband or the wife, it is community property.[1] Where a husband after marriage purchases land with his separate funds, he may take the conveyance in the name of his minor children by a former wife, and such action cannot be considered to be a fraud upon the rights of the wife.[2] But if, during the existence of the

[1] Dimmick v. Dimmick, 95 Cal. 329, 30 Pac. 547; Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538; Lewis v. Burns, 122 Cal. 358, 55 Pac. 132; Jordan v. Fay, 98 Cal. 264, 33 Pac. 95; McDonald v. Badger, 23 Cal. 393, 83 Am. Dec. 123; Moll v. Smith, 16 Cal. 533. In re Boody, 113 Cal. 682; Hoeck v. Greif, 142 Cal. 119, 75 Pac. 670; Nelson v. Sarment, 153 Cal. 524, 96 Pac. 315; Booker v. Castillo, 154 Cal. 672, 98 Pac. 1067; Halloway v. Halloway, 30 Tex. 164; Flannery v. Chidgey, 33 Tex. Civ. App. 638, 77 S. W. 1034; Kiu Kaid v. Lee (Tex. Civ. App.), 119 S. W. 342; Phillips v. Palmer, (Tex. Civ. App.), 120 S. W. 911; Clark v. Thayer, 98 Tex. 142, 81 S. W. 1274; Duncan v. Bickford, 83 Tex. 322, 18 S. W. 598; Allardyce v. Hambleton, 96 Tex. 30, 70 S. W. 76; Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705; Stanley v. Epperson, 45 Tex. 644; Stephenson v. Chappell, 12 Tex. Civ. App. 296, 33 S. W. 880, 36 S. W. 482; Moffatt v. Sydnor, 13 Tex. 628; York v. Hilger, (Tex. Civ. App.), 84 S. W. 1117; Burleson v. Alvis, 28 Tex. Civ. App. 51, 66 S. W. 235; Clardy v. Wilson, 27 Tex. Civ. App. 49, 64 S. W. 489; Lake v. Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; Ford v. Ford, 1 La. 301; Stauffer v. Morgan, 39 La. Ann. 785, 2 So. 575; Pearson v. Ricker, 15 La. Ann. 119; Duruty Musacchia, 42 La. Ann. 357, 7 So. 555; Burke's Succession, 107 La. 82, 31 So. 391; Hall v. Toussaint, 52 La. Ann. 1763, 28 So. 304; Murphy v. Jurey, 39 La. Ann. 785, 2 So. 575; Huntington v. Legros, 18 La. Ann. 249; Neher v. Armijo, 9 N. M. 325, 54 Pac. 236; Strong v. Eakin, (N. M.), 66 Pac. 539; Ballard v. Slyfield, 47 Wash. 174, 91 Pac. 642; Woodland Lumber Co. v. Link, 16 Wash. 72, 47 Pac. 722; Hanna v. Reeves, 22 Wash. 6, 60 Pac. 62; Dormitzer v. German Sav. etc. Society, 23 Wash. 132, 62 Pac. 862; Gesler v. Hochstettler, 4 Wash. 349, 3 Pac. 398. Evidence however may overcome this presumption: Bollinger v. Wright, 143 Cal. 292, 76 Pac. 1108; Hoeck v. Greif, 142 Cal. 119, 75 Pac. 670; Freese v. Hibernia Sav. etc. Society, 139 Cal. 392, 73 Pac. 172; Brookman v. State Ins. Co., 18 Wash. 308, 51 Pac. 395; Clark v. Thayer, 98 Tex. 142, 81 S. W. 1274; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396, 7 S. Ct. 147.

[2] Smith v. Smith, 12 Cal. 216, 73 Am. Dec. 533.

marriage relation, the husband erects a building on such land, the presumption that the community property was invested in this form cannot be repelled by loose and unsatisfactory evidence.[3]

§ 868a. Improvements on community property.—Where there is no evidence of an agreement, the fact that fact that the husband performed labor in constructing a house on land belonging to the wife and also gave her money to discharge a mortgage on the property will not create a lien on the land in his favor so as to make the land community property.[4] If a husband erects improvements on a lot in-

[3] Smith v. Ward, 12 Cal. 216. See, also, Schuler v. Savings and Loan Society, 64 Cal. 398; Althof v. Conheim, 38 Cal. 230; Barbour v. Fairchild, 6 L. C. Rep. 113; City Insurance Co. v. Steamboat Lizzie Simmons, 19 La. Ann. 249; Schmeltz v. Garey, 49 Tex. 49; Planchett's Succession, 29 La. Ann. 520; Bouligny v. Fortier, 16 La. Ann. 213; Provost v. Delahoussaye, 5 La. Ann. 610; Chapman v. Alden, 15 Tex. 278; Sulstrang v. Belts, 24 La. Ann. 235; Block v. Melville, 22 La. Ann. 149; Tally v. Heffner, 29 La. Ann. 583; Huston v. Curl, 8 Tex. 242, 58 Am. Dec. 110; Cooke v. Bremond, 27 Tex. 457, 86 Am. Dec. 626; Zorn v. Tarver, 45 Tex. 419; Love v. Robertson, 7 Tex. 11, 54 Am. Dec. 41; Mitchell v. Marr, 26 Tex. 331; Higgins v. Johnson, 20 Tex. 394, 70 Am. Dec. 394; Succession of Wade, 21 La. Ann. 347; Smalley v. Lawrence, 9 Rob. (La.) 214; Ford v. Ford, 1 La. 201; Fisher v. Gordy, 2 La. Ann. 763. In Ford v. Ford, 1 La. 201, the court said: "The principles laid down in the last article of the code cited, creates a legal presumption that property acquired during marriage by purchase, whether the acquisition be made in the joint names of husband and wife, or in the names of either separately, must be considered as common property, which can be dedicated only by certain and positive evidence that it was acquired by the separate funds of one of the parties." The statute in California, § 164 of the Civil Code, has, however, been amended by providing that when property is conveyed to a married woman by an instrument in writing, the presumption is that the title is vested in her as her separate property, and if to her and her husband, the presumption is that she takes as tenant in common. See Heney v. Pesoli, 109 Cal. 53.

[4] Carlson v. Carlson, 10 Cal. App. 430, 101 Pac. 923. See, also, Watkins v. Watkins, 119 S. W. 145, where a husband was denied reimbursement for improvements.

herited by a wife from her father, such improvements will constitute community property in which the husband will have an interest.[5] Generally, if the improvements are made with funds belonging to the community on the separate property of either husband or wife, the improvements will belong to the owner of the separate property.[6] If during the existence of a second marriage land is acquired by the exchange of land which formed a part of the community property of a prior marriage, it does not become a part of the community property of the second marriage.[7] If a timber claim is the separate property of the husband, the fact that funds of the community were employed to purchase it would not confer upon the wife an interest in or lien upon the property itself.[8] The husband has no power of converting by gift the community property into his separate property.[9] He cannot dispose of the property by will as his right to dispose of it terminates when the marriage relation ends.[1] A life estate may be conveyed by a husband to his wife with remainder over to their children.[2] A wife may be estopped by her conduct from asserting that the property was that of the community.[3] So may a husband, as when he knowingly permits her to contract for the purchase of land. He will not be allowed to

[5] Brady v. Maddox, 124 S. W. 739.

[6] Peck v. Brummagin, 31 Cal. 440, 89 Am. Dec. 195; Metey's Succession, 113 La. 1012,37 So. 909; Dillon v. Dillon, 35 La. Ann. 92; In re Patton Myrick Probate (Cal.) 241. But upon dissolution of the community it may be reimbursed if the improvements have increased the value of the property. Dillon v. Dillon, 35 La. Ann. 92; Weber's Succession, 49 La. Ann. 1491, 22 So. 390; Burke's Succession, 107 La. 82, 31 So. 391; Meteye's Succession, 113 La. 1012, 37 So. 909; Hillen v. Williams, 25 Tex. Civ. App. 268, 60 S. W. 997.

[7] Haring v. Shelton, 114 S. W. 389.

[8] James v. James, 51 Wash. 66, 97 Pac. 1113.

[9] Rowlett v. Mitchell, 114 S. W. 845.

[1] Rowlett v. Mitchell, 114 S. W. 845.

[2] Lindly v. Lindly, 113 S. W. 750.

[3] Schillreff v. Schillref, 50 Wash. 435, 97 Pac. 457.

deny her authority to abandon the right thus acquired.[4] There can be no community property where there is not a valid marriage.[5] A husband has power to fix, by agreement, the boundary line between land forming part of the community and land owned by an adjacent proprietor.[6] The interest of the wife in the community property is a mere expectancy.[7]

§ 869. Grants from the government—Rule in Texas. —Property acquired by one party from the government, under a grant or a donation, is considered, in Texas, to be community property.[8] In a case in that state, Mr. Jus-

[4] Bowers v. Good, 52 Wash. 384, 100 Pac. 848.

[5] Stans v. Baitey, 9 Wash. 115, 37 Pac. 316; Rochelle v. Hezeaw, 15 La. Ann. 306; Dejan's Succession, 40 La. Ann. 347, 4 So. 89; Summerlin v. Chapman, 11 Tex. Civ. App. 392, 32 S. W. 564; In re Sloan, 50 Wash. 86, 17 L.R.A.(N.S.) 960, 96 Pac. 684.

[6] Moreno v. Salazar, 116 S. W. 391.

[7] Hall v. Johns, 17 Idaho, 224, 105 Pac. 71.

[8] Yates v. Houston, 3 Tex. 433. In this case the court, in considering this question, said: "It would seem that where the government requires, by public order, a sum of money so considerable in amount to be paid before the issue of the title, and as an indispensable condition to its delivery, that the grant could not be regarded as a pure donation. Nor can it be regarded as bought with the separate funds of the husband. There is no provision of law which requires or authorizes the separate property of the head of the family to be expended for this purpose; and where there is no showing to the contrary, the presumption always is, that the advances proceed from the funds of the community, and purchases are made for its benefit and augmentation. The fact that the grant was made to the head of the family is an immaterial circumstance, provided it was founded on considerations which impress upon it the character of a purchase, or of property acquired by onerous title. The head-right grants under the State colonization laws, in which some consideration was paid for the land itself, were made to the heads of families. And if, by law, lands were expressly directed to be sold to families, to a greater or less amount, according to the merits and circumstances of the applicants, and the grants were made in the name of the head of the families, it could not be contended that such lands were the separate property of the husband. Is there any substantial difference between such sales and this grant, where the title was, by public authority, directed not to issue until after the fees were paid? But, on the second

tice Bonner said: "The policy of Texas has ever been to induce by grants of land both married and single men to immigrate and become citizens. In consonance with the objects

ground, we are of opinion that the grant was in consideration of services to be rendered, and should, therefore, be regarded as a portion of the *ganancial* property of the marriage. The object of the government in the law of colonization, was to settle the vast wilderness of a remote frontier with a reputable, hardy, and industrious population. 'Agriculture, industry, and the arts,' were to be promoted, and to accomplish this, grants of a large amount of land were offered to emigrant families, but not gratuitously; not simply on the ground that they would introduce themselves into the country; but that they should cultivate the lands, and that within two years from the date of the concession. The inquiry then arises, by whom is this to be accomplished? Are we to suppose that the husband is the sole cultivator? That fields are to be opened, and lands stocked with cattle, without the assistance of his partner, and the expenditure of their joint funds? And, in fact, it seems immaterial whether the whole of the labor and money be bestowed and expended by the husband or not, provided such was the necessary condition and charge by which title could alone be originally acquired, or subsequently preserved. By the principles of the law then existing, the results of the labor of the partners, and of each one of them, became common property. It is of no consequence whether one contribute more than the other to the acquisition, or whether it be procured by the labor and traffic of one alone, it is common to both by virtue of the subsisting partnership, through which their acquisitions are are reciprocally communicated. The position is fallacious which assumes that the land is already granted, and that the labors of the wife are repaid by her community interest in the value of the improvements made, or cattle pastured on the land. If the land can be retained only by services to be rendered, or labors performed, by both of the partners, or by one, and the profits by law accrue to both, it would be inequitable that the labors of the one should be rewarded by the land and half of the improvements, and that of the other by only half of the latter. To this she would be entitled on property brought by the husband into the marriage as his separate estate, and of which the title was fully vested in him, and to procure or preserve which no expenditure of labor or money is necessary; but where these expenditures and services can alone procure and secure the title, she should certainly be entitled to an equal share of the reward bestowed. These grants were, in fact, dearly purchased by the unparalleled toils and sufferings of both the partners; and the fruits of their labors under a system of laws where the community interests are protected with such zealous vigilance should be equally distributed. It cannot be

sought, greater inducements have been held out to the former class, as shown by the increased amount of land given. Although the certificate of title, under the law, issued to the husband as the head of the family, yet, in consideration of the joint toils, privations, and dangers undergone by the wife also, it has been repeatedly decided by this court that, under our system, it would constitute community property of the husband and wife, one-half of which, charged with the debts of the community, would, on the death of the wife, descend to her children."[9] But it has been held in that State that, where the land was selected by the husband prior to the death of the wife, but the title was not extended to him until after her death, the land did not become community property.[1] In Texas, the true test to be derived from the authorities is said to be: "1st. Did the surviving husband receive the grant by reason of such immigration, settlement, residence, etc., on his own part, as would, under the law, entitle him to it, independently of the right based upon his *status* as a married man at the date of the death of his wife? If so, it was his separate property. 2d. Was the increased quantity over that to which

said, that if the land be not appropriated exclusively to the husband, each member of the family is as much entitled to a distributive share as the wife, inasmuch as the services of the whole are rendered to secure the title. This is answered by the consideration that, under the laws, the services of the family are always to be rendered for the benefit of the community, and not for its individual members, especially those in a subordinate relation. The law was framed to secure the migration of women as well as men. Their presence was indispensable to the domestic happiness of individuals, and to the order, welfare, and continued existence and prosperity of the colony. It cannot be supposed that a legislator, under the Spanish system, would intend that, in a grant to be made to a family, consisting of a husband, wife, and children, and this on onerous conditions, that the rights of the wife, as partner in the conjugal society, should be disregarded. The presumption of law strongly favor the rights of the community, and they should have their due force where the law is not too clear to exclude their operation."

[9] Hodge v. Donald, 55 Tex. 344. And see Wilkinson v. Wilkinson, 20 Tex. 242.

[1] Webb v. Webb, 15 Tex. 274.

a single man, not the head of a family, was entitled, given to the surviving husband by reason of the fact that, at the date of the death of the wife, he was then a married man? If so, it was the community property of the husband and the deceased wife, her half-interest in which, subject to the debts of the community, would descend to her children." [2]

§ 870. **In California and Louisiana.**—In California, the rule prevailing in Texas on the point considered in the previous section is disapproved. Referring to an early case in Texas, cited in the preceding section,[3] the supreme court of California said: "The error, as we conceive, of this decision, consists in regarding the fees paid to the officers, and the services rendered in settling upon the land, as constituting a valuable consideration in the nature of a price to the government. The fees incurred in making the survey, and in issuing the title papers, were altogether incidental to the grant and formed no part of its consideration, and the services rendered in the settlement were directly for the benefit of the grantee, and only collaterally and remotely for the benefit of the government. Agricultural lands solicited under the colonization laws were supposed to be for use and cultivation by the petitioner, and the grant to him was only subject to their appropriation to that end. Such limitation could not affect the character of the grant as a donation, and convert it into a purchase. The government, in fact, said to the petitioner, if you want the lands for use and cultivation, you may have them for that purpose; in other words, we will give them to you if you will use them. Conditions which require the performance of services are not onerous in the sense of the Spanish law, so as to convert the transaction into one of contract, when they are rendered by the grantee for his own benefit; they are only so when rendered for the benefit of the grantor, or parties

[2] Hodge v. Donald, 55 Tex. 344, 350.

[3] Yates v. Houston, 3 Tex. 433.

other than the grantee. They do not differ in that respect from the payment of money, which it would be absurd to say could be made by the grantee to himself."[4] In Louisiana, the court in speaking of these grants observed: "It was, however, said that the object in making these grants was to encourage the settlement of the country; and that to carry that object into effect it was necessary the lands should be considered as given to both husband and wife. To this it might be answered, and with great force, that if the government were of that opinion, it is strange they did not at once say so, and by making the concession in the name of both, place the matter beyond doubt; and not, by granting it to one of the spouses, leave it to the operation of a positive law which repelled the idea. But if we could enter into political considerations, in order to ascertain whether they could repeal statutes, we

[4] In Noe v. Card, 14 Cal. 576, 600. On a petition for rehearing Mr. Chief Justice Field said (p. 610): "Under all systems, donations are of three classes—pure, remuneratory, and conditional. They are pure when made without condition in the exercise of a spirit of liberality as charities. They are remuneratory when required by no legal obligation, but are made from a regard for services rendered. Such were pensions; such was the character of the grants of land made in many instances to officers of the Revolution. They are conditional when accompanied with provisions intended to secure the purposes for which they are made. These provisions may often impose the discharge of burdensome and expensive duties without changing the character of the transactions. Grants of land for institutions of benevolence or instruction, for hospitals, schools, asylums, and the like, are generally of this class. Conditions annexed to such grants, that the institutions shall be established, only operate as a requirement that the lands shall be appropriated for the purposes for which they are granted. The performance of the condition does not constitute a consideration in the nature of a price, thereby converting the transaction into sales. This is so obviously true as to require no argument for its support. The counsel appears to be impressed with a conviction that the annexation of conditions which require labor or expenditures, necessarily converts grants into sales. That such is the effect only of conditions, the performance of which is for the benefit of the grantors or persons other than the grantees, we think we have shown in the opinion already rendered."

would, in this case, be led to the examination of a nice and refined question of policy, in relation to the effect on national prosperity, of giving to the wife a distinct interest in the property acquired during marriage; one on which men would be found to differ, according to their education and particular modes of thinking. Some nations whose fate has been as prosperous as those of any community with whose history we are acquainted, proceed on an entirely opposite principle, and act on the idea that domestic felicity, and consequently public happiness, are best promoted by considering the acquisitions made during coverture as belonging to the husband alone. It is true the Spanish law viewed this matter in a very different light, but the same law makes a positive exception in respect to donations, and the political consideration is surely not so clear as to authorize us to make a distinction where the legislator has made none. On the contrary, it may be as readily conceived that those to whose care the colonization of this country was intrusted, though strangers might be invited into it, and settlements formed with as much facilitiy by giving all the land to the husband, as by giving it to the husband, wife, and children. The father, as head of the family, had a right to select his place of residence; the wife was bound to follow him. It was natural he should go to the place where the most advantages were conferred *on him;* where he knew in the event of losing his life from the perils and sufferings of a first settlement, that the objects which induced him to come there would go to his children; and not be divided with those of another bed, in case his wife survived him and married another man." [5] Under the state laws a part of land on

[5] Frique v. Hopkins, 4 Martin, N. S., 212, 219. In Gayoso de Lemos v. Garcia, 1 Martin, N. S., 324, 333, the court say: "The title of the plaintiffs is founded on a grant made to their father during marriage, and it has been urged that the land thus acquired entered into and made a part of the community subsisting between husband and wife. Whatever support this argument may derive from the practice which we believe has prevailed in some parts of the State

which the husband had made a homestead entry during the lifetime of his wife, but concerning which he had not made final proof, or secured a patent until after her death, became community property.[6] If a transfer of a land certificate is made to a husband while the marriage relation exists, it is community property.[7]

§ 871. **Land purchased by earnings of wife.**—Property purchased with money earned by the wife during marriage is community property unless it appear that the husband intended to give the wife the money earned by her, in which case the title taken by her would be considered a gift.[8] If the purchase price for a conveyance of land is formed of money due for services as a school teacher performed by the wife, the property will be presumed to belong to the community.[9] If a husband execute a deed to his wife, she cannot, as against a purchaser under a prior recorded deed, be considered a *bona fide* purchaser, unless the consideration for the conveyance

to regard lands granted by the sovereign as property common to both spouses, it is certain that it is not only unsupported by authority, but that the law most positively says it shall not be common to both; but that it shall belong exclusively to the individual to whom the king grants it." See, also, Rouquier v. Rouquier, 5 Martin, N. S., 98, 16 Am. Dec. 186; Hughey v. Barrow, 4 La. Ann. 250; Wilkinson v. American Iron Co., 20 Mo. 122.

[6] Ahern v. Ahern, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. Rep. 912.

[7] Booth v. Clark, 34 Tex. Civ. App. 315, 78 S. W. 392. See as to the acquisition of public lands: Brown v. Fry, 52 La. Ann. 58, 26 So. 748; Richard v. Moore, 110 La. 435, 34 So. 593; Cunningham v. Krutz, 41 Wash. 190, 7 L.R.A. (N.S.) 907, 83 Pac. 109; Crochet v. McCamant, 116 La. 1, 40 So. 474, 114 Am. St. Rep. 538; Barrett v. Spence, 28 Tex. Civ. App. 344, 67 S. W. 921; McAlister v. Hutchinson, 75 Pac. 41; Hall v. Hall, 41 Wash. 186, 83 Pac. 108, 111 Am. St. Rep. 1016; Phœnix Min. & Mill. Co. v. Scott, 20 Wash. 48, 54 Pac. 777; Cox v. Tompkinson, 39 Wash. 70, 80 Pac. 1005; Carratt v. Carratt, 32 Wash. 517, 73 Pac. 481.

[8] Johnson v. Burford, 39 Tex. 242; Pendergast v. Cassidy, 8 La. Ann. 96; Lake v. Lake, 4 West Coast Rep. 174; Isaacson v. Mentz, 33 La. Ann. 595.

[9] Pearce v. Jackson, 61 Tex. 642.

was paid from her separate means. If the consideration is a part of the community property, she cannot, as she has paid herself no valuable consideration, be deemed an innocent purchaser, the deed from her husband in that case being considered as a gift.[1] The rule as to determining whether land purchased with money earned by the wife is her separate property or not, is not altered by the fact that the husband collected the money, executed the deed without the wife's knowledge, for the purpose of reimbursing her, nor by the fact that, as between themselves, he considered the money as the separate property of his wife.[2] The husband in such a case cannot act as the agent of his wife to contract with himself, without the exercise by the wife of her own will.[3]

§ 872. **Gift to husband or wife.**—A deed of the community property to the wife by the husband, made when he is free from debts and liabilities, transfers the title to her as her separate estate. The transaction is a gift, and the property conveyed will not be liable for debts contracted by him after the execution of the deed.[4] Where a husband purchases land with funds belonging to the community, and causes the deed to be made out in the name of his wife, with intent that she shall hold the land conveyed as her separate property, the transaction is a gift from the husband to the wife.[5] The same

[1] Pearce v. Jackson, 61 Tex. 642.

[2] Pearce v. Jackson, 61 Tex. 642.

[3] Pearce v. Jackson, 61 Tex. 642. The earnings of either husband or wife constitute community property. Adams v. Baker, 24 Nev. 375, 55 Pac. 362; Martin v. Southern Pac. Co., 130 Cal. 285; Fennell v. Drinkhouse, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361; Webre's Succession, 49 La. Ann. 1491, 22 So. 390; Knight v. Kaufman, 105 La. 35, 29 So. 711; Manning's Succession, 107 La. 456, 31 So. 862; Abbott v. Wetherby, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. Rep. 176; Yake v. Pugh, 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17; Sherlock v. Denny, 28 Wash. 170, 68 Pac. 452; Cline v. Hackbarth, 27 Tex. Civ. App. 391, 65 S. W. 1086; Cooke v. Bremond, 27 Tex. 457, 86 Am. Dec. 626; Edwards v. Brown, 68 Tex. 329, 4 S. W 380, 5 S. W. 87.

[4] Peck v. Brummagim, 31 Cal. 440, 89 Am. Dec. 195.

[5] Read v. Rahm, 65 Cal. 343; Higgins v. Higgins, 46 Cal. 259.

effect results if the consideration, instead of money, is a debt due from the grantor to the husband.[6] If a trustee holds the title to land for husband and wife and delivers a deed to the land to the wife as grantee, the title still remains in the community, as it requires a deed from the husband to vest in the wife his interest in the community, and mere intention or desire is not sufficient.[7] A man after the performance of a ceremony of marriage deeded a tract of land to the woman, describing her in the deed as a spinster and subsequently conveyed the same land to her by a quitclaim deed. The first deed, the court held, placed the title in her, if the marriage was not valid, and if it was valid she acquired the community interest by the quitclaim deed, so that in either event it became her separate estate, and the person to whom she conveyed obtained a complete title.[8] The general rule is, that where a husband has a conveyance of land made to his wife, he intends it as an advancement. It might be imagined that a different rule would prevail where the principles relating to community and separate property obtain. One of the reasons advanced in favor of the rule that such a conveyance became an advancement, was that the wife could not be a trustee for the husband, and hence there was no ground for the operation of the doctrine of resulting trusts. In a case in Texas, the court, in considering the effect of a conveyance to the wife, said the principle that the wife could not be a trustee "has little or no force under our system of laws and of marital rights. The right of the wife, under our laws, to hold property, is coequal with that of the husband; and upon evidence it may be shown that property in the name of one is really held for the benefit of the other. It is very true, that the

[6] Read v. Rahn, 65 Cal. 643. See, also, Morrison v. Wilson, 13 Cal. 494; 73 Cal. 593; Shanahan v. Crampton, 92 Cal. 9; Swain v. Duane, 48 Cal. 358; McComb v. Spangler, 71 Cal. 418.

[7] Carpenter v. Brackett, 57 Wash. 460, 107 Pac. 359.

[8] Christopher v. Ferris, 55 Wash. 534, 104 Pac. 818.

wife is under the burthen, or as the law intends, under the protection of some legal disabilities, even with reference to her separate property; but these have reference to the mode of alienation, and not to any claim of the husband over such property, *jure uxoris,* for he has none except that of management and its incidents. At all events, where the fundamental principle of the marital relation is, that whatever may be the unity of persons there is no unity of estate, there can be no such rule as that the wife cannot be a trustee for the husband in any sense which would preclude evidence showing that although property is in her name, it was intended for the benefit of the husband."[9] The court then proceeds to discuss the effect of such a conveyance under the laws of that State. "The rational foundation for the presumption of the wife is, that the purchase is intended as a provision for her; and this presumption will hold as well under our system as where the rights of the wife are not so much favored. It may, and would, under the operation of our laws, be generally more easily rebutted than it would be where the wife has no interest in community property, and a very restricted right to sep-

[9] Smith v. Strahan, 16 Tex. 314, 321, 67 Am. Dec. 622. In the absence of fraud gifts between husband and wife are valid. Parker v. Nolan, 37 Tex. 85; Richardson v. Hutchins, 68 Tex. 81, 3 S. W. 276; Callahan v. Houston, 78 Tex. 494, 14 S. W. 1027; Read v. Rahm, 65 Cal. 343, 4 Pac. 111. In re Cudworth, 133 Cal. 462, 65 Pac. 1041; Higgins v. Higgins, 40 Cal. 259; Woods v. Whitney, 42 Cal. 358; Taylor v. Opperman, 79 Cal. 468, 21 Pac. 869; Wren v. Wren, 100 Cal. 276, 60 Pac. 888; Lewis v. Simon, 72 Tex. 470, 10 S. W. 554; Green v. Ferguson, 62 Tex. 525; Peters v. Clements, 46 Tex. 114; Smith v. Boquet, 27 Tex. 507; Fitts v. Fitts, 14 Tex. 443; Parker v. Chance, 11 Tex. 513; Fox v. Brady, 1 Tex. Civ. App. 590, 20 S. W. 1024; Cox v. Miller, 54 Tex. 16; Stafford v. Stafford, 41 Tex. 411; Story v. Marshall, 24 Tex. 305, 76 Am. Dec. 106; Yesler v. Hechstettler, 4 Wash. 349, 30 Pac. 398. But the rights of third persons must be protected: Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277; Pearce v. Jackson, 61 Tex. 462; Green v. Ferguson, 62 Tex. 525; Hutchinson v. Mitchell, 39 Tex. 487; Peck v. Brummagim, 31 Cal. 440, 89 Am. Dec. 195.

arate estate. The necessity for a provision would not so often exist in this State as in others, where, by operation of law, the great proportion of the wife's property is absorbed by the husband. But the necessity might and would often exist in fact. The property of the wife might not be large, or in proportion to her condition and situation in life; and in fact, though eminent advantages are afforded the wife by our laws, yet her condition is not so much enlarged as to repel the presumption of benefit from a purchase made by a husband in her name, out of her own separate funds. The legal effect and operation of the deed is to vest the property in the wife. This effect would be rebutted, in case a stranger were the nominee in the purchase. But the wife is not as a stranger to the husband. She has distinct rights and a separate estate, but he is bound for her support and maintenance, not only by law, but from the impulses of affection; and a conveyance to her, when the purchase money is advanced by himself, is not to be presumed *prima facie* an arrangement for his convenience, but as importing to the wife a substantial benefit, and vesting in her the whole interest, as well legal as beneficial." [1] If a husband who has bought real estate with community funds, directs that the deed should be made to his wife, with the intention that it should constitue separate property, she takes it as a part of her separate estate but it must appear that it was the intent to make it her separate property.[2]

§ 872a. **Subsequently acquired title passes.**—The presumption arising from a conveyance made by a husband to his wife, where apt words of grant are used without other

[1] Smith v. Strahan, 16 Tex. 314, 322, 67 Am. Dec. 622. This is but a presumption, however, and not conclusive. In Rich v. Tubbs, 41 Cal. 34, where the husband purchased land with the separate property of his wife, taking the deed in his own name, it was held that as between the husband and wife, the land so purchased was also the separate property of the wife.

[2] Fanning v. Green, 156 Cal. 279, 104 Pac. 308.

words in any part of the deed indicating an intention to convey a less estate, is that a fee-simple title passes to her. If the husband had, prior to the execution of the deed, executed a deed of trust to secure the payment of a debt, the reconveyance of the naked legal title subsequently by the trustees to the husband does not inure to the benefit of the community. By virtue of the husband's former grant to the wife, the title so conveyed to him by the trustees passes by operation of law to her.[3]

§ 873. **Voluntary gift in fraud of wife.**—While generally the husband has the sole right to alienate or encumber the property,[4] yet he cannot make a voluntary gift for the purpose of defrauding the wife. In an early case in California the court said: "But we think it clear that the law, notwithstanding its broad terms, will not support a voluntary disposition of the common property, or any portion of it, with the view of defeating any claim of the wife."[5] And later the court remarked of this restriction upon his power: "This springs from the relation of the parties and their title to the property, both spouses being jointly entitled to the property, though the husband has the entire management and control of it, and can pass the title in his name alone. All persons occupying a fiduciary relation are in a like manner disabled from disposing of the trust property, for the purpose of defrauding those who are interested in it."[6] In a subsequent case the court laid down this as the law: "A deed of gift of a portion of the common property by the husband is not void *per se*. If the gift be made with the intent of defeating the claims of

[3] Klumpke v. Baker, 68 Cal. 559.

[4] Brewer v. Wall, 23 Tex. 588, 76 Am. Dec. 76; Ranney v. Miller, 51 Tex. 263; Higgins v. Johnson, 20 Tex. 396, 70 Am. Dec. 394; Wright v. Hays, 10 Tex. 132, 60 Am. Dec. 200; Prinn v. Barton, 18 Tex. 206. But in Washington Ty., see Code, § 2410.

[5] Smith v. Smith, 12 Cal. 216, 225, 73 Am. Dec. 533.

[6] Peck v. Brummagim, 31 Cal. 440, 447, per Mr. Justice Rhodes; 89 Am. Dec. 195.

the wife in the common property, the transaction would be tainted with fraud. In the absence of such fraudulent intent, a voluntary disposition of a portion of the property, reasonable in reference to the whole amount, is authorized by the statute, which gives to the husband the absolute power of disposition of the common property, as of his own separate estate."[7] But it seems that she cannot bring an action to set aside the conveyance during the existence of the marriage tie.[8] In Texas it is held that if the husband abandons the management of the community property, and deserts his wife and country, and his absence is prolonged for several years, his right of control will cease, and the wife becomes vested with the control of the common property.[9] The statute in California has been amend-

[7] Lord v. Hough, 43 Cal. 581, 585.

[8] Greiner v. Greiner, 58 Cal. 115, and cases cited. In Ray v. Ray, 1 Idaho, 566, 579, the court, speaking of the effect of a sale after a voluntary separation and before a legal separation, say: "The point presented for our consideration is simply this: Was the sale of the property by Ray to Dangel, after the thirty-first day of January, the day of the voluntary separation by his wife, and before the legal separation was effected in the divorce suit, a valid sale, or was it a fraud *per se* upon the wife, who had, or was about to institute a suit for a divorce, and a division of the common property? The answer to this must be that the sale was a valid one, so far as it is necessary to consider it in this case. The law gave him the absolute right of disposal, as much so as if it had been his separate estate: Van Maren v. Johnson, 15 Cal. 311. The mere act of voluntary separation by the wife, even with the expressed intention of bringing her suit for a division of the property, did not of itself change the character of the community property, and vest it in herself, in her individual right. Her husband retained the same absolute control and power of disposition over it, under such circumstances, as he possessed before the separation, and any sale made by him to another in good faith, and for an adequate consideration was as valid in law as though no separation had taken place: Lord v. Hough, 43 Cal. 585. The sale, under such circumstances, was as much for her benefit as for her husband's. The consideration received became a substitute for the property sold as common property, and inured equally to the benefit of the husband and wife."

[9] Wright v. Hays, 10 Tex. 133, 60 Am. Dec. 200; Lodge v. Leverton, 42 Tex. 21; Kelley v. Whittemore, 41 Tex. 648; Zimpelman v. Robb, 53 Tex. 281.

ed by providing that the husband cannot make a gift of the common property, or convey the same without a valuable consideration, unless the wife in writing consent thereto.[1] But this amendment does not have a retroactive effect. The husband cannot be deprived of his vested right to dispose of property acquired before the passage of the amendment.[2]

§ 874. **Title acquired after voluntary separation.**—All title acquired by either party after marriage, save by gift, devise, or descent, is community property, and its character as such is not changed by the fact that before its acquisition the parties have separated by mutual consent, but without a decree of divorce. In a case in Texas, the court considered the effect of some prior decisions determining conjugal and matrimonial rights of parties that originated under the Spanish law, which gave, under certain rules and limitations, effect to a second and putative marriage, while the parties to the first were still living, and the marriage had not been dissolved.

[1] Civil Code, Cal. § 172.

[2] Clavo v. Clavo, 10 Cal. App. 447, 102 Pac. 556. The general rule is that the husband may transfer the community property: Spreckels v. Spreckels, 116 Cal. 339, 36 L.R.A. 497, 48 Pac. 228, 58 Am. St. Rep. 170; Cooke v. Cooke, 104 Ky. 473, 47 S. W. 325; Moreau v. Detchemendy, 18 Mo. 522; Ray v. Ray, 1 Idabo, 566; Wilson v. Wilson, 6 Idaho, 597, 57 Pac. 708; Belden v. Hanlon, 32 La. Ann. 85; Cotton v. Cotton, 34 La. Ann. 858; Smitheal v. Smith, 10 Tex. Civ. App. 446, 31 S. W. 422; Eastham v. Sims, 11 Tex. Civ. App. 133, 32 S. W. 359; Clopper v. Sage, 14 Tex. Civ. App. 296, 37 S. W. 363; Phœnix Ins. Co. v. Neal, 23 Tex. Civ. App. 427, 56 S. W. 91; Mass v. Bromberg, 28 Tex. Civ. App. 145, 66 S. W. 468; Scott v. Maynard, Dall. 548; Cook v. Bremond, 27 Tex. 457, 86 Am. Dec. 626; Berry v. Wright, 14 Tex. 270; Hagerty v. Harwell, 16 Tex. 663; Harden v. Sparks, 70 Tex. 429, 7 S. W. 769; Dooley v. Montgomery, 72 Tex. 429, 2 L.R.A. 715, 10 S. W. 451; Moore v. Moore, 73 Tex. 383, 11 S. W. 396; Hearfield v. Bridges, 75 Fed. 47, 21 C. C. A. 212. But he cannot defraud the wife: Moore v. Moore, 73 Tex. 383, 11 S. W. 396; Stramler v. Coe, 15 Tex. 211; Cetti v. Denman, 26 Tex. Civ. App. 433, 64 S. W. 787; Smith v. Smith, 12 Cal. 216; Trestin v. Faught, 23 Cal. 237; Cotton v. Cotton, 34 La. Ann. 858; Belden v. Belden, 32 La. Ann. 85.

The court said of these decisions: "But the laws under which such cases have been determined cannot be invoked, nor can those decisions furnish reason or authority to ascertain the effect of a putative marriage under a system of law which recognizes but one valid and subsisting marriage to continue and endure until death, or until it is dissolved by judicial decree. The validity under the Spanish civil law of a putative marriage carried with it the ordinary consequences of legality; it being a lawful marriage, the contract established, therefore, a community of rights between the parties to it; its legality was essential to induce that consequence. The converse must be likewise true—that if it was not a lawful marriage, the incident of community rights, which belong only to a lawful conjugal partnership, will not attach to it. The law of our State then impresses upon the marriage relation inflexible and continuous durability, and at its formation, *ipso facto*, establishes a community of interest in all property that may be thereafter acquired by either of the matrimonial partners, except that acquired by gift, grant, or descent. Under our law it may be said, as it is expressed by the Louisiana Civil Code, that every marriage superinduces, of right, partnership or community in all acquisitions. This conjugal partnership is not established upon the basis of equality of contribution of labor or capital by the parties to it, and it exists and is enforced under principles which recognize perfect union and equality of enjoyment of gains, and the division thereof, regardless of all inequalities induced by accident, misfortune, disease, idleness, or even wasteful habits of one or the other of the spouses. Such was the attribute assigned to the system by the Spanish civil law. . . . We have adopted this civil-law rule as it applies to the marital relation, ingrafting it upon our common-law contract of marriage, which, as we have shown, recognizes no second contract of that character, nor conjugal relation with other persons during the continuance of the lawful marriage, unless the relation is lawfully dis-

solved. In adopting the community system, as it may be termed for convenience of expression, neither the civil law governing the subject of marriage nor the entire system of acquests and gains was made a part of our law. The enactments which regulate the subject in this State are specific and definite statutory rules, and the civil law is not incorporated with them, nor is it further accepted than as it may have been enacted in the statute. Therefore, the qualifications and modifications of the operation of the community system in civil-law States, as Louisiana, or in civil-law countries, or those under civil-law jurisdiction, as Spain, France, and Texas as it once was, will not have application in determining how far marital rights to property claimed under a marriage which is governed by common-law principles, will be affected by a second or putative marriage recognized as valid under the civil law." [3] The court then referred to some decisions made upon the civil law, showing that the terms of that law provided for the forfeiture of rights in certain cases, and continued: "In the present state of our decisions, therefore, it may be concluded that there has not, as yet, been laid down a rule whereby to determine the limits within which the wife is secure against the forfeiture, by her fault or misconduct, of her statutory right to a share in the community. Her *status* as wife is fixed; the right of property she acquires, the duties and disabiliies imposed upon her by the marriage, are precisely defined, but neither by dicta nor decision has it yet been determined what acts, facts, or circumstances, while the duties, disabilities, and burthens of the contract still attach to her, shall divorce her from the rights of property she acquired by the same contract. The facts of this case do not require us to establish that important boundary line in the separation of these important rights more definitely, if it should be drawn, than to determine the question in a negative form, without attempting to prescribe a rule or principle for the entire sub-

[3] Routh v. Routh, 57 Tex. 589, 595.

ject under other phases and facts. The principle referred to, however, is intimately associated with the case before us, and with the operation of the principle that marriage attaches to it as a sequence, the continued right of the wife to an equal interest in the community, until that right is in some mode recognized by the law forfeited; and with the unquestionable proposition that the existence merely of cause for divorce does not necessarily impair her marital rights to property; which rights coexist with the contract of marriage—a part of its essence—irrespective of any mere balance sheet to be struck between herself and her husband on account of their respective moral or conjugal merits or demerits, or that would show as a debit against her, that her husband may have had just grounds, which he had never legally asserted, for terminating by law his relations with her. Slight reflection even is sufficient to suggest the difficulties that would attend the efforts of courts to establish, on consistent and harmonious principles, rules to forfeit for causes of divorce, and for delinquences to matrimonial obligations, marital rights of property without encroachment upon the province of the lawmaking power; and also without being involved in the most serious embarrassment in resting them upon any other than their own arbitrary selection of the particular circumstances under which they should be applied. The varying course of uncongenial married life, its bickerings, quarrels, wrongs, sometimes mutually suffered, its condonations and fresh ruptures and recurring returns to mutual respect and love, when employed as a basis and standard to regulate the rights of the parties in the financial branch of their partnership, presents a medley of incongruous elements from which no legal or equitable rule could be applied, consistent with either the policy of the law governing the domestic relation of husband and wife, or the relative rights of both of the parties to property under our community system." [4] Hence, where a person separated from a second

[4] Routh v. Routh, 57 Tex. 589, 597.

wife without a decree of divorce, and removed to Texas with the children of his first marriage, where he was married a third time to one who did not know that he had a wife then living, and subsequently acquired real estate in Texas, it was held in a suit after his death between the second wife and a child of the first marriage, that the separation did not operate as a forfeiture of her right as a party to the community to the such subsequently acquired land.[5]

[5] Routh v. Routh, 57 Tex. 589. "Their voluntary separation and living apart," said the court, "did not have the effect to forfeit marital rights in the community of gains; nor did his causes of complaint against her on account of her temper, language, and treatment of his children, add any legal force to the fact that they caused him to abandon her. 'The law wisely refuses,' said Judge Porter, in Cole's Wife v. His Heirs, 7 Martin, N. S., 49, 18 Am. Dec. 241, 'any legal effect to a voluntary separation of those who are bound by the most solemn obligations to live together.' And in the case referred to, where the husband acquired all the property in New Orleans, during a voluntary separation of several years preceding his death, she living in New York, and never having been in the State of Louisiana, she was held to be entitled to her equal one-half interest. When Jonathan Routh established himself in Texas, his domicile became that of the wife for *all* the purposes of her beneficial interest under the circumstances of their separation. In Cole's Wife v. His Heirs, 7 Martin, N. S., 49, 18 Am. Dec. 241, the able jurist who delivered the opinion showed that the writers on the civil law, where the community system prevails, who treat on the subject, all lay it down that the residence of the parties in different places will not prevent the community from existing. That the separation referred to by them, which terminates the community interest, is a legal one, and that a judicial sentence is necessary to destroy 'the community." In Newland v. Holland, 45 Tex. 588, Mr. Justice Moore, in delivering the opinion of the court, says: "That a wife who voluntarily and without any just and reasonable cause, abandons and separates herself from her husband, and continues, in wanton disregard of her duties as a wife, to live separate and apart from him at the time of his death, is estopped and precluded from claiming the homestead rights given by the constitution and statutes to the surviving wife, is not now an open question in this court. See Sears v. Sears, 45 Tex. 557, decided at a former day of this term, and the cases there cited. But it by no means follows that the court can hold that by so doing she also forfeits her entire interest in the community estate, or the distributive share of the separate

§ 875. Gift in compensation for services.—A gift made to one of the parties to the marriage is the separate property of the party to whom it is made, and the fact that the gift is made to the wife in compensation for services rendered by her to the donor, does not change its character as separate property. The husband has no greater power over property conveyed to the wife, under these circumstances, than he has over any other separate property belonging to her.[6] The

property of her deceased husband, given her by the statute. The homestead is intended for the comfort and security of the family, and for like considerations its rights an privileges are extended to and conferred upon the family of the decedent after his death, so long as any constituent of it remains. But it is only when there is a family, or some remaining constituent of the family surviving him, that the rights and privileges of the homestead subsist or are recognized by law. Unquestionably, when the wife has voluntarily and without cause, withdrawn from and destroyed the family, ceased to be a member of it, it would be mockery to say that she is reunited to or become again a member of it by the death of her husband, or can claim privileges and immunities which by law are only given to the family or some surviving constituent of it. But the right of the surviving wife to her interest in the community property, or her distributive portion of the separate estate of her deceased husband, grows out of and depends upon the existence of the marital relation between the parties, and not merely upon continued existence of the family. It may be that by the separation the community interest in future gains will cease; but certainly it does not work a forfeiture in such as have been previously acquired. And the mere withdrawal of the wife from the husband and continuance to live separate and apart from him, however unjustifiable and improper her doing so may be, does not operate and cannot be treated as tantamount to a severance of the marital relation. Though the husband may have good cause for annulling the marriage, evidently, unless he chooses to do this, the mere improper and wrongful withdrawal by the wife, and her living apart from him, cannot have this effect. And if he does not choose by his will to deprive her of the distributive interest in his separate estate, which the statute gives her in the absence of any testamentary disposition of his property by her husband, it is not conceived that the court has any power to do so." See, as to the effect of a second and putative marriage under the Spanish law, while the parties to the first were still living, and the marriage had not been dissolved, Smith v. Smith, 1 Tex. 621, 46 Am. Dec. 121; Lee v. Smith, 18 Tex. 145; Nichols v. Stewart, 15 Tex. 233.

[6] Fisk v. Flores, 43 Tex. 340.

court, after considering the rules of the civil law as to donations, observed: "It is also quite evident that it is entirely consistent with the nature of a title by 'donation,' that the donor may be removed by reason of services rendered by the donee to make the donation, and that it is induced by such consideration does not take from the transaction the character of 'a donation.' "[7]

§ 875a. **Unrecorded tax deed.**—Until the limitation of the period necessary to ripen adverse possession under an unrecorded tax deed has elapsed, the title is not acquired and if the death of the wife occurs before that time, the title does not become community property.[8]

§ 876. **Rebuttal of presumption of community property.**—The presumption that property conveyed to one of the parties to the marriage for a pecuniary consideration is community property, may be rebutted by showing that the purchase money was the separate property of the one to whom the deed is made.[9] Evidence may be received for the purpose of showing from what source the consideration proceeded, on the same principle that permits the introduction of evidence to show that a deed absolute on its face is a mortgage, or to show that although the deed is made to one person the consideration was in fact paid by another. Neither party to the marriage is estopped from showing, as against the other, the facts connected with the transaction, or from showing that the grantee did not pay the consideration from his or her sep-

[7] Fisk v. Flores, 43 Tex. 340, 433, per Moore, J.

[8] Votaw v. Pettigrew, 15 Tex. Civ. App. 87, 38 S. W. 215; Roberts v. Trout, 13 Tex. Civ. App. 70, 35 S. W. 323; Bishop v. Lusk, 8 Tex. Civ. App. 30, 27 S. W. 306; Zafford v. Foster, 36 Tex. Civ. App. 56, 81 S. W. 63.

[9] Ramsdell v. Fuller, 28 Cal. 37, 87 Am. Dec. 103; Woods v. Whitney, 42 Cal. 358; Ingersoll v. Truebody, 40 Cal. 612; Smith v. Boquet, 27 Tex. 512; Peck v. Brummagim, 31 Cal. 441, 89 Am. Dec. 195.

arate funds, and between them, or between one of them and the heirs of the other, no questions involving the doctrine of notice can be mooted.[1] Where the wife purchased real estate and paid a part of the price with her separate funds, the balance being secured by a note and trust deed signed both by her and her husband, and there was nothing showing that the vendor looked to her alone for the payment of the loan, it was held that the land was her separate property so far as separate funds went to its payment, and was community property in so far as the money realized on the note and deed of trust went to its payment.[2]

§ 877. **Presumption when deed is made to wife.**—As to the presumption that should prevail where a deed is made to the wife, and the rights of third persons are concerned, the courts are not agreed. In California prior to the amendment of the code the rule was that if the deed is made to the wife, the record gives notice to all the world that the property may be the separate property of the wife. This fact, was prior to the amendment, considered sufficient to put subsequent purchasers upon inquiry, and if they purchased the property from the husband they did so at their peril[3] Mr. Justice Sawyer

[1] Peck v. Brummagim, 31 Cal. 440, 89 Am. Dec. 195. The presumption that property is that of the community may be overcome by evidence: Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719; Santa Cruz Rock Pav. Co. v. Lyons, 43 Pac. 599; Freese v. Hibernia Sav. etc. Soc., 139 Cal. 392, 73 Pac. 172; In re Boody, 119 Cal. 402, 51 Pac. 634; Hoeck v. Greif, 142 Cal. 119, 75 Pac. 670; Bollinger v. Wright, 143 Cal. 292, 76 Pac. 1108; Neher v. Armijo, 9 N. M. 325, 54 Pac. 236; Strong v. Eakin, 66 Pac. 539; Stauffer v. Morgan, 39 La. Ann. 632, 2 So. 98; Rogge's Succession, 50 La. Ann. 1220, 23 So. 993; Hames v. State, 46 Tex. Cr. 562, 81 S. W. 708; Duncan v. Bickford, 83 Tex. 322, 18 S. W. 598; Clark v. Thayer, 98 Tex. 142, 81 S. W. 1274; Weymouth v. Sawtelle, 14 Wash. 32, 44 Pac. 109; Brookman v. State Ins. Co., 18 Wash. 308, 51 Pac. 395; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396, 7 S. Ct. 147.

[2] Barr v. Simpson, 117 S. W. 1041.

[3] Ramsdell v. Fuller, 28 Cal. 37, 87 Am. Dec. 103.

said in one of the early cases that the deed in question was sufficient in law to convey a title to the wife, but whether by it the estate became separate or community property, depended upon a fact *dehors* the deed, although ostensibly the intent was to vest the title in her. The justice proceeded to say: "It did not appear on the face of the deed that the grantee was a married woman, or that, being a married woman, the consideration was paid out of her separate estate. The deed then, so far as shown on its face, might have conveyed a title absolute to a *feme sole,* a separate estate to a *feme covert,* or an estate in common to both husband and wife. Upon the best view for plaintiff, the deed upon its face was equivocal. But it afforded to all persons seeking to acquire title under it a clue to the title, which they were bound to pursue, or suffer the consequences of their laches. The grantee is a woman. The presumption of law is, that she is sole, and *prima facie* a conveyance from her would pass the title. But she may be married, and her deed may not pass the title. The fact as to whether she is married or single, all parties dealing with the land must ascertain, or omit to do so at their peril. So, also, if a grantee of a conveyance for a money consideration is a married woman at the date of the conveyance, *prima facie* a conveyance by the husband, in his own name, of the land so conveyed to the wife will be presumed to pass the title; but in fact it may not, for the reason that the land may still be the separate property of the wife, which he has no power to convey. And in such cases, as in the case last mentioned, all parties claiming title through the husband to lands, the title to which never stood in his name, must ascertain at their peril, whether he did in fact have the power to convey." [4] The law as to community property in California has been amended so that now if property is conveyed to a married

[4] Ramsdell v. Fuller, 28 Cal. 43, 87 Am. Dec. 103. See, also, Peck v. Vandenberg, 30 Cal. 36; Metcalf v. Clark, 8 La. Ann. 287; Dominguez v. Lee, 17 La. 295; Gonor v. Gonor, 11 Rob. (La.) 526.

woman by an instrument in writing, the presumption is that the title thus vested in her is her separate property. If the conveyance is made to a married woman and her husband, or to her and any other person, the presumption is that she takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument. This presumption is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration.[5] The statute was also amended by providing that where married women had conveyed or should after the passage of the statute convey any property which they acquired prior to May nineteenth, 1889, the husband or the heirs or assigns of such married woman should be barred from commencing or maintaining any action to show that the real property was community property or to recover it, unless such action should be commenced, as to any conveyance made prior to the act within one year after the date the act took effect, and as to conveyances made subsequently to the passage of the act, unless such action should be commenced within one year from the filing in the recorder's conveyance of such record.[6] The general rule, however, is that if a deed is made to a married woman for a consideration not coming from her separate estate the property will be that of the community.[7] Parol evidence is admissible to show that the wife was named as

[5] Civil Code, § 164.

[6] Civil Code, Cal. § 164.

[7] Smith v. Strahan, 16 Tex. 314, 67 Am. Dec. 622; Zorn v. Tarver, 45 Tex. 519; Cooke v. Bremond, 27 Tex. 457, 86 Am. Dec. 626; Augustine v. State, (Tex. Civ. App.), 23 S. W. 794; Newman v. Newman, (Tex. Civ. App.), 85 S. W. 635; Wade v. Wade, (Tex. Civ. App.), 106 S. W. 188; Henry v. Vaughan, 46 Tex. Civ. App. 531, 103 S. W. 192; Hart v. Robertson, 21 Cal. 346; Gwynn v. Dierssen, 101 Cal. 563, 36 Pac. 103; Richardson v. Cheevalley, 26 La. Ann. 551; Burns v. Thompson, 39 La. Ann. 377, 1 So. 913; Hanna v. Pritchard, 6 La. Ann. 730; Marshall v. Mullen, 3 Rob. (La.) 328; New Orleans Exchange v. Bein, 12 Rob. (La.) 578.

grantee by the husband's direction, with the intention of converting the property conveyed into her separate estate.[8]

§ 878. **Different conclusion in Texas.**—The question considered in the preceding section has been before the court in Texas, and a conclusion has in that State been reached, at variance with the rule prevailing in California. In one case in that State, Mr. Justice Moore said: "Our whole system of marital rights is based upon the fact that acquisitions, either of the joint or separate labor or industry of the husband or wife, become common property, and, as a general rule deducible from this principle, all property acquired by purchase or apparent onerous title, whether the conveyance be in the name of the husband or of the wife, or in the names of both, is *prima facie* presumed to belong to the community. It is true that it is now a well-established and long-recognized rule of procedure in our judicial system, as between the parties to such deeds, their privies in blood, purchasers without value or with notice, to affect the legal import of such deeds by parol evidence. But we know of no principle upon which such evidence can be received for the purpose of explaining or modifying such deeds, after the property has passed into the hands of innocent purchasers, and thereby ingrafting upon it a trust to their detriment. Such a doctrine would go far to destroy the utility of written evidences of title to land, and the registration of conveyances for the purpose of notice. . . . The statute authorizes the husband, during its continuance, to dispose of all community property. That the title of it, when acquired by the community, was taken in the name of the wife, imposes no additional burden upon the purchaser of inquir-

[8] Higgins v. Johnson, 20 Tex. 389, 70 Am. Dec. 394; Parker v. Coop, 60 Tex. 111; Dunham v. Chatham, 21 Tex. 231, 73 Am. Dec. 228; Morrison v. Clark, 55 Tex. 437; Sinsheimer v. Kahn, 6 Tex. Civ. App. 143, 24 S. W. 533; Weymouth v. Sawtelle, 14 Wash. 32, 44 Pac. 109; Peck v. Brummagim, 31 Tex. 440; Jackson v. Torrence, 83 Cal. 521.

ing as to the equities of the husband and wife in respect to it." [9] In a later case in the same State, the court says that the case last cited was decided "on the ground that the purchaser from the husband, of land acquired during marriage, by deed of bargain and sale taken in the name of the wife, is not thereby put upon inquiry as to any equity she may have in respect to it, but is justified and protected, if he innocently buys it as community property. The decision was not placed on the ground that it was inadmissible to prove a different consideration than that recited in the deed, but upon the broad ground that the deed could not be modified by evidence in ingrafting on it a trust to the detriment of an innocent purchaser. It is scarcely necessary to say, that if there were any recitals in the deed showing that the consideration was the wife's separate estate, or that the conveyance as designed to be for her separate benefit, the rule would be different." [1] In another case the court referred to the rule prevailing in that State, that a purchaser is not compelled to inquire what equities exist between husband and wife, where a deed expressing a valuable consideration conveys land to a married woman, and said it could see no reason why the same principle should not apply to sales made by the husband after the death of the wife.[2] In Texas, a judgment creditor who purchases at the execution sale is considered a *bona fide* purchaser. Hence, under the rule just considered, he has no notice that property purchased by him at such sale was the separate property of the wife, from the fact that the deed was made to her.[3]

§ 879. **Purchase on credit.**—The circumstances that land is bought on credit does not affect its character as separate or community property. A husband bought land on

[9] Cooke v. Bremond, 27 Tex. 457, 86 Am. Dec. 626.

[1] Kirk v. Navigation Co., 49 Tex. 213, 215, per Gould, J.

[2] French v. Strumberg, 52 Tex. 92. See Veramendi v. Hutchins, 48 Tex. 531.

[3] Wallace v. Campbell, 54 Tex. 87.

credit and subsequently paid a portion of the purchase price with property of his separate estate, and for the purpose of securing the remainder, he and his wife joined in a note and executed a joint mortgage on the property purchased. He subsequently sold a part of the land at a price yielding him a profit, and with a part of the proceeds derived from such sale, paid the note, and with a sum composed of the balance, and some of his separate property, built a house on the part of the land remaining unsold. Such land and the building thereon, it was decided, were to be considered the separate property of the husband.[4]

§ 880. Tortious possession and deed in consideration of surrender thereof.—A party before his marriage was in possession of a tract of land without any right to hold such possession. After his marriage he executed a deed and surrendered possession of a part of the land to those lawfully entitled to it. In consideration of this fact, the owners of the land conveyed to him a portion of it. The court decided that the land thus acquired by the husband was community property.[5] Mr. Justice McKinstry said: "It is true that a possession of lands may, under some circumstances, constitute property. But as between the sole and exclusive owner of a tract, and one who has intruded himself into the possession without right, how can the latter be said to have any *property* in the lands? The owners who conveyed to the defendant their title may have been induced to make the conveyance to save themselves the annoyance and expense of litigation, which, however, could only have resulted in a judgment in their favor. The interchange of deeds did not necessarily involve a recognition by the owners of both tracts of land of any estate in defendant. The ability of defendant to give trouble, and cause expense to those who held the Peralta title,

[4] Martin v. Martin, 52 Cal. 235.

[5] Pancoast v. Pancoast, 57 Cal. 320.

by withholding from them the possession for a time, at the cost of a judgment against him for restitution (including costs of suit, and perhaps mesne profits), cannot be termed *property* in any legal sense. This is not the case of separate property acquired by one of the parties to the marriage contract prior to the marriage, and which has simply changed its *form* after marriage. Defendant had no right in or to the land before his marriage; his tortious possession could give him none after marriage."[6]

[6] Pancoast v. Pancoast, 57 Cal. 320.

CHAPTER XXVI.

COVENANTS.

§ 881. Covenants.
882. Construction.
883. How created.
884. Covenants usually found in deeds.
885. Covenant for seisin.
886. Different rule.
887. Covenant for seisin of indefeasible estate.
888. By what the covenant of seisin is broken.
889. Broken at once if grantor has no possession.
890. By what the covenant is not broken.
891. Seisin of grantee.
892. Burden of proof.
893. Covenant for right to convey.
894. Damages for breach of covenants of seisin and right to convey.
895. Proof of real consideration.
896. Mitigation of damages.
897. Knowledge of grantor's want of title.
898. Value of land as measure of damages.
899. Undisturbed possession of grantee.
900. Partial breach.
901. Treating partial breach as entire.
902. Burden of proof on partial breach.
903. Power to purchase title.
§ 904. Keeping public street open
905. Covenant against encumbrances.
906. Encumbrance defined.
907. What are considered encumbrances.
908. Water rights.
909. Right to use stairway in common.
910. Public highways as encumbrances.
911. Right of way for a railroad.
912. Right to light.
913. Purchaser's knowledge of encumbrance.
914. Parol evidence to exclude encumbrance from covenant.
915. Comments.
916. Damages for breach of covenant against encumbrances.
917. Special injury.
918. Removal of encumbrance by purchase.
919. Burden of proof.
920. Where encumbrance cannot be removed.
921. Covenant for quiet enjoyment.
922. Not broken by wrongful acts of others.
923. Exercise of right of eminent domain.
924. Actual eviction.

§ 925. Purchaser has burden of proof if he yields to adverse title.
926. Comments.
927. Premises in possession of another.
928. Purchase of paramount title.
929. Redemption on tax sales.
930. Covenant for further assurance.
931. Covenant of warranty.
932. Breach of covenant of warranty.
933. Right of joint possession.
934. Damages for breach of covenants of quiet enjoyment and of warranty.
935. Notice to the covenantor of suit.
936. Comments.
937. Where no notice is given to the covenantor.
938. Mortgagee entitled to benefit of covenant.
939. Interest and counsel fees as damages.
940. Covenants running with the land.
§ 940a. Grantee bound by acceptance of deed.
941. Markethouse.
942. Covenants not running with the land.
942a. Covenant converted into lien.
943. Change in character of neighborhood.
944. Estoppel from covenants.
945. The necessity for a covenant.
946. Statutory regulation.
947. Limitations on this rule.
948. Estoppel of State.
949. Acquisition of title by trustee.
950. General covenant when grantor's interest only conveyed.
951. Estoppel of grantee.
952. What covenants will create an estoppel.
953. Implied covenants.
954. Restriction of covenants.
955. Liability of covenantor.
956. Covenant to pay mortgage.
957. Failure of title.

§ 881. **Covenants.**—Covenants in deeds are those clauses or agreements whereby one party stipulates that certain facts are true, or obligates himself to perform or forbear doing something to or for the other.[1] "A covenant may be defined to be an agreement between two or more parties, reduced to writing, and executed by a sealing and delivery thereof, whereby some of the parties named therein, or one of them, engages with the other or others, or some of them, therein also named, that some act hath or hath not already been done, or for the performance or nonperformance of some specified

[1] 2 Blackst. Com. 304; Bacon, Abr. tit. Evidence.

duty."[3] They may be either express or implied.[4] If land is conveyed as bounded upon one or more sides by a way, this is not a description merely, but an implied covenant of the existence of such a way. "It probably entered much into the consideration of the purchase," said the court, "that the lot fronted upon two ways which would be always kept open, and indeed, could never be shut without a right to damages in the grantee or his assigns."[4]

§ 882. **Construction.**—The rule in construing covenants is to construe them most strictly against the covenantor and most favorably to the covenantee.[5] But as a covenant is a part of a deed, it is subject to the same construction as the deed itself, and should receive such a construction as will effectuate the actual intent of the parties.[6] A penalty annexed to a covenant for its nonperformance is, where the primary intent is that the covenant shall be performed, regarded merely as a security. It is not a substitute for the covenant, and it

[3] De Bolle v. Pennsylvania Ins. Co., 4 Whart. 68, 33 Am. Dec. 38. And see Randel v. Chesapeake etc. Canal Co., 1 Har. (Del.) 233; Greenleaf v. Allen, 127 Mass. 248; Kelley v. Palmer, 42 Neb. 423, 60 N. W. 924; Cheney v. Straube, 35 Neb. 521, 53 N. W. 479. That covenant need not be under seal, see Ry. Co. v. McKinney, 124 Ga. 929, 6 L.R.A.(N.S.) 436, 53 S. E. 701. Equity will enforce against the grantees of the original covenantor, a covenant to use, or abstain from using, the land in such manner as the original covenantee may specify: Hodge v Sloan, 107 N. Y. 244, 1 Am. St. Rep. 816.

[4] Taylor v. Hopper, 62 N. Y. 649; Parker v. Smith, 17 Mass. 413, 9 Am. Dec. 157; Emerson v. Wiley, 10 Pick. 310; Frey v. Johnson, 22 How. Pr. 323.

[4] Parker v. Smith, 17 Mass. 413, 9 Am. Dec. 157.

[5] Warde v. Warde, 16 Beav. 103; Randel v. Cheseapeake etc. Canal Co., 1 Har. (Del.) 154; Hookes v. Swain, Lev. 102; Gifford v. First Pres. Soc., 56 Barb. 114; Bevan v. Muir, 53 Wash. 54, 101 Pac. 485.

[6] Schoenberger v. Hoy, 40 Pa. St. 132; Watchman v. Crook, 5 Gil. & J. 239; Ludlow v. McCrea, 17 Wend. 228; Marvin v. Stone, 2 Cowen, 781. See Burk v. Burk, 64 Ga. 632. In construing a covenant, the intention of the parties should not be gathered by reading a single clause, but by the whole context, and, in case of a doubt in the meaning, by considering those

is immaterial that such a covenant follows the *habendum* clause, while the use in other respects of the property conveyed is restrained by other covenants.[7] Reference in a deed, for the purpose of aiding its description, to another deed which is declared to be subject to a mortgage, does not qualify the covenants in the first deed, as such reference is for the purpose of describing the land and not the title.[8] "The general rule should be carefully observed, that covenants are to be construed, as nearly as possible, by the obvious intentions of the parties, which must be gathered from the whole context of the instrument, interpreted according to the reasonable sense of the words."[9] A covenant was in this form: "The said parties of the first part, for themselves, heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, have not heretofore done, committed, or wittingly or willingly suffered to be done or committed, any act, matter, or thing whatsoever, whereby the premises hereby granted, or any part thereof, is, are, or shall or may be charged, encumbered in title, or estate, or otherwise." The court held it to be a covenant, for a breach of which, at any time in the future, damages might be recovered.[1] The covenant created by the words, "grant, bargain and sell" is not qualified or restricted by the *haben-*

surrounding circumstances that the parties are supposed to have considered when their minds agreed: Clarke v. Devoe, 124 N. Y. 120, 21 Am. St. Rep. 652.

[7] Phœnix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400. In this case the covenant was not to erect any building adjoining certain premises which depended for air and light on the land conveyed.

[8] Powers v. Patten, 71 Me. 583.

[9] Wadlington v. Hill, 18 Miss. (10 Smedes & M.) 560, 562. See, also, Fowler v. Kent, 71 N. H. 388, 52 Atl. 554; Helmsley v. Hotel Co., 63 N. J. Eq. 804, 52 Atl. 1132; George v. Robinson, 23 Utah 79, 63 Pac. 819; Uhl v. R. Co., 51 W. Va. 106, 41 S. E. 340; Balch v. Arnold, 9 Wyo. 17, 59 Pac. 434; R. Co. v. McKinney, 124 Ga. 929, 6 L.R.A. (N.S.) 436, 53 S. E. 701; Sexauer v. Wilson, 136 La. 357, 14 L.R.A.(N.S.) 185, 113 N. W. 941; Brown v. Southerland, 145 N. C. 331, 59 S. E. 114.

[1] Post v. Campau, 42 Mich. 91.

dum clause as such clause is not connected with the granting clause.[1a] The law of the state where the land lies, and not that of the state in which the deed is executed and delivered, will govern.[2] The intention of the parties as collected from the entire conveyance and the circumstances attending its execution is to be carried out.[3]

§ 883. **How created.**—A covenant may be created by any language showing the intention of the parties to bind themselves. No particular form is required,[4] nor is it necessary to use any particular word. A covenant may be created without using the word "covenant" in the clause containing the stipulation.[5] A covenant may be contained in a recital in the deed, and be as operative as though it was expressed with the other covenants.[6] As it is a promise, the question is what was the understanding of the parties. A single sentence may contain several covenants.[7] Where a circuity of action would arise from mutual deeds, otherwise making the parties thereto liable to each other upon similar covenants relating to the same encumbrance, they will be construed as mutually satisfying each other.[8] A covenant of title should be taken in connection with the terms of the conveyance.[9] The covenants may extend to equitable as well as to legal claims.[1] But it

[1a] Coleman v. Clark, 80 Mo. App. 339.

[2] Dalton v. Taliaferro, 101 Ill. App. 592.

[3] Atlanta etc. Ry. Co. v. McKinney, 124 Ga. 929, 6 L.R.A.(N.S.) 436, 53 S. E. 701.

[4] Marshall v. Craig, 1 Bibb, 379, 4 Am. Dec. 647; Sampson v. Esterby, 9 Barn. & C. 505; Rigby v. Great Western Ry., 14 Mees. & W. 811; Jackson v. Swart, 20 Johns. 85. Distinguished from condition, Cavanagh v. Beer Co., 136 La. 236, 113 N. W. 856.

[5] Bull v. Follett, 5 Cowen, 170; Kendall v. Talbot, 2 Bibb, 614; Randel v. Chesapeake etc. Canal Co., 1 Har. (Del.) 151.

[6] Horry v. Frost, 10 Rich. Eq. 109; De Forest v. Byrne, 1 Hilt. 43.

[7] Johnson v. Hollensworth, 48 Mich. 140.

[8] Silverman v. Loomis, 104 Ill. 137.

[9] Hall v. Scott County, 2 McCrary C. C. 356.

[1] Dugger v. Oglesby, 99 Ill. 405.

is held in a deed conveying the legal title, that the existence of an equitable title in another arising from a parol agreement for a conveyance, is not a breach of any of the usual covenants.[2]

§ 884. **Covenants usually found in deeds.**—It is not intended to give the practice in the different States and England concerning the insertion of covenants in deeds, or to discuss at length what is understood by an agreement to give a deed with the "usual covenants." While in some places it is customary to give a deed with full covenants, in others a demand for a deed of this character would, from the infrequency with which a conveyance of this kind is given, be considered as implying a doubt concerning the validity of the owner's title. The covenants in general use may be enumerated as those of seisin, right to convey, against encumbrances, for quiet enjoyment, further assurance, and warranty. In California, the Civil Code provides that "an agreement on the part of the seller of real property to give the usual covenants binds him to insert in the grant covenants of 'seisin,' 'quiet enjoyment,' 'further assurance,' 'general warranty,' and 'against encumbrances.'"[3] "Covenants for title

[2] Wilson v. Irish, 57 Iowa, 184.

[3] Civil Code Cal. § 1733. So under Sec. 1113 Cal. Civil Code the word "grant" in a conveyance of an estate of inheritance or fee simple implies a covenant that prior to the execution of the conveyance, the grantor had not conveyed the estate or any part thereof to another: Lyles v. Perrin, 134 Cal. 417, 66 Pac. 472. Mr. Washburn, in his treatise on Real Property, vol. 3 (4th ed.), 448, says: "The three covenants ordinarily found in deeds of conveyance in the Eastern States are those contained in the form of a deed heretofore given, namely, of seisin, the right to convey, against encumbrances, and of warranty. In the English deeds there is a covenant for further assurance, which is also found in deeds in use in some of the Middle States, and a covenant of quiet enjoyment. It is said that the covenant of seisin is not in use now in England, being embraced in that of a right to convey; while in the Western States, Pennsylvania, and the Southern States, the covenant of warranty is not infrequently the only covenant in-

are those covenants in a deed conveying land which are inserted for the purpose of securing to the grantee and the covenantee the benefit of the title which the grantor and covenantor professes to convey. Those in common use are five in number in England—of seisin, of right to convey, for quiet enjoyment, against encumbrances, and for further assurance—and are held to run with the land. In the United States,

serted. In Iowa, a covenant of warranty is held to embrace the whole three above mentioned. It is said that covenants for further assurance are not in general use in this country. In Ohio, the usual covenants are of seisin and warranty:" Citing Williams Real Prop. 69, and Rawle's note; Caldwell v. Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36; Van Wagner v. Van Nostrand, 19 Iowa, 426; Foote v. Burnet, 10 Ohio, 317, 329, 36 Am. Dec. 90; Armstrong v. Darby, 26 Mo. 517; Walk. Am. Law, 382.

Mr. Rawle says: "To a layman it would seem plain that if one were to undertake to convey an estate in fee simple, which he professed to hold in his own right, and not fiduciary, he must himself be seised of such an estate; and yet, until recently, it was a common practice of conveyancing in England, for the purpose of saving the expense upon a resale, of levying a fine whereby to bar the dower of the wife, to cause property upon its purchase to be conveyed to such uses as the purchaser should appoint, and, in default of appointment, to the use of the purchaser and his heirs. And it has been, perhaps, owing to this custom that the covenant for seisin has been for more than half a century generally omitted in England, and in its place substituted the covenant for good right to convey. And although, by a recent act of Parliament, the estate of the wife is now passed, as with us, by a simple separate acknowledgment, yet it seems to be customary, in the most modern conveyancing, to omit the covenant for seisin. The usual covenants, then, in the case of a sale, are those of good right to convey, for quiet enjoyment, against encumbrances, and for further assurance. . . . As to those upon this side of the Atlantic, of course the local habit and usage varies not only more or less widely between the different States, but sometimes, indeed, between different parts of the same State; but it may, perhaps, in general be said that what are here often called 'full covenants' are the covenants for seisin, for right to convey, against encumbrances, for quiet enjoyment, sometimes for further assurance, and, almost always, of warranty—this last often taking the place of the covenant for quiet enjoyment:" Rawle on Covenants (4th ed.), 24, 27.

there is, in addition, a covenant of warranty, which is now more commonly used than any of the others." [4]

§ 885. **Covenant for seisin.**—This covenant is generally expressed by the clause "that the said grantor is lawfully seised," or "has a good and sufficient seisin.", The word "seisin" has different significations. It may mean actual possessions, or, as it is frequently termed, "seisin in deed." There is also a constructive seisin, exemplified by the case of a tenant for years, whose possession is also the possession of the owner of the reversion. There is also a seisin in law when a person not actually in possession is deemed to be seised of the estate, as in the case of an heir who has not entered into possession of land acquired by descent. On account of the various meanings attached to the word "seisin," a covenant of this kind is not always given the same construction. In England, a covenant for seisin is a covenant for the title, and imports that the grantor is seised of the title.[5] This rule also prevails in most of the States.[6]

[4] Bouv. Law Dict. tit. Covenant.

[5] Cooke v. Fowns, 1 Keb. 95; Gray v. Briscoe, Noy, 142; Young v. Raincock, 7 Com. B. 310; Howell v. Richards, 11 East, 641; Rawle on Covenants, 56. In Wetzell v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004, the Supreme Court of Ohio says: "A covenant of seisin is defined to be 'an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey,' and extends not only to the land itself, but also to whatever is properly appurtenant to and passes by the conveyance of the land; and, though the covenant is usually found in conveyances of the fee, it is appropriate in leases and assignments of them."

[6] Richardson v. Dorr, 5 Vt. 21; Catlin v. Hurlburt, 3 Vt. 407; Mills v. Catlin, 22 Vt. 106; Lockwood v. Sturdevant, 6 Conn. 385; Parker v. Brown, 15 N. H. 186, overruling Willard v. Twitchell, 1 N. H. 178; Breck v. Young, 11 N. H. 491; Pringle v. Witten, 1 Bay, 256, 1 Am. Dec. 612; Kincaid v. Brittain, 5 Sneed, 119; Pollard v. Dwight, 4 Cranch, 430, 3 L. ed. 669; McCarty v. Leggett, 3 Hill, 134; Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; Brandt v. Foster, 5 Clarke, 287; Mott v. Palmer, 1 Comst. 564; Morris v. Phelps, 5 Johns. 49, 4 Am. Dec. 323; Abbott

§ 886. Different rule.—But in other States, as in Massachusetts, Maine, and, to a certain extent, in Ohio and Illinois, a different rule prevails. In those States a covenant

v. Allen, 14 Johns. 248; Fitch v. Baldwin 17 Johns. 161; Fitzhugh v. Croghan, 2 Marsh. J. J. 430, 19 Am. Dec. 140; Coit v. McReynolds, 2 Rob. (N. Y.) 655; Hastings v. Webber, 2 Vt. 407; Martin v. Baker, 5 Blackf. 232; Thomas v. Perry, 1 Peters C. C. 57; Woods v. North, 6 Humph. 309, 44 Am. Dec. 312; Clapp v. Herdman, 25 Ill. App. 509; Resser v. Carney, 52 Minn. 397, 54 N. W. Rep. 89; Trice v. Kayton, 84 Va. 217, 10 Am. St. Rep. 836, 4 S. E. Rep. 377; Zent v. Picken, 54 Iowa, 535, 6 N. W. Rep. 750; Moore v. Johnston, 87 Ala. 220. See Lindsey v. Veasy, 62 Ala. 421; Matteson v. Vaughn, 38 Mich. 373; Fishel v. Browning, 145 N. C. 71, 58 S. E. 759. In Parker v. Brown, 15 N. H. 186, Parker, C. J., who delivered the opinion of the court, said: "Parties not conversant with the law ordinarily understand this covenant as an assurance of a title, and we are of the opinion that they have a right so to understand it. A party who has disseised another may be treated as seised of the fee at the election of his disseisee. He cannot be permitted to qualify his own wrong; but this is for the sake of the remedy. A party who remains in the adverse, peaceable possession of lands for twenty years, as owner, may thereby have evidence of a seisin in fee during that time. But this is for a quieting of possession and barring State claims. It does not show that, before the lapse of the period prescribed, he had a lawful seisin in fee; on the contrary, he was, until the expiration of the period, a wrongdoer."

In Catlin v. Hurlburt, 3 Vt. 407, Hutchinson, C. J., in delivering the opinion of the court, said, with reference to a covenant that the grantors were seised of the land in fee simple, and had in themselves good right to bargain and sell the same in the manner mentioned in the deed: "These expressions, and those of similar import, have always been considered in this State as amounting to a covenant of title. They have been inserted that they should be so considered. It is argued, however, that this means nothing more than that the grantors were in possession, claiming to hold in fee simple. This alteration might as well be incorporated by construction in all the covenants that decidedly relate to title in the whole deed. That they were well seised in fee simple means that they were actually in possession, claiming to hold in fee simple. That they had good right to sell and convey, means that they claim to have such right. That the premises are free from all encumbrances, means that they claim that they are thus free. This is not the most natural and obvious meaning of the usual expressions in deeds of warranty. They say nothing about claiming. They speak of realities. Fee simple denotes a permanent estate."

of good and sufficient seisin does not require that the grantor shall have a perfect title, but it is sufficient if he have an actual seisin under a color of title, no matter how tortious his possession may be.[7] These latter decisions are probably based upon the ground that a covenant for seisin is simply an assurance that the grantor had such possession as would render his conveyance unaffected by the champerty acts; that is, his deed was not that of a disseisee. "It is probable that the covenant for seisin was anciently introduced into deeds to guard against such an adverse possession as would render the deed void, as would have been the case at common law, and is now the case by virtue of our statute, if there be adverse possession." [8]

[7] Marston v. Hobbs, 2 Mass. 439, 3 Am. Dec. 61; Cornell v. Jackson, 3 Cush. 509; Chapel v. Bull, 17 Mass. 219; Follett v. Grant, 5 Allen, 175; Wait v. Maxwell, 5 Pick. 217, 16 Am. Dec. 391; Raymond v. Raymond, 10 Cush. 134; Griffin v. Fairbrother 1 Fairf. 59; Wheeler v. Hatch, 3 Fairf. 389; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; Boothby v. Hathaway 20 Me. 255; Cushman v. Blanchard, 2 Greenl. 268, 11 Am. Dec. 76; Wilson v. Widenham, 51 Me. 567; Ballard v. Child, 34 Me. 355; Backus v. McCoy, 3 Ohio, 211, 17 Am. Dec. 585; Watts v. Parker, 27 Ill. 224, 229; Kirkendall v. Mitchell, 3 McLean, 145; Twambley v. Henley, 4 Mass. 439; Bearce v. Jackson, 4 Mass. 408; Scott v. Twiss, 4 Neb. 133; Montgomery v. Reed, 69 Me. 510. See Wetzell v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004, in which the court says: "It has long been the law of this State that a covenant of seisin is not broken, so as to give the covenantee a right of action if the covenantor had actual seisin, though not the legal title, at the time of the conveyance, and the former is put in possession under it, until there has been an eviction under a paramount title." In Marston v. Hobbs, *supra*, the court say: "The defendant, to maintain the issue on his part, was obliged to prove his seisin when the deed was executed. But it was not necessary to show seisin under an indefeasible title. A seisin in fact was sufficient whether he gained it by his own disseisin, or whether he was in under a disseisin. If at the time he executed his deed he had the exclusive possession of the premises, claiming the same in fee simple, by a title adverse to the owner, he was seised in fee and had a right to convey."

[8] Catlin v. Hurlburt, 3 Vt. 407, per Hutchinson, C. J. And see Triplett v. Gill, 7 Marsh. J. J. 436; Pierce v. Johnson, 4 Vt. 253.

§ 887. **Covenant of seisin of indefeasible estate.**—As we have seen, a covenant that the grantor is seised merely without further qualification, may in some States mean that he has only the actual possession. Yet everywhere the rule prevails that when the covenant is that the grantor is seised of an *indefeasible* estate, the covenant is one of title, and can be satisfied only by the possession on the part of the vendor of an indefeasible title to the land conveyed.[2] Of this covenant, Mr. Washburn says that the effect of this covenant in this country, "when expressly made, is uniformly held to extend further than that of the ordinary covenant of seisin, and to cover an existing outstanding title adverse to that of the grantor. It is intended to meet the case where one is in possession and his grantee wishes for a remedy, if he shall discover that a third person has a better title, which for any reason he does not see fit to enforce by eviction, so as to lay a foundation for an action by the grantee upon his covenant of warranty." [1]

§ 888. **By what the covenant of seisin is broken.**—A covenant of seisin is broken if there is no such land in existence as that described in the deed or purporting to have been conveyed.[2] Where a spring had been previously conveyed, it was held, on the ground that the spring was a part of the land conveyed, the covenant of seisin in the deed had been broken.[3] So it is broken where there is a paramount right in another to prevent the grantee from damming water to a certain height,

[2] Raymond v. Raymond, 10 Cush. 134; Collier v. Gamble, 10 Mo. 472; Smith v. Strong, 14 Pick. 132; Garfield v. Williams, 2 Vt. 328; Prescott v. Trueman, 4 Mass. 631, 3 Am. Dec. 246; Pierce v. Johnson, 4 Vt. 253; Abbott v. Allen, 14 Johns. 252; Bender v. Fromberger, 4 Dall. 436, 439, 1 L. ed. 898, 899.

[1] 3 Wash. Real. Prop. (4th ed.) 456.

[2] Bacon v. Lincoln, 4 Cush. 212, 50 Am. Dec. 765; Basford v. Pearson, 9 Allen, 389, 85 Am. Dec. 764; Wheelock v. Thayer, 16 Pick. 68.

[3] Clark v. Conroe, 38 Vt. 471.

when there is a reservation of that right to him in his deed.[4] It is also broken if the grantor possesses only an estate tail,[5] or if an estate for life is outstanding.[6] If the grantor has previously sold any part of the premises which is a fixture, such as the rails of a fence, buildings, or other structures, so that the right to remove them is vested in another at the time of his conveyance, his covenant of seisin is broken.[7] The use by a railway company of a parcel of land as a right of way is not of itself a breach. It must also appear that the company had a valid right to such use of the land.[8] If the grantor covenants that he is seised of an undivided portion of certain land, his covenant is broken if the fact be that a partition had been made.[9] So, where there are two tenants, and one of them attempts to convey the entire estate, the covenant is broken as to one-half of the estate.[1] It is broken by the existence of a prior deed conveying to a railroad company and its assigns a strip of land along the line of its road for the purposes of the company, where a deed is subsequently executed conveying a parcel of land including such strip, notwithstanding the fact that at the time of the execution of the second deed, the strip of land is occupied for the purposes of a railroad.[2]

§ 889. **Broken at once if grantor has no possession.**— Unless there is some statutory regulation to the contrary, the rule is that a covenant of seisin, where the grantor has no pos-

[4] Walker v. Wilson, 13 Wis. 522; Traster v. Snelson, 29 Ind. 96; Hall v. Gale, 14 Wis. 55.

[5] Comstock v. Comstock, 23 Conn. 352.

[6] Wilder v. Ireland, 8 Jones (N. C.) 90; Mills v. Catlin, 22 Vt. 106.

[7] West v. Stewart, 7 Barr. 122; Powers v. Dennison, 30 Vt. 752; Van Wagner v. Van Nostrand, 19 Iowa, 427. See Burke v. Nichols, 2 Keyes, 671; Abbott v. Rowan, 33 Ark. 593; Benton County v. Rutherford, 33 Ark. 640.

[8] Jerald v. Elly, 51 Iowa, 321.

[9] Morrison v. McArthur, 43 Me. 567.

[1] Downer v. Smith, 38 Vt. 464.

[2] Messer v. Oestreich, 52 Wis. 684.

session, either actual or constructive, is broken as soon as made. If he has no possession, either by himself or by another, nothing is conveyed by his deed where champerty acts prevail.[3]

§ 890. **By what the covenant is not broken.**—This covenant is not broken by the existence of a highway over a portion of the land,[4] nor is it broken by the existence of a railroad across the land, but a covenant against encumbrances would be.[5] A judgment, mortgage, or a right of dower does not operate as a breach of the covenant of seisin.[6] All of these do not affect the technical seisin of the grantee. He has the title by virtue of his deed, and although these may be encumbrances from which he may be protected by his covenant against encumbrances, yet they do not affect his possession of the land or his legal title thereto. Thus, a mortgage is a charge upon the land, but until the mortgagee enters,

[3] See Reasoner v. Edmondson, 5 Ind. 393; Fowler v. Poling, 2 Barb. 303; Cushman v. Blanchard, 2 Me. 269, 11 Am. Dec. 76; Wilson v. Cochran, 46 Pa. St. 231; 3 Wash. Real Prop. (4th ed.) 457. See, also, Seldon v. Jones Co., 74 Ark. 348, 85 S. W. 778; Seyfried v. Knoblaunch, 44 Colo. 86, 96 Pac. 993, Hayden v. Patterson, 39 Colo. 15, 88 Pac. 437; Wysong v. Nealis, 13 Ind. App. 165, 41 N. E. 388; Sturgis v. Slocum, 140 Ia. 25, 116 N. W. 128; Foshay v. Shafer, 116 Ia. 302, 89 N. W. 1106; Bumstead v. Cook, 169 Mass. 410, 48 N. E. 767, 61 Am. St. Rep. 293; Foster v. Byrd, 119 Mo. App. 168, 96 S. W. 224; Fishel v. Browning, 145 N. C. 71, 58 S. E. 759; Eames v. Armstrong, 142 N. C. 506, 55 S. E. 405, 146 N. C. 1, 59 S. E. 165, 125 Am. St. Rep. 436; Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353; Building etc. Co. v. Fray, 96 Va. 559, 32 S. E. 58.

[4] Whitbeck v. Cook, 15 Johns. 483, 8 Am. Dec. 272; Vaughn v. Stuzaker, 16 Ind. 340.

[5] Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426.

[6] Fitzhugh v. Croghan, 2 Marsh. J. J. 430, 19 Am. Dec. 139; Sedgwick v. Hollenbeck, 7 Johns. 376; Stanard v. Eldridge, 16 Johns. 254; Tuite v. Miller, 10 Ohio, 383; Massey v. Craine, 1 McCord, 489; Lewis v. Lewis, 5 Rich. 12; Reasoner v. Edmondson, 5 Ind. 394. See Zent v. Picken, 54 Iowa 535. See, also, as to dower, Building etc. Co. v. Fray, 96 Va. 559, 32 S. E. 58; Aiple v. Hemmelman, etc. Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480; Fishel v. Browning, 145 N. C. 71, 58 S. E. 759; note 125 Am. St. Rep. 453, 454 citing text §§ 894, 899.

the covenant of seisin is not broken.[7] Where a deed conveys land, excepting "eighty acres more or less heretofore conveyed," to another, such clause is descriptive merely. It is not of the essence of the contract; hence, if the portion previously conveyed exceeds the quantity mentioned in the deed, the covenant of seisin by the grantor is not broken.[8] Where a purchaser from a sheriff, under a judgment of foreclosure, conveyed with a covenant of seisin, a subsequent order of the court vacating the sale and opening the judgment did not, it was held, operate as a breach of the covenant.[9] Where one is in possession of land under a patent, and sells it with a covenant of seisin, the fact that such patent is voidable, and hence, his title to the premises defeasible, does not render him liable on the covenant.[1] So, also, the great weight of authority holds that the covenant is not broken where the breach complained of is based on a misdescription or an incorrect description of the land conveyed.[2]

§ 891. **Seisin of grantee.**—Nor can advantage be taken of this covenant, when the grantee is himself seised of the premises. "It can never be permitted to a person to accept a deed with covenants of seisin, and then turn round upon his grantor and allege that his covenant is broken, for,

[7] Reasoner v. Edmondson, 5 Ind. 394. Where one of the parties was a minor, it was held that inasmuch as the title had passed to the grantee, there could be no breach of the covenant until the minor attained majority and disaffirmed, or in some legal manner avoided the conveyance: Van Nostrand v. Wright, Lalor's Supp. to Hill & Denio (N. Y.), 260.

[8] McArthur v. Morris, 84 N. C. 405.

[9] Coit v. McReynolds, 2 Rob. (N. Y.) 658. "Suppose a man conveys his property to an innocent party in fraud of his creditors, and the court should set aside the deed (if a court could be found to do such a thing), would an action lie by the grantee for a breach of the covenant of seisin? I think not."

[1] Pollard v. Dwight, 4 Cranch, 430, 432, 3 L. ed. 669, 670.

[2] Brown v. Southerland, 145 N. C. 331, 59 S. E. 114; Wiley v. Loveley, 46 Mich. 83, 8 N. W. 716; Mann v. Pearson, 2 Johns. (N. Y.) 37; Breck v. Young, 11 N. H. 485. But see Wilson v. Forbes, 13 N. C. (2 Dev.) 30.

that at the time he accepted the deed, he himself was seised of the premises."[3] A subsequent written contract from a former owner to convey the legal estate to some one else than the grantee, is not a breach.[4] And this covenant is not broken by the existence of an easement.[5]

§ 892. **Burden of proof.**—When an action is brought by a grantee against the grantor for a breach of the covenant of seisin, the defendant has the burden of proof to show that the title he has transferred is good and valid. This rule is founded on the reason that the defendant is supposed to know the state of the title, and the plaintiff has the negative until the defendant shows affirmatively title on his part. It would follow from this rule that in the absence of evidence on either side, the plaintiff would be entitled to recover.[6]

§ 893. **Covenant for right to convey.**—In most cases a covenant for a right to convey is the equivalent of a covenant of seisin. But there are cases where this covenant must take the place of the latter. Wherever a conveyance is made under a power, manifestly the trustee or donee cannot execute a covenant of seisin, but he can give a covenant of equal value by inserting in his conveyance a covenant for good right to convey. Then, again, in those States where a covenant of seisin is satisfied by an actual possession, no matter

[3] Fitch v. Baldwin, 17 Johns. 161.

[4] Seckler v. Fox, 51 Mich. 92. Evidence is inadmissible to show, in support of such a contract, that it was executed in compliance with a prior oral agreement with the grantor to provide for such person in this mode: Seckler v. Fox, 51 Mich. 92.

[5] Blondeau v. Sheridan, 81 Mo. 545.

[6] Abbott v. Allen, 14 Johns. 253; Patter v. Kitchen, 5 Bosw. 566; Baker v. Hunt, 40 Ill. 266, 89 Am. Dec. 346; Swafford v. Whipple, 3 Greene, G. 261, 264, 54 Am. Dec. 498; Schofield v. Iowa Co., 32 Iowa, 321; Beckman v. Henn, 17 Wis. 412; Mechlem v. Blake, 16 Wis. 102, 82 Am. Dec. 707; McLerman v. Prentice, 77 Wis. 124, 45 N. W. 943, 85 Wis. 427, 55 N. W. 764; Evans v. Fulton, 134 Mo. 653, 36 S. W. 230.

how tortious it may be, without reference to the title or right to possession, it is natural that a purchaser should seek to protect himself by this covenant. Where the covenant of seisin is considered as warranting the title, as is the case in England and most of the States, the rules and limitations applicable to a covenant of seisin also apply to the covenant for right to convey, which, for practical purposes, may be considered its equivalent.[7]

§ 894. **Damages for breach of covenants of seisin and good right to convey.**—The measure of damages for a breach of these covenants, where the conveyance passes nothing to the grantee, is the consideration paid by the grantee, and interest on such sum.[8] It has frequently been contended

[7] See Sugden on Vendors (13th ed. 462; Dart on Vendors (4th ed.), 499; Rawle on Covenants (4th ed.), 87; Chapman v. Holmes, 5 Halst. 20; Bickford v. Page, 2 Mass. 455; Dunnica v. Sharp, 7 Mo. 71; Willson v. Willson, 5 Fost. (N. H.) 234, 57 Am. Dec. 320.

[8] Smith v. Strong, 14 Pick. 128; Bickford v. Page, 2 Mass. 455; Ela v. Card, 2 N. H. 175, 9 Am. Dec. 46; Morse v. Shattuck, 4 N. H. 229, 17 Am. Dec. 419; Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; Farmers' Bank v. Glen, 68 N. C. 35; St. Louis v. Bissell, 46 Mo. 157; Kimball v. Bryant, 25 Minn. 496; Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 83; Stubbs v. Page, 2 Greenl. 378; Mitchel v. Hasen, 4 Conn. 495, 10 Am. Dec. 169; Foster v. Shannon, 41 N. H. 373; Phipps v. Tarpley, 31 Miss. 433; Hodges v. Thayer, 110 Mass. 286; Overhauser v. McCallister, 10 Ind. 41; Leland v. Stone, 10 Mass. 459; Marston v. Hobbs, 2 Mass. 433, 3 Am. Dec. 61; Caswell v. Wendwell, 4 Mass. 108; Wilson v. Forbes, 2 Dev. 30; Nutting v. Herbert, 35 N. H. 120; Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320; Sterling v. Peet, 14 Conn. 245; Tapley v. Lebaume, 1 Mo. 550; Campbell v. Johnston, 4 Dana, 182; Cox v. Strode, 2 Bibb. 277, 5 Am. Dec. 603; Foster v. Thompson, 41 N. H. 373; Martin v. Long, 3 Mo. 391; Lawless v. Colier, 19 Mo. 480; Blake v. Burnham, 29 Vt. 437; Recohs v. Younglove, 8 Baxt. 385; Backus v. McCoy, 3 Ohio, 211, 17 Am. Dec. 585; Clark v. Parr, 14 Ohio, 118, 45 Am. Dec. 529; Nichols v. Walter, 8 Mass. 243; Hacker v. Blake. 17 Ind. 97; Frazier v. Supervisors, 74 Ill. 291; Blossom v. Knox, 3 Pinn. 262; Blackwell v. Justices, 2 Blackf. 143; Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 338; Lacy v. Marnan, 37 Ind. 168; Kincaid v. Brittain, 5 Sneed, 109; Kingsbury v. Milner, 69 Ala. 502; Hacker v. Storer, 8 Me. 228; Hacker v. Blake, 17 Ind.

that the vendee should be entitled to recover the value of the land at the time he is deprived of it; in other words, that he should be reimbursed for the loss he has actually sustained. But the rule is settled as stated above. Chief Justice Tilghman, in a case where it was urged that actual loss should be the criterion by which to measure the damages, said: "The rule contended for by the plaintiff's counsel, in its utmost latitude, applied to covenants like the present, would, in many instances, produce excessive mischief. Indeed, the counsel have, in some measure, given up this rule by confessing that when buildings of magnificence are erected to gratify the luxury of the wealthy, it would be unreasonable to give damages to the extent of the loss; but the ruinous consequences would not be less to many persons who have sold lands on which no other than useful buildings have been erected. The rise in the value of land, not only in towns on the sea coast, but in the interior part of the United States, is such that it can hardly be supposed that any prudent man would undertake to answer the incalculable damages which might overwhelm his family, under the construction contended for by the plain-

97; Bonta v. Miller, 1 Litt. 250; Sheets v. Andrews, 2 Blackf. 274; Kimball v. Bryant, 25 Minn. 496; Cummins v. Kennedy, 3 Litt. 118, 14 Am. Dec. 45; Moore v. Frankenfield, 25 Minn. 540; Park v. Cheek, 4 Cold. 20; Rhea v. Swain, 122 Ind. 272; Horne v. Walton, 117 Ill. 130; Semple v. Whorton, 68 Wis. 626, 32 N. W. Rep. 690; Daggett v. Reas, 79 Wis. 60, 48 N. W. Rep. 127; McLennan v. Prentice, 85 Wis. 427, 55 N. W. Rep. 764; Bowne v. Wolcott, 1 N. Dak. 415, 48 N. W. Rep. 336; Mercantile Trust Co. v. South Park Residence Co., 94 Ky. 271, 22 S. W. Rep. 314. See Price v. Deal, 90 N. C. 290; Lanigan v. Kille, 13 Phila. 60; Bloom v. Wolfe, 50 Iowa 286; J. M. Ackley & Co. v. Hunter, Benn & Co., 154 Ala. 416, 45 So. 909; Brooks v. Mohl, 104 Minn. 404, 116 N. W. 931, 124 Am. St. Rep. 629, 17 L.R.A.(N.S.) 1195 (citing text); Devine v. Lewis, 38 Minn. 24, 35 N. W. 711; Daggett v. Reas, 79 Wis. 60, 48 N. W. 127; Wetzell v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004. See, also, Curtis v. Brannon, 98 Tenn. 153, 69 L.R.A. 760, 38 S. W. 1073; Evans v. Fulton, 134 Mo. 653, 36 S. W. 230; Webb v. Wheeler, 80 Neb. 438, 17 L.R.A.(N.S.) 1178, 114 N. W. 636; Conklin v. Hancock, 67 Ohio St. 455, 66 N. E. 518; McLennan v. Prentice, 85 Wis. 427, 55 N. W. 764.

tiff. I have taken pains to ascertain the opinion of lawyers in this State prior to the American revolution, and I think myself warranted in asserting, from the information that I have received, that the prevailing opinion among the most eminent counsel was that the standard of damages was the value of the land at the time of making the contract." [9] To similar effect is the language of Mr. Justice Livingston, in one of the early New York cases: "To refund the consideration, even with interest, may be a very inadequate compensation when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion, where there has been no fraud, may also be attended with injustice, if not ruin. A piece of land is bought solely for the purpose of agriculture; by some unforseen turn of fortune, it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its present value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which the value of the property might rise by causes not foreseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee? The safest general rule in all actions on contract is to limit the recovery as much as possible to an indemnity for the actual injury sustained, without regard to the profits which the plaintiff has failed to make, unless it shall clearly appear from the agreement that the acquisition of certain profits depended on the defendant's punctual performance, and that he had assumed to make good such a loss also." [1] Where the plaintiff has had the use of the premises,

[9] In Bender v. Fromberger, 4 Dall. 442, 1 L. ed. 901.

[1] In Staats v. Ten Eyck, 3 Caines, 111, 2 Am. Dec. 254. And see, also, Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 229; Swafford v. Whipple, 3 Greene, G. 261, 264, 54 Am. Dec. 498. In Pitcher v. Livingston,

no interest can be recovered for the time elapsing before eviction, unless he has been forced to pay mesne profits to the hold-

4 Johns. 1, 17, Chief Justice Kent said: "The case before us then resolves itself into this question: What is the extent of the rule of damages on a breach of the covenant of seisin? Three points are submitted by the case: (1) Whether the plaintiff can recover interest on the consideration paid; (2) whether he can recover for the increased value of the land; and (3) whether he can recover for his beneficial improvements. The two first points were settled in the case of Staats v. Ten Eyck, and need not be again examined. Nothing has been shown which affects the accuracy of that decision on those points, and it deserves notice as being of great weight in support of that decision, that in the States of Massachusetts and Pennsylvania, the same rule of damages is established in an action for a breach of the covenant of seisin. The third point was reserved in the consideration of the former case, and no opinion expressed upon it. It, therefore, remains open for discussion. I must own that I never perceived any ground for a distinction as to the damages between the rise in the value of the land and the improvements. There is no reason for such a distinction deducible from the nature of the covenant of seisin. Improvements made upon the land were never the subject matter of the contract of sale any more than its gradual increase or diminution in value. The subject of the contract was the land as it existed and was worth when the contract was made. The purchaser may have made the purchase under the expectation of a great rise in the value of the land, or of great improvements to be made by the application of his wealth or his labor. But such expectations must have been confined to one party only, and not have entered as an ingredient into the bargain. It was the land, and its price at the time of the sale, which the parties had in view, and to that subject the operation of the contract ought to be confined. The argument in favor of the value of the land and the improvements as they exist at the time of eviction, has generally excepted cases of extraordinary increase and of very expensive improvements. It seems to have been admitted, that without such a limitation to the doctrine, it could not be endured. But this destroys everything like a fixed rule on the subject, and places the question of damages in a most inconvenient and dangerous uncertainty. We have a striking illustration of this in the French law. The rule in France upon *bona fide* sales, according to Pothier, Traité du contrat de Vente (No. 132–141), is to make the seller, on eviction of the buyer, refund not only the original price, but the increased value of the land, and the expense of the meliorations made. He admits, however, that the intention of the parties is to be the rule in the assessment of damages, and that in the case of an im-

er of the paramount title.[2] Where the possession of the gran-

mense augmentation in the price of the land, or in the value of the improvements, the seller is to answer only for the moderate damages which the parties could be supposed to have anticipated when the contract was made. It is plainly to be perceived that there is no certainty in such a loose application of the rule, and that it leaves the damages to an arbitrary and undefined discretion, and so it appears to have been understood; for in the 'Institution au Droit Francais,' by M. Argou (liv. 3, c. 23), it is laid down that 'the question of damages, beyond the price paid, is with them *very arbitrary*.' This is not consonant to the genius of our law, nor does it recommend itself well for our adoption. On a subject of such general concern, and of such momentous interest, as the usual covenants in a conveyance of land, the standard for the computation of damages, upon a failure of title (whatever that standard may be), ought, at least, to be certain and notorious. The seller and the purchaser are equally interested in having the rule fixed. I agree that the contract is to be construed according to the intention of the parties; but I consider that the intention of the covenant of seisin, as uniformly expounded in the English law, is only to indemnify the grantee for the consideration paid. This was the settled rule at common law, upon the ancient warranty, of which this covenant of seisin is one of the substitutes; and all the reasons of policy which prevent the extension of the covenant to the increased value of the land apply equally, if not more strongly, to prevent its extension to improvements made by the purchaser. A seller may be presumed, at all times, able to return the consideration which he actually received; but to compel him to pay for extensive improvements, of the extent of which he could have made no calculation, and for which he received no consideration, may suddenly overwhelm him and his family in irretrievable ruin." See, also, Morris v. Matthews, 3 Strob. 199; Nelson v. Matthews, 2 Hen. & M. 164, 3 Am. Dec. 620; Blessing v. Beatty, 1 Rob. (Va.) 287; Bond v. Quattlebaum, 1 McCord, 584, 10 Am. Dec. 702.

[2] Hutchins v. Roundtree, 77 Mo. 500. And see Stebbins v. Wolf, 33 Kan. 765. In Curtis v. Brannon, 98 Tenn. 153, 69 L.R.A. 760, 38 S. W. 1073, the rule is thus stated: "The recovery of the consideration and interest is subject, however, to abatement for rents during the vendee's possession, when it appears that he cannot be made liable therefor to the owner of the paramount title. A vendee, having enjoyed the advantages of possession at the expense of the vendor, is bound, especially in a court of equity, to account for those advantages when he demands repayment of the purchase money with interest. He cannot, in such a case, hold benefits, and at the same time recover as if he had not received them."'

[3] Boon v. McHenry, 55 Iowa, 202. Where there is no actual loss the measure of damages is at least

tee has never been disturbed, only nominal damages can be recovered for a mere technical breach.[3]

§ 895. **Proof of real consideration.**—In this country the clause stating the consideration is not conclusive. A different rule seems to prevail in England. Mr. Mayne says: "Where the damages are calculated upon the basis of the purchase money, its amount, if stated in the deed of conveyance, cannot be contradicted by parol evidence. Where any consideration is mentioned, if it is not said also 'and for other considerations' you cannot enter into any proof of any other; the reason is, it would be contrary to the deed; for when the deed says it is in consideration of a particular thing, that imports the whole consideration, and is negative to any other."[4] But in the United States the rule is that the consideration clause is not conclusive, and that evidence is admissible to show the true consideration.[5] It follows from this rule that

nominal damages. J. M. Ackley & Co. v. Hunter, Benn & Co., 154 Ala. 416, 45 So. 909. See in this connection McLennan v. Prentice, 85 Wis. 427, 55 N. W. 764; Hammerslough v. Hackett, 48 Kan. 700, 29 Pac. 1079; Building etc. Co. v. Fray, 96 Va. 559, 32 S. E. 58; Lloyd v. Sandusky, 95 Ill. App. 593, aff'd 203 Ill. 621, 68 N. E. 154; Castor v Dufur, 133 Iowa 535, 111 N. W. 43; Jones v. Haseltine, 124 Mo. App. 674, 102 S. W. 40; Fishel v. Browning, 145 N. C. 71, 58 S. E. 759, note 125 Am. St. Rep. 461, 463, citing text.

[4] Mayne on Damages (2d ed.) 148.

[5] Guinotte v. Chouteau, 34 Mo. 154; Hodges v. Thayer, 110 Mass. 286; Martin v. Gordon, 24 Ga. 533; Gavin v. Bucklers, 41 Ind. 528; Goodspeed v. Fuller, 46 Me. 141, 71 Am. Dec. 572; Bullard v. Briggs, 7 Pick. 533, 19 Am. Dec. 292; Watson v. Blaine, 12 Serg. & R. 131, 14 Am. Dec. 669; Gulley v. Grubbs, 1 Marsh. J. J. 388; Wade v. Merwin, 11 Pick. 280; Duval v. Bibb, 4 Hen. & M. 113, 4 Am. Dec. 506; Clapp v. Tirrell, 20 Pick. 247; Higdon v. Thomas, 1 Har. & G. 139; Hayden v. Mentzer, 10 Serg. & R. 329; McCrea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103; Wolfe v. Hauver, 1 Gill, 84; Strawbridge v. Cartledge, 7 Watts. & S. 399; Park v. Cheek, 2 Head. 451; Monahan v. Colgin, 4 Watts, 436; Dexter v. Manley, 4 Cush. 26; Jack v. Dougherty, 3 Watts, 151; Burbank v. Gould, 15 Me. 118; Bingham v. Weiderwax, 1 Comst. 509; Bolton v. Johns, 5 Barr. 145, 47 Am. Dec. 404; Meeker v. Meeker, 16 Conn. 383; Harvey v. Alexander, 1 Rand.

either party can prove what was in fact the real consideration, when the amount stated in the deed is not the true one. The defendant may show that the consideration was less than that expressed in the conveyance for the purpose of diminishing the amount of damages.[6] So, on the other hand, for the purpose of augmenting the damages, the plaintiff may show that the real consideration was larger.[7] It is permissible to show that the consideration was property. In such a case, the damages will be measured by the value of the property at the time of the execution of the conveyance, with interest.[8] But, of course, it is competent for the parties to agree upon the value of the property as the whole or a part of the consideration. When such agreement is made, the value so determined will be the amount to be recovered, rather than the value which, at the trial, the property might be proven to have.[9]

§ 896. Mitigation of damages.—In mitigation of damages, the defendant may show that a certain parcel was in-

219, 10 Am. Dec. 519; Jones v. Ward, 10 Yerg. 160; Curry v. Lyles, 2 Hill (S. C.) 404; Garrett v. Stuart, 1 McCord, 514; Wilson v. Shelton, 9 Leigh, 343; Hartley v. McAnulty, 4 Yeates, 95, 2 Am. Dec. 396; Engleman v. Craig, 2 Bush, 424; Morse v. Shattuck, 4 N. H. 229, 17 Am. Dec. 419; Barnes v. Learned, 5 N. H. 264; Nutting v. Herbert, 35 N. H. 120; Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661; Henderson v. Henderson, 13 Mo. 151; Bircher v. Watkins, 13 Mo. 521; Hallam v. Todhunter, 24 Iowa, 166; Harlow v. Thomas, 15 Pick. 66; Cushing v. Rice, 46 Me. 303, 71 Am. Dec. 579; Moore v. McKie, 5 Smedes & M. 238; Williamson v. Test, 24 Iowa, 138; Byrnes v. Rich, 5 Gray, 518.

[6] Harlow v. Thomas, 15 Pick. 70; Morse v. Shattuck, 4 N. H. 229, 17 Am. Dec. 419; Williamson v. Test, 24 Iowa, 139; Bingham v. Weiderwax, 1 Comst. 514; Moore v. McKie, 5 Smedes & M. 238; Swafford v. Whipple, 3 Greene, 267, 54 Am. Dec. 498; Cox v. Henry, 8 Casey, 19; Martin v. Gordon, 24 Ga. 535.

[7] Dexter v. Manley, 4 Cush. 26; Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661; Guinotte v. Chouteau, 34 Mo. 154.

[8] Hodges v. Thayer, 110 Mass. 286; Lacey v. Marnan, 37 Ind. 168; Bonnon's Estate v. Urton, 3 Greene, 228.

[9] Williamson v. Test, 24 Iowa, 138.

cluded in the deed by mistake, and that he received no part of the consideration price for it.[1] "Whatever evidence," said the court, in one of these cases, "therefore, tended to show the consideration actually paid for the premises before granted to Merrill, or to show that no consideration was paid for them, for the reason that it was known and understood by the parties that they were not to pass by the conveyance, was competent and admissible on the question of damages, although inadmissible upon the issue raised by the plea of *omnia performavit*. If the jury or an auditor should find that nothing was paid for the Merrill place, although it is clearly included within the deed, but that both parties knew and understood it to have been previously sold, and that, in fact, it was included in the deed by mistake, or through inadvertence, the plaintiff would be entitled to nominal damages only."[2] It may be shown in mitigation of damages that the part of the land as to which a breach is alleged was included by mistake in the description, and that the grantee neither bought nor paid for

[1] Leland v. Stone, 10 Mass. 459; Barnes v. Learned, 5 N. H. 264; Nutting v. Herbert, 35 N. H. 121; s. c. 37 N. H. 346; Stewart v. Hadley, 55 Mo. 235. On mitigation of damages see, also, § 894 ante note 2 page 1236.

[2] Nutting v. Herbert, 35 N. H. 127, per Fowler J. In Burke v. Beveridge, 15 Minn. 208, the court, in speaking of a breach of the covenants of seisin and good right to convey, and the effect of the covenantor securing the paramount title which, by virtue of another covenant in the deed, passed to the covenantee, said: "Though by the breach of the covenants in question, as thereby the title wholly fails, the law restores to the plaintiff the consideration paid, with interest, yet, if by virtue of another covenant in the same deed, also intended to secure to her the subject matter of the conveyance, she has obtained that seisin, it would be altogether inequitable that she should have that seisin, and also the consideration paid for it; that is to say, that if there exists facts which would render inequitable the application of the rule that such covenants, if broken at all, are broken as soon as made, and the purchaser's right of action to recover back the consideration is then perfect, such facts are to be taken into consideration by the jury, not as a bar to the action, but in mitigation of damages."

such part.[3] Where a uniform price per acre or per front foot has been agreed upon, the measure of damages is determined by such price multiplied by the quantity of land, including interest, as to which there is a failure of the covenant.[4]

§ 897. **Knowledge of grantor's want of title.**—The right of recovery for a breach of a covenant of seisin, is not affected by the fact that it was known to one or both of the parties, at the time the covenant was made, that the grantor had no title to the land or any part of it.[5] Bailey, P. J., in the case cited, quoted with approval the language of the supreme court of that State in a former case:[6] "Where a person insists upon and obtains covenants for title, he has the right, when obtained, to rely upon them and enforce their performance, or recover damages for their breach. The vendor is under no compulsion to make covenants when he sells land, but, having done so, he must keep them or respond in damages for injury sustained by their breach. Nor is it a release or discharge of the covenant to say that both parties knew it was not true, or that it would not be performed when it was made. A person may warrant an article to be sound when both buyer and seller know that it is unsound; so the seller may warrant the quantity or quality of an article he sells when both parties know that it is not of the quality or does not contain the quantity warranted. In fact the reason the purchaser insists upon covenants for title, or a warranty of quality or quantity, is because he either knows or fears that the title is not good, or that the article lacks in quantity or quality."

[3] Spurr v. Andrews, 88 Mass. (6 Allen) 422; Leland v. Stone, 10 Mass. 459.

[4] Conklin v. Hancock, 67 Ohio St. 455, 66 N. E. 518. See, also, as to damages: Egan v. Martin, 71 Mo. App. 60; Haynie v. American Trust Inv. Co., 39 S. W. 860; Curtis v. Brannon, 98 Tenn. 153, 69 L.R.A. 760, 38 S. W. 1073; Building Light etc. Co. v. Fray, 96 Va. 559, 32 S. E. 58.

[5] Wadhams v. Innes, 4 Bradw. (Ill. App.) 642, 646.

[6] Beach v. Miller, 51 Ill. 211, 2 Am. Rep. 290.

§ 898. **Value of land as measure of damages.**—As has been pointed out, the measure of damages in most cases is the consideration paid with interest. But there may be cases where to apply such a rule would be to deny to the covenantee all relief. No consideration whatever may be mentioned in the deed, and it may be impossible to learn the true consideration. The consideration may have been paid by a third person at whose request the covenants in the deed may have been inserted. In cases of this character, the circumstances of each particular case must control the rule as to damages, and, generally, the value of the land at the time the conveyance is made, with interest, will form the basis of damages.[7] An agreement was made between a debtor and a creditor, whereby the latter agreed to receive a certain lot of land, in full satisfaction of the debt. The former agreed with another for the purchase of the land, and requested him to make the deed directly to the creditor with warranty. This was done, the deed expressing a large nominal consideration. It was delivered by the debtor to the creditor in satisfaction of the debt. In a suit upon the covenant, Mr. Chief Justice Shaw said: "Then what was the actual consideration as between the plaintiff and defendant? It is very clear that the consideration expressed in the deed is no criterion; the actual consideration may be always inquired into by evidence *aliunde*. Nor is it the sum agreed to be paid to the defendant by Leighton [the debtor]; to that the plaintiff was a stranger. Nor is it the nominal amount of the note which the plaintiff agreed to surrender and release to Leighton, as the consideration to be by him paid for the land. That may have been a security of little value; no evidence of its value was given; and, besides, to that part of the transaction the defendant was a stranger. It seems, therefore, to be a case to which the ordi-

[7] Smith v. Strong, 14 Pick. 128; Byrnes v. Rich, 5 Gray, 518; Hodges v. Thayer, 110 Mass. 286. See Staples v. Dean, 114 Mass. 125; Mason v. Kellogg, 38 Mich. 132.

nary general rule cannot apply, and which must be determined according to its particular circumstances upon the general principles applicable to breaches of contract; the party shall recover a sum in damages which will be a compensation for his loss. . . . If the failure of the title extended to the whole of the land, then the entire value of the land is to be the measure; if to a part only, and the plaintiff does not tender a reconveyance of the part upon which the conveyance operated to give title to the grantee, then the value of the part, the title to which failed, with interest, will be taken as the measure of damages."[8] When damages have been recovered for a total breach of these covenants, such fact is a bar to any further recovery.[9] When the covenantee has never been in possession and is unable to obtain it, the action upon the covenant is, in effect, an action for money had and received, on account of failure of consideration.[1]

§ 899. **Undisturbed possession of grantee.**—If there has been no disturbance of the possession of the grantee for a sufficient length of time to enable him to acquire title by the statute of limitations, a recovery on the covenant should be for no more than nominal damages.[2] The consideration money and interest are the measure of damages when the grantee acquires nothing by the conveyance. But when he acquires anything by his deed, this must be considered in estimating the damages. "The weight of American authority has

[8] In Byrnes v. Rich, 5 Gray, 518.

[9] Rawle on Covenants (4th ed.) 263, and note; Outram v. Morwood, 3 East, 346; Nosler v. Hunt, 18 Iowa, 212; Duchess of Kingston's Case, 2 Smith's Leading Cases (7th ed.), 778; Markham v. Middleton, 2 Strob. 1259; Donnell v. Thompson, 10 Me. 174, 25 Am. Dec. 216. And see Parker v. Brown, 15 N. H. 176; Kincaid v. Brittain, 5 Sneed, 119; Porter v. Hill, 9 Mass. 34, 6 Am. Dec. 22.

[1] Baker v. Harris, 9 Ad. & E. 532.

[2] Somerville v. Hamilton, 4 Wheat. 230, 4 L. ed. 558; Wilson v. Forbes, 2 Dev. 30; Pate v. Mitchell, 23 Ark. 591, 79 Am. Dec. 114; Garfield v. Williams, 2 Vt. 328; Cowan v. Silliman, 4 Dev. 47. See Hencke v. Johnson, 62 Iowa, 555.

determined that the covenant for seisin is broken, if broken at all, so soon as it is made, and thereby the immediate right of action accrues to him who has received it. But in such case, the grantee is not entitled, as matter of course, to recover back the consideration money. The damages to be recovered are measured by the actual loss at that time sustained. If the purchaser has bought in the adverse right, the measure of his damages is the sum paid. If he has been actually deprived of the whole subject of his bargain, or of a part of it, they are measured by the whole consideration money in the one case, and a corresponding part of it in the other."[3] But the mere fact that the covenantee is in the undisturbed possession of the premises, where his possession has not ripened into title, is no defense.[4]

§ 900. **Partial breach.**—Where the covenant is for a fee simple, and the estate is subject to a life estate, recovery may be had for the value of the less estate.[5] If, after these

[3] Lawless v. Collier, 19 Mo. 480. In Hartford and Salisbury Ore Co. v. Miller, 41 Conn. 112, the court says: "But if the party takes anything by his deed, directly or indirectly, by its own force, or by its co-operation with other instruments or other circumstances, whether it be the entire thing purchased or a part of it, its value must be considered in considering the damages." See Tanner v. Livingston, 12 Wend. 83; Kimball v. Bryant, 25 Minn. 496; Terry v. Drabenstadt, 68 Pa. St. 400; Guthrie v. Pugsley, 12 Johns. 126; Mills v. Catlin, 22 Vt. 98; Cockrell v. Proctor, 65 Mo. 41; Lockwood v. Sturtevant, 6 Conn. 373.

[4] Akerly v. Vilas, 21 Wis. 109. But in Missouri, it is held, where the covenant is considered as running with the land, that if the covenantee has not been compelled to yield possession to a paramount title, he can only recover nominal damages. He is not permitted to give up possession and seek substantial damages: Cockrell v. Proctor, 65 Mo. 41. And see Hencke v. Johnson, 62 Iowa, 555.

[5] Guthrie v. Pugsley, 12 Johns. 126; Recohs v. Younglove, 8 Baxt. 385; Tanner v. Livingston, 12 Wend. 83. See Rickert v. Snyder, 10 Wend. 416; Blanchard v. Blanchard, 48 Me. 174. Life tables may be used for the purpose of computing the value of the life estate: Mills v. Catlin, 22 Vt. 98; Donaldson v. Mississippi etc. Ry. Co., 18 Iowa, 280, 87 Am. Dec. 391. The

covenants are broken, and before the covenantee commences action, the paramount title is acquired by the covenantor, which, by the operation of other covenants, is transferred to the covenantee, the damages may be mitigated or reduced to a nominal amount by this fact.[6] If the estate which the grantor had and by deed transferred was a copyhold, and he had covenanted for a seisin in fee, there is a breach of the covenant, and the difference in value between a fee simple and a copyhold estate is the measure of damages.[7] When there has been a partial breach by a failure of title to part of the land conveyed, either party is entitled to show, for the purpose of determining the damages, the value which that part, to which title has failed, relatively bears to the whole.[8] "The law will apportion the damages to the measure of value between the land lost and the land preserved."[9] In a case in Massachusetts, it was contended that the proper method of determining

measure of damages, where there is an eviction of a definite portion of the premises, is a proportional amount of the purchase money with interest: Wetzell v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004. See, also, Conklin v. Hancock, 67 Ohio St. 455, 66 N. E. 518; Webb v. Wheeler, 80 Neb. 438, 17 L.R.A. (N.S.) 1178, 114 N. W. 636; Haynie v. Inv. Co. (Tenn.) 39 S. W. 860; Bolinger v. Brake, 4 Kan. App. 180, 45 Pac. 950.

[6] Kimball v. Bryant, 25 Minn. 496, 500; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; Burke v. Beveridge, 15 Minn. 205; Noonan v. Isley, 21 Wis. 138; Knowles v. Kennedy, 82 Pa. St. 445; McCarty v. Leggett, 3 Hill, 134; King v. Gilson, 32 Ill. 348, 83 Am. Dec. 269, See Tucker v. Clark, 2 Sand. Ch. 96; Boulter v. Hamilton, 15 Up. Can. C. P. 125; Blanchard v. Ellis, 1 Gray, 195, 61 Am. Dec. 417; McInnis v. Lyman, 61 Wis. 191.

[7] Gray v. Briscoe, Noy, 142. See Wace v. Brickerton, 3 De Gex & S. 751.

[8] Morris v. Phelps, 5 Johns. 49, 56, 4 Am. Dec. 323. See Wallace v. Talbot, 1 McCord, 467; Griffin v. Reynolds, 17 How. 611, 15 L. ed. 230; Dickens v. Shepperd, 3 Murph. 526; Cornell v. Jackson, 3 Cush. 506, 510.

[9] Morris v. Phelps, *supra*. See, also, Blanchard v. Hoxie, 34 Me. 376; Blanchard v. Blanchard, 48 Me. 177; Morrison v. McArthur, 43 Me. 567; Bryan v. Smallwood, 4 Mar. & McH. 483; Hubbard v. Norton, 10 Conn. 435; Rickert v. Snyder, 9 Wend. 416; McNear v. McComber, 18 Iowa, 14; Nyce v. Obertz, 17 Ohio St. 76; Phillips v. Reichert, 17 Ind. 120, 79 Am. Dec. 463; Hoot v. Spade, 20 Ind. 326.

damages was by ascertaining the proportion in quantity which the part, to which there had been a failure of title, had to the remainder. But the court replied: "This is not a just rule, for the value may be unequal. The true and just rule is, that the proportional value, and not the quantity of the several parts of the land, should be the measure of damages." [1] The grantors had the fee in two-sixths of an estate and a life estate in the remaining four-sixths. Upon a breach of the covenant, it was held that to measure the damages, the value of the life estate should be deducted from four-sixths of the purchase price, and that as there was no one to call upon the grantee for the mesne profits, no interest should be allowed.[2] If a constructive eviction is founded on the existence of a tax deed which a third person held at the time of the execution of the deed, the grantor may contest the validity of the tax deed in an action for a breach of the covenant. The right of the grantor to contest the validity of the tax deed is not affected by the fact that the statute of limitations has since run in favor of the tax deed. The rights of the respective parties are to be determined by the conditions as they existed at the time at which the conveyance was executed.[3] In Wisconsin the

[1] Cornell v. Jackson, 3 Cush. 506, 510.

[2] Guthrie v. Pugsley, 12 Johns. 126. "There is no settled rule of law," said the court, "to ascertain the damages in such a case, without having a jury to assess them, as they must depend principally upon the value of the estate during the lives of the defendants, which must be deducted from four-sixths of the consideration money. Nor ought interest to be allowed during their lives, for no one, during that time, will have a right to turn the plaintiff out of possession, or call on him for the mesne profits." See, also, Downer v. Smith, 38 Vt. 464; Tone v. Wilson, 81 Ill. 529; Ela v. Card, 2 N. H. 175, 9 Am. Dec. 46; Scantlin v. Allison, 12 Kan. 851.

[3] McInnis v. Lyman, 62 Wis. 191. When title fails as to a part of the land conveyed, damages should be awarded in such proportion to the whole consideration as the part bears to the whole tract: Beaupland v. McKeen, 28 Pa. St. 124, 70 Am. Dec. 115; Messer v. Ostreich, 52 Wis. 684; Remple v. Whorton, 68 Wis. 626, 32 N. W. Rep. 690; Larson v. Cook, 85 Wis. 564, 55 N. W. Rep. 703; McLennan v. Prentice, 85 Wis. 427, 55 N. W. Rep. 764; Hunt v. Raplee, 44 Hun, 149; Furniss v. Ferguson, 15 N. Y.

measure of damages has been stated as being such fractional part of the whole consideration paid as the value, at the time of the purchase, of the part to which title fails bears to the whole of the lots purchased, and interest during the period of eviction not exceeding six years.[4]

§ 901. **Treating partial failure as entire.**—Where there is an entire failure there can be a total recovery, and where there has been a partial failure there can be a partial recovery. But can a party treat a partial failure as entire and recover the entire purchase money, or must he retain whatever title was acquired, thus permitting him to recover only the difference in value between that title and the entire estate? The

437; Hymes v. Esty, 133 N. Y. 342, 31 N. E. Rep. 105; Guthrie v. Pugsley, 12 Johns. 126; Staats v. Ten Eyck, 3 Caines, 111, 2 Am. Dec. 254; Morris v. Phelps, 5 Johns. 49, 4 Am. Dec. 323; Tone v. Wilson, 81 Ill. 529; Major v. Dunnavant, 25 Ill. 262; Wadhams v. Innes, 4 Ill. App. 642; Weber v. Anderson, 73 Ill. 439; Clapp v. Herdman, 25 Ill. App. 509; Threkeld v. Fitzhugh, 2 Leigh, 451; Clarke v. Hardgrove, 7 Gratt. 399; Conrad v. Effinger, 87 Va. 59, 24 Am. St. Rep. 646, 12 S. E. Rep. 2; Click v. Green, 77 Va. 827; Ela v. Card, 2 N. H. 175, 9 Am. Dec. 46; Winnipiseogee Paper Co. v. Eaton, 65 N. H. 13, 18 Atl. Rep. 171; Parker v. Brown, 15 N. H. 176; Partridge v. Hatch, 18 N. H. 494; Blanchard v. Blanchard, 48 Me. 174; Blanchard v. Hoxie, 34 Me. 376; Koestenbader v. Peirce, 41 Iowa, 204; Hoot v. Spade, 20 Ind. 326; McDunn v. Des Moines, 39 Iowa, 286; Mische v. Baughn, 52 Iowa, 528; Long v. Sinclair, 40 Mich. 569; Scheible v. Slagle, 89 Ind. 323; Wright v. Nipple, 92 Ind. 310; Price v. Deal, 90 N. C. 290; Saunders v. Flaniken, 77 Tex. 662, 14 S. W. Rep. 236; White v. Holley, 3 Tex. Civ. App. 590, 24 S. W. Rep. 831; Gass v. Sanger (Tex. Civ. App.), 30 S. W. Rep. 502; Weeks v. Barton (Tex. Civ. App.), 31 S. W. Rep. 1071; Keesey v. Old, 82 Tex. 22, 17 S. W. Rep. 928; Stark v. Olney, 3 Or. 88; Crawford v. Crawford, 1 Bailey, 128, 19 Am. Dec. 660; Lewis v. Lewis, 5 Rich. 12; Wallace v. Talbot, 1 McCord, 466; Jeter v. Glenn, 9 Rich. 374; Aiken v. McDonald, 43 S. C. 29, 20 S. E. Rep. 176; Hunt v. Nolen, 46 S. C. 356, 24 S. E. Rep. 310; Nyce v. Obertz, 17 Ohio, 71; Moses v. Wallace, 7 Lea, 413; Whitzman v. Hirsh, 87 Tenn. 513; Mette v. Dow, 9 Lea, 93; Downer v. Smith, 38 Vt. 464; Butcher v. Peterson, 26 W. Va. 447, 53 Am. Rep. 89.

[4] McLennan v. Prentice, 85 Wis. 427, 55 N. W. 764; Semple v. Wharton, 68 Wis. 626, 32 N. W. 690.

question arose in Tennessee, where a deed containing covenants of seisin and warranty purported to convey an absolute estate to the entire land in fee, but in fact it conveyed only a life estate. The court held that the measure of damages was the difference between the value of the life estate and the fee, and that as to the life estate the conveyance remained in force.[5] To the argument that a purchaser ought not to be compelled to accept a title to a part or an estate for life, when the inducement to the purchase was the entire estate, the court said the reply was that these "would be important considerations upon an application to a court of equity for a decision, but if the purchaser choose to sue upon the covenant at law without a rescission or offer to rescind, he can only recover to the extent of the breach, the contract of sale and conveyance remaining in force as to the part to which the title does not fail." [6]

§ 902. **Burden of proof on partial breach.**—Where a covenantee sues a remote grantor for failure of title to a portion of the land which the covenantee had purchased from an intermediate grantor, he can recover, of course, a proportionate share of the consideration received for the deed. But as to the relative value of the portion purchased by the covenantee bringing suit, he has the burden of proof. He is the one seeking relief, and he must establish all the facts showing that he is entitled to relief, and to what extent it should be given.[7]

§ 903. **Power to purchase title.**—The fact that the purchaser might have removed the defect or bought in the outstanding title, can have no effect upon his claim for damages for a breach of the covenants. "It is true," said the court in one case, "the grantee, while the prior mortgage re-

[5] Recohs v. Younglove, *supra*. 385.

[6] Recohs v. Younglove, *supra*.

[7] Mische v. Baughn, 52 Iowa, 528.

mained only an encumbrance, might have discharged it if he had possessed the pecuniary ability, and thus saved himself from eviction, but then so might the grantor; the grantee, whether able or willing or not, was in no way bound to do it, and had a right to expect that the grantor would do it, while he, the grantor, was bound to do it, bound by the obligations of his express covenant." [8] Lands of which the grantors sup-

[8] Lloyd v. Quimby, 5 Ohio St. 265; Miller v. Halsey, 2 Green, 48; Stewart v. Drake, 4 Halst. 143; Chapel v. Bull, 17 Mass. 221; Elder v. True, 32 Me. 104; Burk v. Clements, 16 Ind. 132; Norton v. Babcock, 2 Met. 510. In the last cited case the grantor had obtained the premises under a judgment, leaving an equity of redemption in the judgment debtor. This equity of redemption was levied upon by another judgment creditor and purchased. The purchaser notified the grantee of his intention to redeem, and the latter paid him a sum of money for the purpose of prevention, the amount for which the equity had been purchased and interest both being $602.89. The deed contained the usual covenants of seisin, warranty, and against encumbrances. In a suit upon these covenants, Chief Justice Shaw said: "It appears by the statement of facts reported as found by the jury that more than a month before the expiration of the right of redeeming the estate levied upon by the defendant, and by him conveyed to the plaintiff with covenants of warranty, Edward A. Phelps, the holder of this right to redeem, gave notice to the plaintiff of his intention to redeem; whereupon the plaintiff in good faith, and in order to discharge that right to redeem and enable himself to retain the estate, paid $602.89, in order to extinguish such encumbrance. The value of the estate at that time, as found by the jury, was $1,200; for the one moiety which was the subject of the levy, and the estate to be redeemed, and the value of the improvements made upon it, $500. It is contended for the plaintiff that the amount thus paid by him to extinguish the encumbrance is the measure of his damage; but we think that this cannot be laid down as a rule of damages without considerable qualification. Where the encumbrance is of such a character that if not extinguished it would take the whole estate, and it can be extinguished for the value of the estate, so that the amount paid for its extinguishment would bring a less onerous burden upon the covenantor than he would have to sustain by an eviction, it being for his benefit as well as that of the owner to extinguish it, the amount paid for extinguishing would be the measure of damages, because it would afford the plaintiff perfect indemnity. Otherwise, the amount thus paid exceeds the amount which the covenantor would have been bound to pay if the plaintiff had been evicted. For instance, we will

posed themselves seised were sold with covenants of seisin and warranty, but it appeared subsequently that they had no title. The grantee sued on the covenant of seisin, six years after-

suppose the case of a conveyance with the usual covenants against encumbrances and covenants of warranty. There is an outstanding mortgage, and the mortgagee is about to foreclose and oust the mortgagee, and the mortgagee is evicted. If he is evicted, he will have a remedy on his covenant, and recover the value of the land at the time of the eviction and interest. Now, if the value of the land be $2,000, and the amount of the mortgage, with interest, $2,500, should the grantee redeem and pay $2,500 to extinguish the imcumbrance, he could not recover that sum of his warrantor, although the encumbrance could not be extinguished for less, because the covenantor is liable only for the value of the land. But if the mortgage should amount to $1,500, and the grantee should pay that sum to redeem, it would constitute the measure of damages, because it would afford an indemnity to the plaintiff, and bring a less charge on the covenantor than if the grantee had permitted the mortgagee to foreclose."

The court then referred to the case of Wyman v. Brigden, 4 Mass. 150, where a levy was rightfully made upon the estate s the property of another for $1,800, and the plaintiff, who had never been out of actua' possession, redeemed by paying $1,800, the estate being worth $3,000, in which it was held that the sum paid for the redemption should be the measure of damages, and continued: "We are then to apply this rule to the present case, and the result will be that if the sum of $602.89, paid by the plaintiff to extinguish the right of redemption, was less than the defendant would have been liable for had the plaintiff permitted Phelps to redeem, then that is the measure of damages for which the defendant is now liable. If it exceeds that amount, then he is liable only for the smaller amount. . . . Had the plaintiff declined the offer to pay, what would have been the amount of damages? As the estate granted by the defendant to the plaintiff actually passed by the conveyance, the defendant being seised, and having good right to convey, subject only to redemption by his creditor, the amount of damages he would have been liable for on his covenants was the value of the land at the time of the eviction: Gore v. Brazier, 3 Mass. 543, 3 Am. Dec. 182. The value of the land, independent of the improvements, was then $1,200 and the value of the improvements $500, making in round numbers $1,700. By improvements, we here understand buildings or betterments, other than repairs made by the defendant or the plaintiff after the levy, and before the expiration of the year allowed by law for the redemption. The great difficulty probably arises from the fact of these expensive betterments made upon a defeasible estate. We are of the opinion

ward, and the original grantors purchased the title of the true owners, and tendered a new deed to the grantee, but he refused to accept it. They then filed a bill in equity to compel him to receive the conveyance and to stay his proceedings on the covenant; but it was held that the court possessed no power to compel the grantee to take the deed or to disturb his action on the covenant.[9] When a grantee does, however, buy in an outstanding title, his recovery is limited to the amount paid by him with interest from the time of payment, provided this sum does not exceed the consideration money and interest.[1]

§ 904. **Keeping public street open.**—While a party may maintain an action for damages for the breach of a covenant, it does not follow in all instances that he can secure relief by enforcing the specific performance of a covenant

that if they were made by the creditor after the levy, the debtor could not be charged with them on redemption, for the reasons above stated; and being annexed to the realty, and having become a part of the freehold, they would have constituted a part of the actual value at the time of the redemption. Suppose them made by the plaintiff, they were made by him after he acquired a title purporting to be absolute and indefeasible under the defendant's deed of warranty; and we are of opinion that, as between the plaintiff and defendant, the loss must fall on the latter. It arises from want of caution in giving such a deed, when in fact he had only a defeasible estate." That the covenantee is not bound to wait for actual dispossession, but may, after such assertion, pay off or extinguish the right by purchase and recover the reasonable value of the right discharged or extinguished by him: See Schnelle etc. Lumber Co. v. Barlow, 34 Fed. 853; Ward v. Ashbrook, 78 Mo. 517; Hall v. Bray, 51 Mo. 288.

[9] Tucker v. Clark, 2 Sand. Ch. 96. See, also, Burton v. Reeds, 20 Ind. 87; Noonan v. Isley, 21 Wis. 138; Bingham v. Weiderwax, 1 Comst. 513; Blanchard v. Ellis, 1 Gray, 195, 61 Am. Dec. 417; Porter v. Hill, 9 Mass. 36, 6 Am. Dec. 22; Kincaid v. Brittain, 5 Sneed, 123; Parker v. Brown, 15 N. H. 188.

[1] Brooks v. Mohl, 104 Minn. 404, 17 L.R.A.(N.S.) 1195, 124 Am. St. Rep. 629, 116 N. W. 931; Dade v. Shively, 8 Kan. 277. See, also, Schnelle etc. Lumber Co. v. Barlow, 34 Fed. 853; Eames v. Armstrong, 146 N. C. 1, 59 S. E. 165, 125 Am. St. Rep. 436.

or agreement. A deed conveyed a tract of land describing it by metes and bounds, and at the close of the description of the property added, "together with the right of way in, upon, and over a street thirty-five feet in width, called Minna street, running from Tenth street to the southwesterly line of the lot of land thereby conveyed (to wit, said last-described parcel of land), said street forever to be and remain free and open as a public street." After the death of the grantor, the land, including the street, was distributed to his heirs, and the grantee requested that the street be kept open, and this request being refused, he brought an action for specific performance. The court held that if the language constituted a covenant, it was one of seisin, of warranty, or of quiet enjoyment; if it should be regarded as a covenant of seisin, it was broken as soon as executed, and a claim for the breach should have been presented to the administratrix of the grantor's estate, and if considered as a covenant of warranty or quiet enjoyment, the breach occurring after the death of the covenantor, the heirs, as they were not named in the covenant, were not bound.[2]

§ 905. **Covenant against encumbrances.**—This covenant is intended to protect the grantee against rights or interests in third persons, which, while consistent with the fee being in the grantor, yet diminish the value of the estate.[3] As a general rule, this covenant does not run with the land, because, if an encumbrance exists, the covenant is broken as soon as it is made.[4] In South Carolina, however, it is held that the

[2] McDonald v. McElroy, 60 Cal. 484. It was also held in this case that the grantee had no right of way of necessity over the grantor's lands.

[3] Carey v. Daniels, 8 Met. 482; Prescott v. Trueman, 4 Mass. 629, 3 Am. Dec. 246; Chapman v. Kimball, 7 Neb. 399.

[4] Blondeau v. Sheridan, 81 Mo. 545; Cathcart v. Bowman, 5 Pa. St. 317; Clark v. Swift, 3 Met. 392; Mc Pike v. Heaton, 131 Cal. 109, 63 Pac. 179, 82 Am. St. Rep. 335; Woodward v. Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Waters v. Bagley, 3 Neb. (unof.) 106, 92 N. W. 637; Sears v.

covenant runs with the land, although it may be broken at once upon the making of the deed.[5] And in Indiana the same doctrine obtains.[6] In Iowa, although the covenant is considered as *in presenti,* nevertheless if a second or third grantee from the covenantee be compelled to remove the encumbrance to protect his title, he may sue upon the covenant and recover what he has been forced to pay.[7] In Illinois, a remote grantee may maintain an action against the original grantor, if the grantee sustains the damage, although the covenant is not considered as running with the land.[8] In Nebraska, this covenant

Broady, 66 Neb. 207, 92 N. W. 214; Thompson v. Richmond, 102 Me. 335, 66 Atl. 649; Brass v. Brandecar, 70 Neb. 35, 96 N. W. 1035. But see Cole v. Kimball, 52 Vt. 639; Boyd v. Belmont, 58 How. Pr. 513.

[5] McGrady v. Brisbane, 1 Nott & McC. 104. See also Tucker v. McArthur, 103 Ga. 409, 30 S. E. 283; Security Bank v. Holmes, 68 Minn. 538, 71 N. W. 699; Geiszler v. DeGraff, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659; Libby v. Hutchinson, 12 N. H. 190, 55 Atl. 547; In re Hanlin, 133 Wis. 140, 17 L.R.A.(N.S.) 1189, 113 N. W. 411.

[6] Martin v. Baker, 5 Blackf. 232; Whitern v. Krick, 31 Ind. App. 577, 68 N. E. 694.

[7] Knadler v. Sharp, 36 Iowa, 236.

[8] Richard v. Bent, 59 Ill. 43, 14 Am. Rep. 1. Justice Sheldon said: "Where the covenant of seisin is broken, and there is an entire failure of title, the breach is final and complete, the covenant is broken once for all; actual damages and all the damages that can result from the breach have accrued; the measure of damages is the purchase money and interest, which are at once recoverable. In such case the right of action is substantial, and its transfer may well be held to come within the rule prohibiting the assignment of *choses in action.* But as the covenant against encumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the encumbrance. And where there is the barren right of recovery of only nominal damages, the right of action is one only in name, and is essentially no right of action. It is distinguishable from an ordinary *chose in action.*"

[9] Chapman v. Kimball, 7 Neb. 399. In Massachusetts this covenant was originally not assignable: Whitney v. Dinsmore, 6 Cush. 124; Tufts v. Adams, 8 Pick. 547; Thayer v. Clemence, 22 Pick. 490. But this is now changed by statute: Gen. Stat., c. 89, § 17. See Foote v. Burnet, 10 Ohio, 332, 36 Am. Dec. 90. For a case holding that the easement of the public over flat-

is considered an agreement that the grantor has an unencumbered title, and it is not viewed as having the nature of a covenant of indemnity.[9]

§ 906. **Encumbrance defined.**—It is sometimes extremely difficult to determine whether or not a particular right in another is an encumbrance, within the meaning of the covenant against encumbrances. This difficulty arises from the fact that the word "encumbrance" does not admit of a general, and at the same time accurate, definition. Besides, the circumstances of each particular case must be considered. Take, for instance, the case of an outstanding lease. It can easily be imagined that, in many cases, the fact that a piece of property was leased for a number of years would, were the property sought for an investment, add to its value; while, if the purchaser desired the present possession of the property, the existence of a lease might detract from its market value. The definition of an encumbrance that finds the most favor is thus given by Bouvier: "Any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee." [1] To this general rule, the modification has been added that: "Nothing which constitutes a part of the estate, or which, as between the parties, is to be regarded as an incident to which the estate is subject, can be deemed an encumbrance." [2]

not built upon or inclosed, is not an encumbrance within the meaning of the usual covenant against encumbrances, see Montgomery v. Reed, 69 Me. 510.

[1] Bouv. Law Dict., tit. Encumbrances; 2 Greenleaf on Evidence, § 242. See Prescott v. Trueman, 4 Mass. 630, 3 Am. Dec. 246; Mitchell v. Warner, 5 Conn. 527; Carter v. Denman, 3 Zab. 273; Tuskegee etc. Co. v. Birmingham etc. Co. 161 Ala. 542, 23 L.R.A.(N.S.) 992, 49 So. 378, see, also, Dieterlen v. Miller, 99 N. Y. Supp. 699, 114 App. Div. 40.

[2] Dunklee v. Wilton R. R. Co., 4 Fost. (N. H.) 489.

§ 907. **What are considered encumbrances.**—A right to cut and maintain a drain is deemed an encumbrance;[3] so is a right to dam up the water of a stream passing through the land;[4] so is a right to maintain an artificial watercourse,[5] or a right to cut timber on the land conveyed.[6] A right of dower is also an encumbrance, and it is immaterial whether it is inchoate or consummate by the death of the husband.[7] The covenant is broken by the existence of a paramount private right of way,[8] or by the existence of taxes, due at the time the conveyance is executed,[9] or which levied subsequently have, by operation of law, relation back to the date of the

[3] Smith v. Sprague, 40 Vt. 43.

[4] Morgan v. Smith, 11 Ill. 199; Gin v. Hancock, 31 Me. 42. See Isele v. Arlington Five Cents Savings Bank, 135 Mass. 142; Gawtry v. Leland, 31 N. J. Eq. 385.

[5] Prescott v. White, 21 Pick. 341, 32 Am. Dec. 266.

[6] Spurr v. Andrew, 6 Allen, 420; Cathcart v. Bowman, 5 Barr. 319.

[7] Walker v. Deaver, 79 Mo. 664; Shearer v. Ranger, 22 Pick. 447; Jeter v. Glenn, 9 Rich. 376; Bigelow v. Hubbard, 97 Mass. 195; Russ v. Perry, 49 N. H. 549; Fuller v. Wright, 18 Pick. 405. See Donnell v. Thompson, 10 Me. 170, 25 Am. Dec. 216; Porter v. Noyes, 2 Greenl. 26, 11 Am. Dec. 30; Smith v. Cannel, 32 Me. 126; Hatcher v. Andrews, 5 Bush. 561; Blanchard v. Blanchard, 48 Me. 177; Runnells v. Webber, 59 Me. 488; Henderson v. Henderson, 13 Mo. 152; McAlpin v. Woodruff, 11 Ohio St. 120; Carter v. Denman, 3 Zab. 273. See, also, Selden v. Jones Co., 74 Ark. 348, 85 S. W. 778; Fishel v. Browning, 145 N. C. 71, 58 S. E. 759; and compare Cain v. R. Co., 124 Ky. 449, 99 S. W. 297. But see, Combs v. Combs, 130 Ky. 827, 114 S. W. 334. But see Powell v. Monson Co., 3 Mason, 355, where Judge Story said that, in his opinion, the covenant against encumbrances was not broken by an inchoate right of dower. See, however, Ward v. Ashbrook, 78 Mo. 515.

[8] Russ v. Steele, 40 Vt. 310; Wilson v. Cochran, 10 Wright, 233. See, also, Sherwood v. Johnson, 28 Ind. App. 277, 68 N. E. 645. But see McMullin v. Wooley, 2 Lans. 394; Wetherbee v. Bennett, 2 Allen, 428.

[9] Fuller v. Jillette, 9 Biss. 296; Ingalls v. Cooke, 21 Iowa, 560; Plowman v. Williams, 6 Lea (Tenn.), 268; Almy v. Hunt, 48 Ill. 45; Mitchell v. Pillsbury, 5 Wis. 410. And see Evans v. Saunders, 3 Lea (Tenn.), 734; Selden v. Jones Co., 89 Ark. 234, 116 S. W. 217; See, also, Rambo v. Armstrong (Colo.) 100 Pac. 586; White v. Gibson, 146 Mich. 547, 109 N. W. 1049; Cemansky v. Fitch, 121 Ia. 186, 96 N. W. 754; Patterson v. Capon, 125 Wis. 198, 102 N. W. 1083.

deed.[1] But, of course, if the taxes levied subsequently become a lien only from the time they are levied, or do not relate so far back as the time of the execution of the deed, they are not encumbrances.[2] There is no breach, however, if a portion of the land conveyed has been illegally sold for taxes.[3] The existence of a mortgage, a judgment, or any debt which has the effect of a lien upon the land, is an encumbrance.[4] To make a mortgage an encumbrance, it is essential that it should be a lien. If, therefore, for any cause, the mortgage is not a lien upon the premises, its existence is not a breach of the covenant.[5] It is held that taxes which are a lien, but not payable until afterward, are not an encumbrance within a covenant that there are no encumbrances suffered by the grantor.[6] This covenant is broken by the existence of a prior covenant to which the land is subject, that a particular fence shall be erected or maintained,[7] or that no intoxicating liquor

[1] Rundell v. Lakey, 40 N. Y. 514; Hutchins v. Moody, 30 Vt. 656, 34 Vt. 433; Long v. Moler, 5 Ohio St. 272; Overstreet v. Dobson, 28 Ind. 256; Peters v. Myers, 22 Wis. 602; Blossom v. Van Court, 34 Mo. 394, 86 Am. Dec. 114.

[2] Jackson v. Sassaman, 5 Casey, 109; Tull v. Royston, 30 Kan. 617. That tax must be a lien, see White v. Gibson, 146 Mich. 547, 109 N. W. 1049. That special assessments constituting a lien are within meaning of the covenant, see Foley v. Haverhill, 144 Mass. 352, 11 N. E. 554; Pierse v. Bronnenberg, 40 Ind. App. 662, 81 N. E. 739, 82 N. E. 126; Lafferty v. Milligan, 165 Pa. 534, 30 Atl. 1030. See, also, Bowers v. Real Estate Co., 28 R. I. 329, 67 Atl. 324. That lien must have attached prior to conveyance, see Maloy v. Holl, 190 Mass. 277, 76 N. E. 452; Bowers v. Real Estate Co., 28 R. I. 329, 67 Atl. 521.

[3] Cummings v. Holt, 56 Vt. 384. See, also, in this connection, White v. Gibson, 146 Mich. 547, 109 N. W. 1049.

[4] Norton v. Babcock, 2 Met. 510; Bean v. Mayo, 5 Greenl. 94; Shearer v. Ranger, 22 Pick. 447; Jones v. Davis, 24 Wis. 229. See, also, McLaughlin v. Royce, 108 Ia. 254, 78 N. W. 1105; Whittern v. Krick, 31 Ind. App. 577, 68 N. E. 694.

[5] Case v. Erwin, 18 Mich. 434.

[6] Smith v. Eigerman, 5 Ind. App. 269, 51 Am. St. Rep. 281. But see Cochran v. Guild, 106 Mass. 29, 8 Am. Rep. 296.

[7] Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633; Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550. But see Parish v. Whitney, 3 Gray, 516.

shall be sold on the premises.[8] Where a daughter had, under the provisions of her father's will, the right of living in a part of a house, of which the whole was afterward conveyed by the residuary devisee, it was held that this paramount right of the daughter was a breach of the covenant against encumbrances made by such residuary devisee.[9] A restriction against building, unless it be done in a specified way, is also an encumbrance.[1] A covenant against encumbrances will extend to an outstanding lease.[2] Where the grantee, however, at the time of the grant takes an assignment of the lease the rule would be different.[3] Conditions of such a nature that their nonperformance may cause a forfeiture of the estate are encumbrances.[4] So are covenants which run with the land. Thus, a covenant to maintain a division fence along the entire land between the premises conveyed and certain adjoining land, is an encumbrance.[5] An action on the covenant does not accrue until an ouster takes place, or the grantee has been compelled to extinguish the covenant to protect his estate.[6] As a general rule it may be said that the existence of an easement on the land conveyed which diminishes its

[8] Hatcher v. Andrews, 5 Bush. 561.

[9] Jarvis v. Buttrick, 1 Met. 480.

[1] Roberts v. Levy, 3 Abb. Pr., N. S., 311. See, also, Locke v. Hale, 165 Mass. 20, 42 N. E. 331.

[2] Fritz v. Pusey, 31 Minn. 368. See, also, Demars v. Koehler, 62 N. J. L. 203, 41 Atl. 720, 72 Am. St. Rep. 642; Crawford v. McDonald, 84 Ark. 415, 106 S. W. 206; La Rue v. Parmele, 73 Neb. 663, 103 N. W. 304; Brown v. Taylor, 115 Tenn. 1, 4 L.R.A.(N.S.) 309, 88 S. W. 933.

[3] Mann v. Montgomery, 6 Cal. App. 646, 92 Pac. 875.

[4] Jenks v. Ward, 4 Met. 412. But see Estabrook v. Smith, 6 Gray, 572, 66 Am. Dec. 445.

[5] Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550. And see Bronson v. Coffin, 108 Mass. 175, 187, 11 Am. Rep. 335; Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633. But see, also, Parish v. Whitney, 3 Gray, 516; Plymouth v. Carver, 16 Pick. 183. Such an agreement is construed as a covenant and not as a condition: Hartung v. Witte, 59 Wis. 285. But see Floyd v. Clark, 7 Abb. N. C. 136.

[6] Hunt v. Marsh, 80 Mo. 396; Patterson v. Yancy, 81 Mo. 379.

value violates the covenant.[7] An easement to cut ice is an incumbrance,[8] so is the right of a mechanic to file a lien.[9]

§ 908. **Water rights.**—A right to erect and maintain a dam has been held to be an encumbrance.[1] But where the owner of an upper and lower mill and dam had sold them to different persons, it was held that the existence of the lower dam, with the right of raising water by it to the point at which it stood at the time of the execution of the deed, was not a breach of the covenant against encumbrances, which the conveyance of the upper mill contained. "The right to the use of the water below the granted premises, as modified by the appropriation previously made for the lower mill, was not, in legal contemplation, an encumbrance, but rather in the nature of parcel of such lower estate."[2] Where a millpond caused by a dam on adjoining property had flooded a tract of land for a sufficient length of time to create a prescriptive right, it was held that this right of flooding was not an encumbrance.[3] It has been held that if a millowner above certain land has the right to have a natural stream of water pass over land below, such a right is not an encumbrance.[4] This covenant relates to rights existing in the property conveyed in favor of parties other than the grantor, which, as against the grantor

[7] Ensign v. Colt, 75 Conn. 111, 52 Atl. 829; Weiss v. Binnian, 178 Ill. 241, 52 N. E. 969; Teague v. Whaley, 20 Ind. App. 26, 50 N. E. 41; Denman v. Mentz, 63 N. J. Eq. 613, 52 Atl. 1117; Ensign v. Colt, 75 Conn. 811, 52 Atl. 829.

[8] Weiss v. Binnian, 178 Ill. 241, 52 N. E. 969.

[9] Duffy v. Sharp, 73 Mo. App. 316. See as to other incumbrances: Denman v. Mentz, 63 N. J. Eq. 613, 52 Atl. 1117; Jones v. Adams, 162 Mass. 224, 38 N. E. 437; Patten v. Fitz, 138 Mass. 456.

[1] Ginn v. Heath, 31 Me. 42.

[2] Carey v. Daniels, 8 Met. 466.

[3] Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85. This case was decided on the principle that where property is notoriously subject at the time to some easement or servitude affecting its physical condition, purchasers take it subject to such rights. But this principle is not universally accepted.

[4] Prescott v. Williams, 5 Met. 429, 39 Am. Dec. 638.

and his assigns, may be exercised upon and enforced against such property. Hence, where a millpond and surrounding lands, portions of which were sometimes flooded, are owned by one person, the idea of an easement does not attach to such use of the water, while such person owns all the land. The land with the stream and use of it as a water right constitute an entire estate, of which the dam and its use are parcel, and neither, it is held, can be considered an encumbrance within the meaning of the covenant.[5]

§ 909. **Right to use stairway in common.**—A deed was executed with covenants. The owner of adjoining premises had the right to use in common a stairway which was a part of the premises conveyed. An action was brought for a breach of the covenant against encumbrances, on the ground that the right to such use was a breach. It was contended before the court that, because the stairway was not in existence when the covenant giving the adjoining owner the use of the stairway was made, the encumbrance did not run with the land, but was simply a personal covenant between the immediate parties to it. The court, however, decided that, whatever the previous condition of things may have been, there was a valid subsisting encumbrance, in the nature of an easement, upon the premises, and that the covenant against encumbrances was clearly broken by the existence of this easement.[6]

§ 910. **Public highways as encumbrances.**—The decisions of the courts as to whether the existence of a public highway should be considered an encumbrance are conflicting, and in the same State, in some instances, the course of

[5] Harwood v. Benton, 32 Vt. 724. For other cases relative to water rights, see Dunklee v. Wilton R. R. Co., 4 Fost. (N. H.) 489; Gould v. Boston Co., 13 Gray, 442; Morgan v. Smith, 11 Ill. 194; Fitch v. Seymour, 9 Met. 462.

[6] McGowen v. Myers, 60 Iowa, 256.

decision has been vacillating. Decisions may be found to the effect that a public road is not an encumbrance.[7] And in Indiana, this was at first laid down as the law.[8] But subsequently this decision was overruled, and the court decided that a public road or street is an encumbrance.[9] And in most of the

[7] Peterson v. Arthurs, 9 Watts, 152; Wilson v. Cochran, 10 Wright, 233; Whitbeck v. Cook, 15 Johns. 483, 8 Am. Dec. 272; Jordan v. Eve, 31 Gratt. 1. See, also, Harrison v. Des Moines etc. R. Co., 91 Ia. 114, 58 N. W. 1081. In Wilson v. Cochran, *supra*, Woodward, C. J., speaking for the court, said: "Public roads are laid out in Pennsylvania by authority of the law, in pursuance of the authority of Penn, who established the custom of allowing to every grantee six acres in the hundred as a compensation for the roads that should thereafter be opened, and they confer on the public merely a right of passage, whilst the title to the soil is left undisturbed in the owner of the land through which they pass. A purchaser who sees such a road that has been used thirty years upon the land he is buying, has no right to consider it an encumbrance within the meaning of a covenant against encumbrances." In Peterson v. Arthurs, the court, per Mr. Justice Kennedy, observed: "Although a public highway, no doubt, is, in many instances, an injury instead of a benefit to the holder or owner of the land upon which it is located, and therefore tends to lessen its value in the estimation of a purchaser, who, before he closes his contract for his purchase of land, has seen it and made himself acquainted with its locality and the state and condition of it; and, consequently, if there be a public road or highway open and in use upon it, he must be taken to have seen it, and to have fixed in his own mind the price that he was willing to give for the land, with a reference to the road, either making the price less or more, as he conceived the road to be injurious or advantageous to the occupation or enjoyment of the land." See, also, Ake v. Mason, 101 Pa. St. 17; Cincinnati v. Brachman, 35 Ohio St. 289.

[8] Scribner v. Holmes, 16 Ind. 142.

[9] Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731. After the decision had been made, a petition for a rehearing was filed, and Chief Justice Buskirk, in delivering the opinion of the court in this petition, said: "It is insisted that our ruling is in direct conflict with Scribner v. Holmes, 16 Ind. 142. That case does not seem to have received much consideration. The opinion is as follows: '*Per curiam.*—This case was tried on May 16th, on which day a motion for new trial was overruled, exception taken, and leave given to file a bill of exceptions in thirty days. The bill was not filed until July 6th. That was too late. A legal public highway in actual use is not embraced in a general covenant against encum-

States, the rule prevails that a public highway or road is an

brances. It would be unreasonable that it should be. See Rawle on Covenants, 141, et seq.' The court having held in that case that the bill of exceptions did not constitute a part of the record, there was no question presented for decision, and all that was said in reference to what encumbrances were embraced in the covenants of a deed was *obiter*. Although what was said was in direct conflict with the well-considered case of Medler v. Hiatt, 8 Ind. 171, no reference was made to such case. Besides, the authorities cited do not sustain the ruling. Rawle, after referring to the cases of Whitbeck v. Cook, 15 Johns. 483, 8 Am. Dec. 272, and Peterson v. Arthurs, 9 Watts, 152, says: 'But whatever weight may be due to these decisions, it cannot be denied that the current of authority has set strongly the other way, and the ruling in Kellogg v. Ingersoll, 2 Mass. 101, has been approved and sustained in nearly all the New England States, and it appears to be definitely settled there that a public highway does constitute at law a breach of this covenant. And in a very recent case in Illinois, these decisions have been approved and applied to the case where the encumbrance complained of was the right granted to a railway company to construct their road across the land conveyed.' Counsel also refer us to several cases in Pennsylvania in conflict with our ruling. In the original opinion, it was stated that the ruling had been uniform in that State in the opposite direction, and the reason of such ruling was stated. In Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85, the rule as it exists in Pennsylvania is approved and applied. On the other hand, our ruling is supported by many adjudged cases which were not cited in the original opinion, and which we now cite: Herrick v. Moore, 19 Me. 313; Haynes v. Young, 36 Me. 557; Lamb v. Danforth, 59 Me. 322, 8 Am. Rep. 426; Pritchard v. Atkinson, 3 N. H. 335; Butler v. Gale, 27 Vt. 739; Clark v. Estate of Conroe, 38 Vt. 469; Parish v. Whitney, 3 Gray, 516; Harlow v. Thomas, 15 Pick. 66; Sprague v. Baker, 17 Mass. 586; Giles v. Dugro, 1 Duer, 331; Hubbard v. Norton, 10 Conn. 422; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426. In the last cases cited, the court, after referring to the rule as it exists in the New England States, says: 'Where the question has come up, the same doctrine has been approved in the Western States.' The court then reviews the cases in Illinois and Iowa, which are cited in the original opinion. . . . Then, as a highway or railway located and running over one's land is an encumbrance, and, to a greater or less degree, obstructs and encumbers the free use and enjoyment of the land, it follows that a person selling land thus encumbered, and covenanting that it is not, must be held to perform his covenants by its removal, or respond in damages. The seller may protect himself by excepting such encumbrances from the operation of

encumbrance, whose existence is a breach of the contract.[1] The existence of the liability of land to be assessed for street

the covenants of his deed." And see Gillfillan v. Snow, 51 Ind. 305, 308.

[1] Haynes v. Young, 36 Me. 557; Butler v. Gale, 1 Williams (Vt.), 742; Herrick v. Moore, 19 Me. 313; Pritchard v. Atkinson, 3 N. H. 335; Parish v. Whitney, 3 Gray, 516; Hubbard v. Norton, 10 Conn. 422; Kellogg v. Ingersoll, 2 Mass. 101. In Butler v. Gale, 1 Williams (Vt.), 742, the opinion of the court was delivered by Chief Justice Redfield, who, in the course of it, said: "In this country, where our tenures are strictly allodial, we are very much accustomed to consider that, if another really possesses any rights in our land, it is so far forth an encumbrance upon our title. Whether it be small or large in amount, whether it be a mortgage or a right to flow a portion or all of the land for a shorter or longer period during the year, or to draw water from a well or spring, or to water cattle at a brook, or to pass across the land on foot, or with teams, or to draw wood in winter only across the land, or to build and maintain a railway perpetually, or a highway, is certainly of no importance in determining the mere technical question of encumbrance or no encumbrance. And it can make no difference whether this right is notorious or not. If the question of an encumbrance were to be determined by its notoriety, or what is the same thing, by its being known to the purchaser, it must, to preserve consistency, be extended to all encumbrances. And, in that view, the grantee could not recover upon this covenant for paying a mortgage which he knew existed at the time of his purchase. But the contrary is perfectly well established, and in regard to these rights of way, if they existed only in a prior grant, and were not known to the grantee at the time of purchase, no one could claim that they did not constitute a breach of the covenant against encumbrances. And if the question whether a highway is an encumbrance upon land is to be determined by the fact of its being open and notorious, it resolves itself into this, whether it was the intention of the parties to treat it as an encumbrance or not. And the same rule should equally apply to a mortgage which the purchaser agreed to pay. But no lawyer will contend that in such a case, if the grantor covenants against all encumbrances, he is not liable to refund the money paid upon the mortgage by the grantee; that is, he is so liable at law. This is the written contract of the parties, and it cannot be set right in a court of law, where the writing is the exclusive evidence of the contract. But in such a case, the party must resort to a court of equity to restrain the other party from claiming indemnity against an encumbrance which was intended to be excepted from the covenant. And the same is no doubt true of a covenant against encumbrances so far as highways are concerned.

improvements is a breach of this covenant, contained in a deed which was executed between the time of improving the street and levying the assessment.[2]

§ 911. Right of way for railroad.—On the same principle which declares that the existence of a public road is an encumbrance, it is held that, also, is a right of way for a railroad.[3] The supreme court of Illinois, after stating that a public highway is an encumbrance, says the same rule must apply to a right of way for a railroad, and observes: "When a purchaser obtains title by deed without covenant, he, of course, takes it subject to all defects and encumbrances it may be under at the time of the conveyance." One of the arguments that may be adduced in support of the proposition, that a right of way for a railroad should not be considered as an encumbrance within the meaning of this covenant, is the fact that such right of way must have been known to the parties. We have considered this point in a previous section, and found that knowledge of the existence of the encumbrance was no defense to an action upon the covenant. If the grantor sees proper to insert covenants in his deed, he does so voluntarily, and should, in case of a breach, suffer all the consequences

Ordinarily, a court of equity would readily suppose the encumbrance of an existing highway or railway, or any other known and notorious right of a similar character, as a right to draw water from a spring, exercised by another at the time of the conveyance, could not have been intended to be indemnified against, and therefore should have been excepted from the operation of the covenant, and would, no doubt, so require the parties to treat the deed."

[2] Fagan v. Cadmus, 46 N. J. L. 441.

[3] Barlow v. McKinley, 24 Iowa, 69; Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290; Van Wagner v. Van Nostrand, 19 Iowa, 422; Williamson v. Hall, 62 Mo. 405; Kellogg v. Malin, 50 Mo. 500, 11 Am. Rep. 426, s. c. 62 Mo. 429. See Haynes v. Young, 36 Me. 557; Giles v. Dugro, 1 Duer, 331; Harlow v. Thomas, 15 Pick. 66; Lamb v. Danforth, 59 Me. 322, 8 Am. Rep. 426. See, also, Tuskegee etc. Co. v. Birmingham etc. Co., 161 Ala. 542, 23 L.R.A.(N.S.) 992, 49 So. 378; Whiteside v. Magruder, 75 Mo. App. 364.

which ordinarily follow. The reason which may induce a purchaser to insist on a covenant, is that he fears a failure of, or some defect in the title, and seeks to protect himself in this mode. The grantor may covenant for a good title when both he and the grantee know that the title is defective. As said by the court in Illinois: "If he were perfectly assured on these questions, he would seldom be tenacious in obtaining a covenant or warranty. If, then, a private or public way is an encumbrance, and we have seen that it is, it follows that, in principle, a turnpike or railway legally located, and running over a piece of land, upon the same ground and for the same reasons must be held to be an encumbrance, as it in an equal or greater degree obstructs or encumbers the free use of the lands." [4]

§ 912. **Right to light.**—One of the chief difficulties in harmonizing the decisions upon the subject of what things are to be considered encumbrances, consists in the fact that different courts take different views of the importance to be attached to easements that are known to the purchaser at the time of the conveyance. In the case of highways, some courts, in deciding them not to be encumbrances, have been led to this conclusion by the consideration that their existence was notorious. On the other hand, it has been stated that this circumstance was entitled to no weight, in determining what were encumbrances. On the ground that "the parties, in the absence of anything to the contrary, are presumed to have

[4] Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290. Land for right of way was conveyed to a railroad company in consideration, among other things, of free passage for plaintiff at all times over the road, and the deed provided for a forfeiture on failure to comply with any condition. The road was conveyed to another, but no agreement was made in regard to plaintiff's having a pass. It was held that though the grantee furnished a pass for a while, plaintiff could not recover damages from it for failure to continue the pass, as his right of action was against the company to whom the conveyance was originally made: Eddy v. Hinnant, 82 Tex. 354.

contracted with reference to the then condition and state of the property, and if an easement to which it is subject be open and visible, and of a continuous character, the purchaser is supposed to have been willing to take the property, as it was at the time, subject to such burthen," in a case where the owner of two adjoining lots leased one of them for a term of years, and covenanted that the lessee should have the right to open certain windows, obtaining their light from the adjoining lot, and subsequently conveyed this adjoining lot, with a covenant of warranty against his acts, it was held that the existence of the windows, and the right to their preservation, was not a breach of the covenant.[5]

§ 913. **Purchaser's knowledge of encumbrance.**—It has sometimes been intimated that if the purchaser has notice of encumbrances at the time he takes his deed, he should be deemed to take the land subject to them, and if he desires protection against them, they should be expressly mentioned in the covenant.[6] But notwithstanding some statements to the contrary, it seems to be settled by authority that the fact that encumbrances are known to the purchaser to exist at the time of the execution of the deed does not affect his right to recover on the covenant against encumbrances, unless they are excepted in terms from its operation.[7] "It is no answer to the

[5] James v. Jenkins, 34 Md. 1, 6 Am. Rep. 300. "As the wall had been erected," said the court, "and the lights therein were plainly to be seen when the appellant purchased the property overlooked by them, it is but rational to conclude that he contracted with reference to that condition of the property, and that the price was regulated accordingly. . . . The grantor, by his covenant, warranted the premises as they were, and by no means intended to warrant against an existing easement, which was open and visible to the appellant, and over which the former had no power or control whatever."

[6] 2 Sugden on Vendors, 449. And see as to covenant of warranty, Bennett v. Buchan, 76 N. Y. 386.

[7] Snyder v. Lane, 10 Ind. 424; Funk v. Voneida, 11 Serg. & R. 112, 14 Am. Dec. 617; Hubbard v. Norton, 10 Conn. 422; Lloyd v. Quimby, 5 Ohio St. 265; Suydam v. Jones, 10 Wend. 185, 25 Am. Dec. 552; Perkins v. Williams, 5 Cold.

purchaser's complaint to say it was his duty to search the record, and to have protected himself by some special covenant against this specific encumbrance. It was no part of this case that he had actual notice, but if he had, it could make no difference." [8] It has been held, however, by a divided court, that a breach of the usual covenants found in a deed does not

513; Sargent v. Gutterson, 13 N. H. 473; Worthington v. Curd, 22 Ark. 285; Harlow v. Thomas, 15 Pick. 70; Medler v. Hiatt, 8 Ind. 173; Shanahan v. Perry, 130 Mass. 460. A covenant against encumbrances covers those known as well as those unknown: Burr v. Lancaster, 30 Neb. 688, 27 Am. St. Rep. 488; Clark v. Monroe, 38 Vt. 469; Butler v. Gale, 27 Vt. 739; Watts v. Fletcher, 107 Ind. 391, 8 N. E. Rep. 111; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731; Quick v. Taylor, 113 Ind. 540, 16 N. E. Rep. 588; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Miller v. Desverges, 75 Ga. 407; Smith v. Eason, 46 Ga. 316; Prichard v. Atkinson, 3 N. H. 335; Fletcher v. Chamberlin, 61 N. H. 438; Foster v. Foster, 62 N. H. 532; Van Wagner v. Van Nostrand, 19 Iowa, 422; Gerald v. Elley, 45 Iowa, 322; Barlow v. McKinley, 24 Iowa, 69; McGowen v. Myers, 60 Iowa, 256; Farrington v. Tourtelott, 39 Fed. Rep. 738; Barlow v. Delaney, 40 Fed. Rep. 97; Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290; Long v. Moler, 5 Ohio St. 271; Doctor v. Darling, 22 N. Y. Rep. 594; Huyck v. Andrews, 113 N. Y. 81, 3 L.R.A. 789, 10 Am. St. Rep. 432; Butt v. Riffe, 78 Ky. 252; Hubbard v. Norton, 10 Conn. 422; Herrick v. Moore, 19 Me. 313; Haynes v. Young, 36 Me. 557; Lamb v. Danforth, 59 Me. 322, 8 Am. Rep. 426; Kellogg v. Ingersoll, 2 Mass. 97; Parish v. Whitney, 3 Gray, 516; Sprague v. Baker, 17 Mass. 586; Harlow v. Thompson, 15 Pick. 66; Ladd v. Noyes, 137 Mass. 151. But see, as to a public road, Heymes v. Estey, 116 N. Y. 501, 15 Am. St. Rep. 421; Huyck v. Andrews, 113 N. Y. 81, 3 L.R.A. 789, 10 Am. St. Rep. 432; Bennett v. Keehn, 67 Wis. 154. See, also, Browne v. Taylor, 115 Tenn. 1, 4 L.R.A.(N.S.) 309, and note, 88 S. W. 933; McCall v. Wilkes, 121 Ga. 722, 49 S. E. 722; Allen v. Taylor, 121 Ga. 841, 49 S. E. 799; Yancey v. Tatlock, 93 Ia. 386, 61 N. W. 997; Newburn v. Lucas, 126 Ia. 85, 101 N. W. 730; Demars v. Koehler, 62 N. J. L. 203, 41 Atl. 720, 72 Am. St. Rep. 642; Osburn v. Pritchard, 104 Ga. 145, 30 S. E. 656; Whittern v. Krick, 31 Ind. App. 577, 68 N. E. 694; Sherwood v. Johnson, 28 Ind. App. 277, 62 N. E. 645; Weiss v. Binnian, 178 Ill. 241, 52 N. E. 969.

[8] Funk v. Voneida, 11 Serg. & R. 110, 14 Am. Dec. 617, per Duncan, J. See, also, Taylor v. Gilman, 25 Vt. 413; Dunn v. White, 1 Ala. 645; Morgan v. Smith, 11 Ill. 200; Grice v. Scarborough, 2 Spear, 649, 42 Am. Dec. 391; Barlow v. Mckinley, 24 Iowa, 70; Van Wagner v. Van Nostrand, 19 Iowa, 427.

arise from the fact that a public road has been laid out across the land, as the grantee has constructive notice of this from the public records.[9] And it is also held that no breach of the usual covenants in a deed is caused by the existence of railways over the land at the time of its sale, the purchaser being presumed to have taken the land with knowledge of them.[1]

§ 914. **Parol evidence to exclude encumbrance from covenant.**—It is a well settled rule that parol evidence is inadmissible to contradict a written contract. Accordingly, where it is intended by the parties that a certain encumbrance is to be excluded from the general operation of the covenant, such fact should be mentioned in the deed. When both parties are cognizant of encumbrances existing on the land to be conveyed, this covenant is frequently made and accepted. The grantor may intend to discharge them from the purchase money, or to remove them at some future period, and the purchaser has a right to rely on the language of the covenant.[2] In some states, parol evidence is admissible to show that the plaintiff, at the time of the execution of the deed, agreed himself to discharge the encumbrance.[3] In a case in Missouri, the deed contained a covenant against encumbrances, and the purchaser having paid certain taxes, brought an action to recover the amount so paid. The court, however, permitted the defendant to show that the amount of the taxes was a portion of the consideration price, and that the purchaser agreed to as-

[9] Ake v. Mason, 101 Pa. St. 117.

[1] Smith v. Hughes, 50 Wis. 620.

[2] See, generally, McGowen v. Myers, 60 Iowa, 256; Burbank v. Pillsbury, 48 N. H. 483, 97 Am. Dec. 633; Long v. Moler, 5 Ohio St. 274; Harlow v. Thomas, 15 Pick. 70; Refeld v. Woodfolk, 22 How. 326; Keith v. Day, 15 Vt. 670; Jaques v. Esler, 3 Green Ch. 463; Skinner v. Starner, 12 Harris, 123; McLeod v. Skiles, 81 Mo. 595; Dunn v. White, 1 Ala. 645; Rawle on Covenants, tit. 121.

[3] Fitzer v. Fitzer, 29 Ind. 468; Pitman v. Conner, 27 Ind. 337; Allen v. Lee, 1 Ind. 58, 48 Am. Dec. 352; Sidden v. Riley, 22 Ill. 111. See Leland v. Stone, 10 Mass. 459, afterward limited in the later case of Spurr v. Andrew, 6 Allen, 422.

sume their payment.[4] But while the rule is not universal, it is generally held that aside from the question of fraud or mistake, parol evidence is not admissible to show that a covenant against encumbrances, where no exception is contained in the deed itself, was not intended by the parties to apply to a particular encumbrance.[5] It has been held that the declarations of the grantor made before the execution of the deed, are admissible in evidence for the purpose of showing that the warranty was intended to cover certain liens or defects in title of which the grantee had knowledge.[6]

§ 915. **Comments.**—On purely equitable principles, it seems harsh to say that where there is a well-known easement or encumbrance, the covenant should embrace it. But if the rule which prohibits the introduction of parol evidence to vary or contradict a written agreement were departed from, disastrous consequences would result. It is safer to declare that the covenant against encumbrances shall apply to all encumbrances, whether known to exist or not, than it is to admit parol evidence to determine what were the unexpressed and secret intentions of the parties in each particular case. When it is once understood that this covenant means just what its language indicates, every encumbrance desired to be excluded from its operation can be excepted by express terms in the deed. Where the covenantor attempted to show that it was agreed, at the time the deed was executed, that the security of the covenantee should consist in the assignment of a certain judgment, and that the covenantor should incur no liability on

[4] Laudman v. Ingram, 49 Mo. 212.

[5] Harlow v. Thomas, 15 Pick. 70; Spurr v. Andrew, 6 Allen, 422; Townsend v. Weld, 8 Mass. 146; McKennan v. Doughman, 1 Penn. 417; Donnell v. Thompson, 10 Me. 177, 25 Am. Dec. 216; Collingwood v. Irwin, 3 Watts, 306; Batchelder v. Sturgis, 3 Cush. 203; Long v. Moler, 5 Ohio St. 271. And see, also, Van Wagner v. Van Nostrand, 19 Iowa, 428; Grice v. Scarborough, 2 Spear, 649, 42 Am. Dec. 391; Suydam v. Jones, 10 Wend. 185, 25 Am. Dec. 552.

[6] Skinner v. Moye, 69 Ga. 476.

his covenant, the court said: "It is impossible to avoid seeing that to admit such proof would not only be admitting evidence to contradict, but to alter and change most materially the character and effect of the deed. Instead of being a deed with covenant of general warranty, as it purports on its face, it would, by the operation of the evidence proposed to be given, become a deed, without any engagement whatever on the part of the grantor for the goodness of the title."[7] But if through fraud or mistake the deed does not contain the true agreement of the parties, it may be reformed in equity.[8]

§ 916. Damages for breach of covenant against encumbrances.—This covenant is considered to be one of indemnity. If the covenantee has not removed the encumbrance, it may be that he will never be disturbed by it. He may discharge the encumbrance, but if he does not do so the universal rule is that while it remains undischarged and he has suffered no actual injury, he is entitled to only nominal damages.[9] "The doctrine is well settled that in an action of cove-

[7] Collingwood v. Irwin, 3 Watts, 306.

[8] Busby v. Littlefield, 11 Fost (N. H.) 199; Haire v. Baker, 1 Seld. 360; Stanley v. Goodrich, 18 Wis. 505; Taylor v. Gilman, 25 Vt. 413; Butler v. Gale, 27 Vt. 744; Metcalf v. Putnam, 9 Allen, 99.

[9] De La Vergne v. Norris, 7 Johns. 358, 5 Am. Dec. 281; Selleck v. Griswold, 57 Wis. 291; Reasoner v. Edmundson, 5 Ind. 393; Baldwin v. Munn, 2 Wend. 405, 20 Am. Dec. 627; Brady v. Spruck, 27 Ill. 478; Andrews v. Davison, 17 N. H. 413, 43 Am. Dec. 606; Mills v. Saunders, 4 Neb. 190; Brooks v. Moody, 20 Pick. 574; Bean v. Mayo, 5 Greenl. 94; Davis v. Lyman, 6 Conn. 255; Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 229; Robbins v Arnold, 11 Ill. App. 434; Hall v Dean, 13 Johns. 105; Randall v. Mallett, 14 Me. 51; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Snell v. Iowa Homestead Co., 59 Iowa, 701; Wyman v. Ballard, 12 Mass. 304; Richardson v. Dorr, 5 Vt. 20; Eaton v. Lyman, 30 Wis. 41; Stewart v. Drake, 4 Halst. 141; Garrison v. Sandford, 12 N. J. L. 261; Braman v. Bingham, 26 N. Y. 483; Foote v. Burnett, 10 Ohio, 317, 36 Am. Dec. 90; Johnson v. Collins, 116 Mass. 392; Jenkins v. Hopkins, 8 Pick. 348; Cormings v. Little, 24 Pick. 269; Tufts v. Adams, 8 Pick. 547; Leffingwell v. Elliott, 8 Pick. 457, 19 Am. Dec. 343; Clark v. Swift, 3 Met. 390;

nant against encumbrances, if the plaintiff has extinguished the encumbrance, he is entitled to recover the amount paid for it; but if he has not bought it in, he is only entitled to nominal damages." [1] And the cost of extinguishing the encumbrance is always the measure of damages, irrespective of the value of the land or the purchase price.[2] Where an unexpired lease is the breach, the value of the occupation of the premises during the time for which the grantee has been deprived of their use is the measure of damages.[3]

Thayer v. Clemence, 22 Pick. 490; Patterson v. Stewart, 6 Watts & S. 528, 40 Am. Dec. 586; Willetts v. Burgess, 34 Ill. 500; Cheney v. City National Bank, 77 Ill. 562; Richard v. Bent, 59 Ill. 38, 14 Am. Rep. 1; Osgood v. Osgood, 39 N. H. 209; Smith v. Jefts, 44 N. H. 482; Willson v. Willson, 25 N. H. 235, 57 Am. Dec. 320; Standard v. Eldredge, 16 Johns. 254; Smith v. Ackerman, 5 Blackf. 541; Pomeroy v. Burnett, 8 Blackf. 142; Pillsbury v. Mitchell, 5 Wis. 17; Herrick v. Moore, 19 Me. 313; Clark v. Perry, 30 Me. 151; Runnells v. Webber, 59 Me. 488; Reed v. Pierce, 36 Me. 455, 58 Am. Dec. 761; Edington v. Nix, 49 Mo. 134; St. Louis v. Bissell, 46 Mo. 157; Funk v. Voneida, 11 Serg. & R. 110, 14 Am. Dec. 617; Beecher v. Baldwin, 55 Conn. 419, 3 Am. St. Rep. 57; Marsh v. Thompson, 102 Ind. 272; Sac. County Bank v. Hooper, 77 Iowa, 435; Harwood v. Lee, 85 Iowa, 622; Lane v. Richardson, 104 N. C. 642; Bradshaw v. Crosby, 151 Mass. 235; Johnson v. Colins, 116 Mass. 392; Ensign v. Colt (Conn.) 52 Atl. 829, 946; McGuckin v. Milbank, 152 N. Y. 297, 46 N. E. 490; Brown v. Taylor, 115 Tenn. 1, 4 L.R.A.(N.S.) 309, 112 Am. St. Rep. 811, 88 S. W. 933. In re Hanlin, 133 Wis. 140, 17 L.R.A.(N.S.) 1189, 113 N. W. 411; Fishel v. Browning, 145 N. C. 71, 58 S. E. 759; Mandigo v. Conway, 90 N. Y. Supp. 324, 45 Misc. Selden v. Jones Co., 89 Ark. 234, 116 S. W. 217; Eagan v. Yeoman (Tenn.) 46 S. W. 1012).

[1] Pillsbury v. Mitchell, 5 Wis. 17, 21, per Cole, J. See, also, Price v. Deal, 90 N. C. 290.

[2] Walker v. Deaver, 79 Mo. 664; Morehouse v. Heath, 99 Ind. 509.

[3] Fritz v. Pusey, 31 Minn. 368. See, also, Browning v. Stillwell, 86 N. Y. Supp. 707, 42 Misc. 346; Toch v. Horowitz, 87 N. Y. Supp. 455; Wragg v. Mead, 120 Iowa, 319, 94 N. W. 856; Brown v. Tailor, 115 Tenn. 1, 4 L.R.A.(N.S.) 309, 88 S. W. 933, 112 Am. St. Rep. 811 The damages awarded should be such as to indemnify the person for the loss actually sustained; Harrington v. Bean, 89 Me. 470, 36 Atl. 986; Loiseau v. Threlstad, 14 S. Dak. 257, 85 N. W. 189; Newburn v. Lucas, 126 Iowa, 85, 101 N. W. 730; McCrillis v. Thomas, 110 Mo. App. 699, 85 S. W. 673; Brass v. Vandecar, 70 Neb. 35, 96 N. W. 1035; Browning v. Stillwell,

§ 917. **Special injury.**—The rule just enunciated applies where there is a technical breach of the covenant by the existence of the encumbrance, but where it has not been discharged, and no actual injury has resulted. But if the covenantee has been really injured, he may recover damages for such injury, notwithstanding the fact that the encumbrance continues undischarged. A good illustration of this principle is found in a case where there was a paramount mortgage having a number of years to run upon a piece of land, covenanted to be free from encumbrances, and the creditors of the covenantee believing that the property he held might not be sufficient to pay off the encumbrance and all his debts, began to seek the collection of their claims. The covenantee in consequence made an assignment, and the court held that if the land was sold by process of law for so much less than the value of the mortgage, a recovery could be had on the covenant for the full amount of the mortgage.[4]

§ 918. **Removal of encumbrance by purchase.**—Where the encumbrance has been removed or paid off by the covenantee, the rule is that he is entitled as damages for a breach of the covenant, the amount that he has paid for this end, if the amount was reasonable and fair.[5] "In the absence of fraud,"

86 N. Y. Supp. 707, 42 Misc. 346. In Bailey v. Agawam etc. Bank, 190 Mass. 20, 3 L.R.A.(N.S.) 98, 76 N. E. 449, the court says: "A covenant against encumbrances, if broken, is broken at the date of the deed (Jenkins v. Hopkins, 9 Pick. 543), and the damages accrue at that date. The damages . . . are a just compensation for the injury actually suffered at that time."

[4] Funk v. Voneida, 11 Serg. & R. 110, 14 Am. Dec. 617. See Braman v. Bingham, 26 N. Y. 483. See, also, Sewall v. Clarke, 51 Cal. 227; Levitsky v. Johnson, 35 Cal. 41. See in this connection, Dana v. Goodfellow, 51 Minn. 375, 53 N. W. 656; Daggott v. Reas, 79 Wis. 60, 48 N. W. 127.

[5] Grant v. Tallman, 20 N. Y. 191, 75 Am. Dec. 384; Stoddard v. Gage, 41 Me. 287; Brandt v. Foster, 5 Iowa, 287; Farnum v. Peterson, 111 Mass. 148; Brown v. Broadhead, 3 Whart. 104; Andrews v. Appel, 22 Hun, 429; Henderson v. Henderson, 13 Mo. 151; Kent v. Cantrall, 44 Ind. 452; Harlow v. Thomas, 15

says Strong, J., "a party who has purchased real estate, and received a deed for it, containing a covenant that it is free from any encumbrance, and has subsequently paid off and discharged an encumbrance, may set off what has been paid by him against the amount due on any mortgage for the purchase money. In order to avail himself of such defense, however, he would be bound to prove either what had been paid by him was actually due, or that he had given notice to his vendor requiring that such vendor should pay off the encumbrance within a limited time, or that otherwise the purchaser would pay a specified amount. Some of the authorities lay down the rule that the purchaser may set off or recover the amount paid without any qualification; but it seems to me reasonable that a vendor who has been innocent of any fraud should have an opportunity to set himself right before he should be obliged to pay or allow more than the amount actually due. It is, I think, well settled that where the encumbrance has not been paid off by the purchaser of the land, and he has remained in quiet and peaceable possession of the premises, he cannot have relief against his contract to pay the purchase money, or any part of it, on the ground of defect of title. The reason is, that

Pick. 66; Snyder v. Lane, 10 Ind. 424; Rardin v. Walpole, 38 Ind. 146; Stambaugh v. Smith, 23 Ohio St. 584; Norton v. Babcock, 2 Met. 516; Baker v. Corbett, 28 Iowa, 320; Spring v. Chase, 22 Me. 505, 39 Am. Dec. 595; Garrison v. Sandford, 12 N. J. L. 261; Thayer v. Clemence, 22 Pick. 490; Chapel v. Bull, 17 Mass. 213; Davis v. Lyman, 6 Conn. 255; Batchelder v. Sturgis, 3 Cush. 205; Lane v. Richardson, 104 N. C. 642; Corbett v. Wrenn, 25 Or. 305; Barnhart v. Hughes, 46 Mo. App. 318; Beecher v. Baldwin, 55 Conn. 419, 3 Am. St. Rep. 57; Wadhams v. Swan, 109 Ill. 46; Bradshaw v. Crosby, 151 Mass. 237; Johnson v. Collins, 116 Mass. 392; Coburn v. Litchfield, 132 Mass. 449; Harrington v. Murphy, 109 Mass. 299; Smith v. Carney, 127 Mass. 179; Harwood v. Lee, 85 Iowa, 622; Kelsey v. Remer, 43 Conn. 129, 21 Am. Rep. 638; Smith v. Jefts, 44 N. H. 482; Fagan v. Cadmus, 46 N. J. L. 441; Hartshorn v. Cleveland, 52 N. J. L. 473. See, also, Win etc. Lumber Co. v. Deshon, 65 Ark. 103, 44 S. W. 1036; Richmond v. Ames, 164 Mass. 467, 41 N. E. 671; Thomas v. Ellison (Tex.) 116 S. W. 1141, 110 S. W. 934.

the encumbrance may not, if let alone, ever be asserted against the purchaser, as it may be paid off or satisfied in some other way; and then it would be inequitable that any part of the purchase money should be retained." [6]

§ 919. **Burden of proof.**—It does not follow that the price paid was the fair and reasonable value of the encumbrance. The covenantee is not entitled to the price that he has been compelled to pay, or has seen proper to pay, but only to this amount when he has fairly and reasonably paid it. It accordingly results that he has the burden of showing this fact. "It was incumbent on him to prove," said Chilton, J., in one of these cases, "in order to recover more than nominal damages, not only the amount paid, but that such payment was the reasonable value of the interest acquired. To hold that it was reasonable, from the bare fact of payment, is to assume as true the fact to be proved." [7]

§ 920. **When encumbrance cannot be removed.**—Where the encumbrance is of such a character, as a right of dower, or an easement, that it cannot be removed at the option of the grantor or grantee, damages are awarded for the injury that proximately is caused by the encumbrance.[8] If

[6] Grant v. Tallman, 20 N. Y. 191, 194, 75 Am. Dec. 384. See, also, McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456; Eaton v. Tallmage, 22 Wis. 502; Hurd v. Hall, 12 Wis. 112; Bailey v. Scott, 13 Wis. 618; Waldo v. Long, 7 Johns. 173; Reed v. Pierce, 36 Me. 455, 58 Am. Dec. 761; Kelly v. Low, 18 Me. 244; Wetmore v. Green, 11 Pick. 462; Dimmick v. Lockwood, 10 Wend. 142; Monahan v. Smith, 19 Ohio St. 384; Smith v. Dixon, 27 Ohio St. 471; Moseley v. Hunter, 15 Mo. 322; Guthrie v. Russell, 46 Iowa, 269, 26 Am. Rep. 135; Knadler v. Sharp, 36 Iowa, 232; Jenkins v. Hopkins, 8 Pick. 346; Smith v. Dixon, 27 Ohio St. 471; Morrison v. Underwood, 20 N. H. 369; Stanard v. Eldridge, 16 Johns. 254. And see Connell v. Boulton, 25 Op. Can. Q. B. 444.

[7] Anderson v. Knox, 20 Ala. 156, 161. See, also, Pate v. Mitchell, 23 Ark. 590, 79 Am. Dec. 114; Dickson v. Desire, 23 Mo. 167; Harlow v. Thomas, 15 Pick. 69; Lawless v. Collier, 19 Mo. 480.

[8] Prescott v. Trueman, 4 Mass.

the encumbrance consists of a right of way over the land for the purpose of obtaining water from a spring thereon, damages should be awarded upon the assumption that just compensation should be made for the injury resulting from the continued existence of the easement.[9] The value of timber for the purposes of a farm at the time of the execution of the deed, will be taken as the amount of compensation to which the covenantee is entitled for an encumbrance, consisting of a prior grant of the timber with the right of entering to cut it during a future term.[1] If the encumbrance is a life estate, for the existence of which damages are sought, the purchaser is entitled to compensation for the value of such estate for the time that he is deprived of the enjoyment of the property.[2] In the case of an outstanding lease, the purchaser may be allowed the annual value, or interest on the purchase money, during the length of time his enjoyment is suspended,

627, 3 Am. Dec. 246; Greene v. Creighton, 7 R. I. 1; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Hubbard v. Norton, 10 Conn. 422; Giles v. Dugro, 1 Duer, 335; Barlow v. McKinley, 24 Iowa, 69; Van Wagner v. Van Nostrand, 19 Iowa, 427; Butler v. Gale, 27 Vt. 739; Chapel v. Bull, 17 Mass. 212; Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290; Batchelder v. Sturges, 3 Cush. 205; Harlow v. Thomas, 15 Pick. 66; Richmond v. Ames, 164 Mass. 467, 41 N. E. 671; Newburn v. Lucas, 126 Iowa, 85, 101 N. W. 730.

[9] Harlow v. Thomas, 15 Pick. 66.

[1] Cathcart v. Bowman, 5 Pa. St. 317; See as to damages for breach of covenant against encumbrances: Bohlcke v. Buchanan, 94 Mo. App. 320, 68 S. W. 92; Loiseau v. Threlstead, 14 S. D. 257, 85 N. W. 189; Brown v. Taylor, 115 Tenn. 1, 4 L.R.A.(N.S.) 309, 88 S. W. 933, 112 Am. St. Rep. 811; Ensign v. Colt, 75 Conn. 111, 52 Atl. 829, 946; Lloyd v. Sandusky, 203 Ill. 621, 68 N. E. 154, affirming 95 Ill. App. 593; McGuckin v. Milbank, 152 N. Y. 297, 46 N. E. 490, affirming 31 N. Y. Supp. 1049, 83 Hun, 473; Utica C. & S. Ry. Co. v. Gates, 47 N. Y. Supp. 231, 21 Misc. Rep. 205; De Long v. Spring Lake & Sea Girt Co., 65 N. J. L. 1, 47 Atl. 491; Whittern v. Krick, 31 Ind. App. 577, 68 N. E. 694; Harrington v. Bean, 89 Me. 470, 36 Atl. 896; Bailey v. Agawam Nat. Bank, 190 Mass. 20, 3 L.R.A.(N.S.) 98, 76 N. E. 449, 112 Am. St. Rep. 296; McCrillis v. Thomas, 110 Mo. App. 699, 85 S. W. 673; J. Wragg & Sons v. Mead, 120 Iowa, 319, 94 N. W. 856; Brass v. Vandecar, 70 Neb. 35, 96 N. W. 1035.

[2] Christy v. Ogle, 33 Ill. 295.

or what would be a fair rent for the land.[3] Only nominal damages, however, can be recovered for the existence of a mere inchoate right of dower, because until the death of the husband no real damage can result.[4] The decrease in the market value of the land may usually be taken as a proper criterion by which to measure the damages caused by the existence of an easement.[5] If the covenant, however, is in the form of an agreement to pay and discharge the encumbrances, the covenantee, although he has not extinguished them, is entitled to recover the amount of the encumbrances.[6]

§ 921. Covenant for quiet enjoyment.—In the United States, the principal or sweeping covenant in deeds is consid-

[3] Rickert v. Snyder, 9 Wend. 416; Porter v. Bradley, 7 R. I. 542. See Grice v. Scarborough, 2 Spear, 649, 42 Am. Dec. 391; Moreland v. Metz, 24 W. Va. 119, 49 Am. Rep. 346; Wragg v. Mead, 120 Iowa, 319, 94 N. W. 856; Brown v. Tailor, 115 Tenn. 1, 112 Am. St. Rep. 811, 4 L.R.A.(N.S.) 309, 88 S. W. 933.

[4] Sheaf v. O'Neil, 9 Mass. 13; Hazelrig v. Huston, 18 Ind. 481; Runnells v. Webber, 59 Me. 488.

[5] Williamson v. Hall, 62 Mo. 405; Giles v. Dugro, 1 Duer, 331; Kellogg v. Malin, 62 Mo. 429. See Burbanks v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Wetherbee v. Bennett, 2 Allen, 428; Richmond v. Ames, 164 Mass. 467, 41 N. E. 671; Newburn v. Lucas, 126 Iowa, 85, 101 N. W. 730.

[6] Hogan v. Calvert, 21 Ala. 199; Booth v. Starr, 1 Conn. 249, 6 Am. Dec. 233; Gilbert v. Wyman, 1 Comst. 550; Gardner v. Niles, 16 Me. 279; Webb v. Pond, 19 Wend. 423; Ex parte Negus, 7 Wend. 499; Lithbridge v. Mytton, 2 Barn. & Adol. 772; Gennings v. Norton, 35 Me. 308; Lathrop v. Atwood, 21 Conn. 123; Ardesco Oil Co. v. N. A. Mining Co., 66 Pa. St. 381; Monahan v. Smith, 19 Ohio St. 384; Dorsey v. Dashiell, 6 Md. 204; Scobey v. Finton, 39 Ind. 275. But if the agreement is not to discharge the debt, but to save harmless from damage, the covenant becomes one of indemnity only; Chase v. Hinman, 8 Wend. 452; Mann v. Eckford, 15 Wend. 502; Kip v. Brigham, 6 Johns. 158; Booth v. Starr, 1 Conn. 244, 6 Am. Dec. 233; Thomas v. Allen, 1 Hill, 145; Rockfeller v. Donnelly, 8 Cowen, 623. And see Stewart v. Clark, 11 Met. 384; Hodgson v. Bell, 7 Term Rep. 97; Sparkes v. Martindale, 8 East, 593; Holmes v. Rhodes, 1 Bos. & P. 638; Devol v. McIntosh, 23 Ind. 529; Warwick v. Richardson, 10 Mees. & W. 284; Churchill v. Hunt, 3 Denio, 321.

ered to be the covenant of warranty; but in England, the covenant for quiet enjoyment occupies this place. It is the covenant generally inserted in leases, however. This covenant is generally expressed in this form: "And that the said premises shall at all times remain and be to the use of the said (purchaser), his heirs and assigns, and be quietly entered into and upon, and held and enjoyed, and the rents and profits thereof received by the said (purchaser), his heirs and assigns, accordingly, without any interruption or disturbance by him, the said (vendor), or any person or persons whomsoever."[7] Or in this form: "And that the said (purchaser), his heirs and assigns, shall and may at all times hereafter, freely, peaceably, and quietly enjoy the same without molestation or eviction of him, the said (vendor), or any person or persons whomsoever," and sometimes the clause is added, "lawfully claiming, or to claim the same by, from, or under him, them, or any of them, or by or with his or their acts, means, consent, default, privity, or procurement."[8] Where taxes had been assessed against property before the defendant owned it, it was held that this claim for taxes did not come within his covenant, "against the lawful claims and demands of all persons claiming by, through, or under him, and against no other claims and demands."[9] Where no legal right to use a sewer leading from the property conveyed to and across adjoining premises owned by another exists, an apparent right to such use is not a legal appurtenance within the meaning of a deed containing a covenant of warranty.[1] When, at the time of the execution of a deed conveying with a covenant of quiet enjoyment a tract of land, with a mill, a dam, and pond for supplying the water, "with the appurte-

[7] Davidson's Precedents and Forms of conveyancing; Rawle on Covenants, tit. (4th ed.) 25; Housman's Handbook of Conveyancing, 1860.

[8] Rawle on Covenants, tit. (4th ed.) 28, 125.

[9] West v. Spaulding, 11 Met. 556.

[1] Green v. Collins, 86 N. Y. 246, 40 Am. Rep. 531.

nances," there were flush-boards on the dam, by the use of which the pond overflowed the land adjoining, of which fact the grantee at time of purchase was ignorant, and the owner of the adjacent property recovered against the grantee for overflowing his land, thereby compelling him to reduce the height of the dam, an action may be maintained for breach of the covenant.[2]

§ 922. **Not broken by wrongful acts of others.**—By the covenant for quiet enjoyment, the grantor covenants only against the acts of those claiming by title. The covenantee has a remedy for any tortious disturbance by a trespasser, and it is said that he should not also have a remedy against his covenantor. Besides, to hold the grantor liable for a tortious disturbance of a stranger would be to make him liable for an act he could neither foresee nor prevent, and it would enable the covenantee to make a tortious disturbance by collusion with another. Then the covenant generally expresses that the covenantee shall lawfully enjoy the premises, and contains no express covenant against the tortious acts of others. For these reasons, it is settled that the tortious act of a stranger is not a breach of this covenant.[3] But all acts of the

[2] Adams v. Conover, 87 N. Y. 422, 41 Am. Rep. 381. In Combs v. Combs, 130 Ky. 827, 114 S. W. 334, As a widow's dower is a mere life estate, it held not to be an encumbrance on lands of a decedent and the existence of such a dower right was held not a breach of a covenant of warranty in a deed by an heir to a coheir conveying the interest formerly owned by the decedent.

[3] Underwood v. Birchard, 47 Vt. 305; Wilder v. Ireland, 8 Jones (N. C. 88; Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; Davis v. Smith, 5 Ga. 274, 47 Am. Dec. 279; Kelly v. Dutch Church, 2 Hill, 111; Hoppes v. Cheek, 21 Ark. 585; Meeks v. Bowerman, 1 Daly, 100; Beebe v. Swartwout, 3 Gilm. 180; Brick v. Coster, 4 Watts & S. 499; Yancey v. Lewis, 4 Hen. & M. 395; Noonan v. Lee, 2 Black. 507; Branger v. Manciet, 30 Cal. 624; Playter v. Cunningham, 21 Cal. 232; Folliard v. Wallace, 2 Johns, 402; Gleason v. Smith, 41 Vt. 293; Gardner v. Keteltas, 3 Hill, 330, 38 Am. Dec. 637; Surget v. Arighi, 11 Smedes & M. 96, 49 Am. Dec. 46; Spear v. Allison, 8 Harris, 200; Rantin v. Robertson, 2 Strob. 336. See, also, Wotten v. Hele, 2 Saund.

covenantor himself, or of others done at his command, whether they are wrongful or not, fall within this covenant.[4] But

178, n; Lewis v. Smith, 9 Mann. G. & S. 610; Nokes v. James, Cro. Eliz. 675; Schuylkill R. R. v. Schmoele, 7 Smith, P. F. 273; Tisdale v. Essex, Hob. 34; Knapp v. Marlboro, 34 Vt. 235; Adams v. Conover, 22 Hun, 424. See, also, Bedell v. Christy, 62 Kan. 760, 64 Pac. 629, in which the court says: "An entry by an intruder, or by any one else, without lawful right and superior title, is not a breach of the covenants, and in such case the remedy of the grantee is against the wrongdoers, and not the covenantor."

[4] Sedgwick v. Hollenback, 7 Johns. 376; Crosse v. Young, 2 Show. 425; O'Keefe v. Kennedy, 3 Cush. 325; Mayor of New York v. Mabie, 3 Kern, 156, 64 Am. Dec. 538; Levitzky v. Canning, 33 Cal. 299; Seaman & Browning's Case, 1 Leon. 157; Cave v. Brooksby, Jones, W. 360. See, also, Cassada v. Stabel, 90 N. Y. Supp. 533, 98 App. Div. 600; Lloyd v. Tomkies, 1 Tenn. 671; Andrew's case, Cro. Eliz. 214; Wotten v. Hele, 2 Saund. 180, n; Rawle on Covenants, 135. In Levitsky v. Canning, 33 Cal. 299, where a covenant for quiet enjoyment was contained in a lease, Sanderson, J., in delivering the opinion of the court, said: "In its terms the covenant is very general, but no set formula is required; any language which expresses the intent to promise a quiet and peaceable enjoyment is sufficient, however brief it may be: Rawle on Covenants, 184. Whether it is broad enough to include strangers or not is immaterial, for the breach alleged was committed, if at all, by the lessor. The covenant for quiet enjoyment goes only to the possession, and hence the general rule that there is no breach unless there has been an eviction or an evasion, or disturbance of the possession: Waldron v. McCarty, 3 Johns. 473; Picket v. Weaver, 5 Johns. 120; Sedgwick v. Hollenback, 7 Johns, 380; Whitbeck v. Cook, 15 Johns. 485, 8 Am. Dec. 272; St. John v. Palmer, 5 Hill, 601. The eviction need not be by legal process: Greenvault v. Davis, 4 Hill, 644. Nor need there be a complete ouster or expulsion; an invasion, disturbance, or prevention, in whole or in part, will constitute a breach of the covenant: Platt on Covenants, 327. There must be some act of molestation, affecting, to his prejudice, the possession of the covenantee. Forbidding a tenant of the covenantee to pay him rent will not amount to a breach, if the tenant, notwithstanding, afterward pays the rent: Witchcot v. Nine, 1 Brownl. 81. But suppose the tenant had not paid the rent, but in consequence of the covenantor's prohibition had refused to pay? The case cited certainly implies very strongly that it would then have amounted to a breach, and there can be little doubt but that it would have been so declared. An act of molestation, whether committed by the covenantor himself or by another at his command, will alike amount to a breach of the cove-

a covenant against the acts of a particular person, who is named in the covenant, will not be limited to his lawful acts.[5]

§ 923. **Exercise of right of eminent domain.**—The object of the covenant for quiet enjoyment is to indemnify the grantee for an eviction or disturbance caused by a defect in the grantor's title. But where the property is taken by the State by virtue of the power of eminent domain, the vendee is not deprived of his land because there was any defect in the vendor's title. The title that the grantee possesses is, presumably, undoubtedly good, and the State, by the exercise of

nant: Seamon v. Browning, 1 Leon. 157. But from the third count in the complaint it appears that the defendant had slandered the plaintiff's possession, giving out and pretending publicly that he had no right to the possession of the demised premises, and that he had brought two actions at law to recover the possession of the premises from the plaintiff and his tenants, under the pretense that his lease had expired. That in consequence of these actions brought against himself and his tenants, he had been put to great expense in defending the same, and his tenants had quit the premises, leaving the same vacant, and that he had been unable to rent the same to other parties, by reason of their doubts as to the lawfulness of his possession, caused by the acts of the defendant in bringing said suits, and publicly declaring that the possession of the plaintiff was unlawful, and that he had no legal right to let the premises. Was this a breach of his covenant within the rule already stated and the cases which we have cited? That it was does not admit of doubt. Those acts, if performed by him, were as much a molestation, disturbance, and invasion of the plaintiff's possession as a taking by the shoulders and a forcible eviction of the plaintiff's tenants would have been. The character of the act must be determined by the results which follow it, and, in view of the results which are alleged to have followed the acts of the defendant, there can be no question that he disturbed and interrupted the possession of the plaintiff to his injury, which is precisely what he had covenanted not to do."

[5] Nash v. Palmer, 5 Maule & S. 374; Foster v. Mapes, Cro. Eliz. 212. And see Rawle on Covenants, 139; Perry v. Edwards, 1 Strange, 400; Fowle v. Welch, 1 Barn. & C. 29; Patton v. Kennedy, 1 Marsh. A. K. 389, 10 Am. Dec. 744; Pence v. Duvall, 9 Mon. B. 49. Another exception to the general rule is where the language of the covenant is "claiming or pretending to claim": Chaplain v. Southgate, 10 Mod. 383.

this power, takes it away from him, making him just compensation. If the exercise of the right of eminent domain were a breach of the covenant for quiet enjoyment, the result would be that the grantee would receive full compensation from the State for his premises, and, at the same time, would have the right to recover from his grantor. But the covenantee can have no such right. His remedy is to look to the provisions of the legislature made to give him compensation for his land, and not to the covenant for quiet enjoyment. It is therefore settled that this covenant is not broken by the exercise of the right of eminent domain.[6]

§ 924. **Actual eviction.**—To operate as a breach of the covenant for quiet enjoyment, an eviction, as it is technically understood, is necessary. Legal process, however, is not essential to an eviction.[7] Where a grantee who has been evict-

[6] Frost v. Earnest, 4 Whart. 86; Ellis v. Welch, 6 Mass. 246, 4 Am. Dec. 122; Bailey v. Miltenberger, 7 Casey, 37; Brimmer v. Boston, 102 Mass. 19; Folts v. Huntley, 7 Wend. 210; Dobbins v. Brown, 2 Jones, 75. And see Schuylkill R. R. v. Schmoele, 7 Smith, P. F. 273; Dyer v. Wightman, 16 Smith, P. F. 427. Where slaves have been sold with covenants, it has been held that they were not broken by emancipation: Whitworth v. Carter, 43 Miss. 61; Osborn v. Nicholson, 13 Wall. 655, 20 L. ed. 693; Philips v. Evans, 38 Mo. 305; Fitzpatrick v. Hearne, 44 Ala. 171, 4 Am. Rep. 128; Mayfield v. Barnard, 43 Miss. 270; Walker v. Gatlin, 12 Fla. 9; Haskill v. Sevier, 25 Ark. 152; Willes v. Halliburton, 25 Ark. 173. See, also, Weeks v. Grace, 194 Mass. 296, 9 L.R.A.(N.S.) 1092 and note, 80 N. E. 220.; Porter v. Ralston, 6 Bush, 655; Hand v. Armstrong, 34 Ga. 232; Bass v. Ware, 34 Ga. 386. In Osborn v. Nicholson, *supra*, Mr. Justice Swayne said: "Emancipation and eminent domain work the same result as regards the title and possession of the owner. Both are put an end to. Why should the seller be liable in one case and not in the other? We can see no foundation in reason or principle for such a claim."

[7] Greenvault v. Davis, 4 Hill, 645; Parker v. Dunn, 2 Jones (N. C.), 204; Ware v. Lithgow, 71 Me 62; Coble v. Wellborn, 2 Dev. 390; Leary v. Durham, 4 Ga. 593; Moore v. Frankenfield, 25 Minn. 540. And see, also, Grist v. Hodges, 3 Dev. 200; Booth v. Star, 5 Day, 282, 5 Am. Dec. 149; Funk v. Creswell, 5 Clarke, 86; Hagler v. Simpson, Busb. 386.

ed from part of the land brings an action upon the covenants, the fact that he took possession of the land described in the deed, and made no complaint as to the quantity of land conveyed, accepting the same as a fulfillment of the covenants alleged to be broken, is no defense to the action.[8] The covenantee is not obliged to withhold the possession from the rightful owner, nor to enter into litigation with the party who has the title. He may surrender his possession to the true owner, and this will be a sufficient ouster to enable him to recover on his covenant.[9] But to have this effect there must have been a hostile assertion of the paramount title.[1] In a case in Illinois, Mr. Justice Eaton, after adverting to the fact that there might be a constructive eviction, as where the prem-

[8] Walterhouse v. Garrard, 70 Ind. 400. The court says in Durbin v. Shenners, 133 Wis. 134, 113 N. W. 421: "The covenant for quiet enjoyment is prospective in its operation, and is not breached by the mere existence of an incumbrance, nor, in fact, by anything short of eviction actual or constructive from a whole or a part of the premises: Falkner v. Woodard, 104 Wis. 608, 80 N. W. 940." See, also, Hayden v. Patterson, 39 Colo. 15, 88 Pac. 437.

[9] Axtel v. Chase, 83 Ind. 546; Fowler v. Poling, 6 Barb. 168; Drew v. Towle, 10 Fost. (N. H.) 537, 64 Am. Dec. 309; Loomis v. Bedel, 11 N. H. 83; Woodward v. Allen, 3 Dana, 164; Stone v. Hooker, 9 Cowen, 157; Haffey v. Birchetts, 11 Leigh, 83; Sterling v. Peet, 14 Conn. 254; Poyntell v. Spencer, 6 Barr. 254; Patton v. McFarlane, 3 Pa. 425. And see Slater v. Rawson, 1 Met. 450, 455; Steiner v. Baughman, 2 Jones, 106; Ferriss v. Harshea, 1 Mart. & Y. 50, 17 Am. Dec. 782; McDowell v. Hunter, Dud. (Ga.) 4; Blydenburgh v. Cotheal, 1 Duer, 196; Hamilton v. Cutts, 4 Mass. 350, 3 Am. Dec. 222; Leary v. Durham, 4 Ga. 593, 606. But see Beebe v. Swartwout, 3 Gilm. 182, 183; Hoy v. Taliaferro, 8 Smedes & M. 541; Dennis v. Heath, 11 Smedes & M. 218, 49 Am. Dec. 51.

[1] Knepper v. Kurtz, 8 Smith, P. F. 480; Sprague v. Baker, 17 Mass. 590; Dupuy v. Roebuck, 7 Ala. 488. Where the only covenant in a deed is one for quiet enjoyment, the grantee who has remained in possession since the execution of the deed can not defend an action to foreclose a purchase money mortgage on the ground that his vendor had no title to a portion of the land, the theory being that it cannot be assumed that the vendee has suffered or ever will suffer any actual damage by reason of such want of title: Falkner v. Hackett, 104 Wis. 608, 80 N. W. 940.

ises were, at the time of the execution of the covenant, in the possession of another, holding them under a paramount title, in which case the covenant would be broken as soon as made, proceeded to say: "But this is not the only case of constructive eviction which may now be considered as well settled by authority, and sustained by sound principles of morality and justice. If the covenantee be in the actual possession of the estate, he has the right to yield that possession to one who claims it under a paramount title, without resisting him by force or litigation; and this is sustained by the same reasons of justice and good government which are applicable to the first exception. This, however, is not to be understood as holding that the mere existence of a paramount title constitutes a breach of the covenant, or that it will authorize the covenantee to refuse to take possession when it is quietly tendered to him, or when he can do so peaceably, and then claim that by reason of such paramount title and his want of possession, the covenant is broken; nor will it justify him in abandoning the possession without demand or claim by the one holding the real title. His possession under the title acquired with the covenant is not disturbed by the mere existence of that title; and he has no right to assume that it ever will be, until he actually feels its pressure upon him. He must act in good faith toward his covenantor, and make the most of whatever title he has acquired, until resistance to the paramount title ceases to be a duty to himself or his covenantor." [2] The surrender must be made to the holder of the paramount title, and not to the vendor.[3] Where the land is unoccupied, and a covenant of warranty is executed, and the land remains vacant, and the owner of the true title, for the purpose of determining the title, commences actions of ejectment, the covenantee may waive the objection of his nonoccupation to this

[2] Moore v. Vail, 17 Ill. 190. And see, also, Hagler v. Simpson, 1 Busb. 386.

[3] Axtel v. Chase, 83 Ind. 546.

form of action. He may try the title in these actions, and if judgment be awarded against him on the question of title, he may abandon any further claim to the land, and a breach of the covenant results.[4] Where a grantee has never secured, nor been able to secure, possession of the land conveyed, by reason of the existence of a paramount title in another, and possession by him, these facts are equivalent to an eviction.[5]

§ 925. **Purchaser has burden of proof if he yields to adverse title.**—If the purchaser refuses to yield possession to the paramount title until it has been established by a judgment, and the covenantor has been properly notified of the suit, then the validity of the paramount title is conclusively shown by the judgment or decree when introduced in evidence.[6] But if he elects to yield to the paramount title before it has been judicially established, he does so at his peril. He has, in such a case, the burden of proof when attempting to recover from his covenantor, and must clearly establish the adverse title which he has thus recognized.[7] "While he is not bound to contest where the contest would be hopeless, or resist where resistance would be wrong, yet always where he yields without a contest or a resistance, he must take upon himself the burden of showing that the title was paramount, and that he yielded the possession to the pressure of that title. Whenever he does yield quietly, he does so at his peril."[8] If in an action for a breach of a covenant of quiet enjoyment the

[4] Allis v. Nininger, 25 Minn. 525.

[5] Blondeau v. Sheridan, 81 Mo. 545. See, also, in this connection, Carpenter v. Carpenter, 88 Ark. 169, 113 S. W. 1032.

[6] Miner v. Clark, 15 Wend. 427; Bridger v. Pierson, 45 N. Y. 603; Wilson v. McElwee, 1 Strob. 65; Middleton v. Thompson, 1 Spear, 67.

[7] George v. Putney, 4 Cush. 355, 50 Am. Dec. 788; Callis v. Coghill, 9 Lea (Tenn.), 137; Hamilton v. Cutts, 4 Mass. 350, 3 Am. Dec. 222; Thomas v. Stickle, 32 Iowa, 76; Stone v. Hooker, 9 Cow. 157; Peck v. Hensley, 20 Tex. 678; Greenvault v. Davis, 4 Hill, 643; Witty v. Hightower, 12 Smedes & M. 481.

[8] Moore v. Vail, 17 Ill. 190, per Eaton, J.

plaintiff does not claim interest on the purchase price, the defendant may be refused credit for rent.[9]

§ 926. **Comments.**—This rule is obviously a reasonable one. The covenantor must, certainly, have an opportunity of contesting the validity of the title alleged to be paramount title. Where the covenantee is sued and the covenantor is notified and thus enabled to defend, it is his own fault if he does not do so, and he ought to be bound by the judgment. But where the covenantee yields possession to what he is pleased to suppose is a superior title, he should be compelled to make out that title with as great a degree of particularity as if he were suing for the possession of the premises.

§ 927. **Premises in possession of another.**—If at the time the conveyance is executed the premises are in the possession of a person other than the grantor, claiming by a paramount title, the covenant for quiet enjoyment or warranty is broken at once by this very fact.[1] If this were not so, the only redress which the covenantee could have, would be either to become a trespasser by entering or to bring a needless suit. It is therefore settled law, that there is an eviction *eo instanti*, if the premises are actually in the possession of a third person,

[9] Wyche v. Ross, 119 N. C. 174, 25 S. E. 878. See, also, as to damages: Holmes v. Seaman, 72 Neb. 300, 101 N. W. 1030.

[1] Murphy v. Trice, 48 Mo. 250; Grist v. Hodges, 3 Dev. 200; Russ v. Steele, 40 Vt. 315; Duvall v. Craig, 2 Wheat. 62, 4 L. ed. 184; Park v. Bates, 12 Vt. 381, 36 Am. Dec. 347; Clark v. Conroe, 38 Vt. 475; Phelps v. Sawyer, 1 Aiken, 318; Noonan v. Lee, 2 Black. 507; Barnett v. Montgomery, 6 Mon. 328; Curtis v. Deering, 12 Me. 501; Blanchard v. Blanchard, 48 Me. 174; Caldwell v. Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36; Cummings v. Kennedy, 3 Litt. 123, 14 Am. Dec. 45; Loomis v. Bedel, 11 N. H. 74; Small v. Reeves, 14 Ind. 164; Rea v. Minkler, 5 Lans. 296; University of Vermont v. Joslyn, 21 Vt. 522; Wilder v. Ireland, 8 Jones (N. C.), 87. And see Randolph v. Meeks, Mart. & Y. 58; Miller v. Halsey, 2 Green, 59; Playter v. Cunningham, 21 Cal. 229; Witty v. Hightower, 12 Smedes & M. 478; Banks v. Whitehead, 7 Ala. 83.

claiming under a paramount title at the time the covenant is made. Still, some decisions may be found to the contrary, which hold or countenance the idea that the covenantee in a case of this kind cannot recover on the covenant for quiet enjoyment.[2] The possesion, however, must be under an actually paramount title, and not merely an adverse possession.[3]

§ 928. **Purchase of paramount title.**—As has been observed, the purchaser may surrender possession to the owner of the paramount title, and this is an eviction, which entitles him to a recovery on his covenant. But he may also purchase the paramount title, in a proper case, without yielding possession, and be entitled to recover from his covenantor.[4] In a case in California, Mr. Justice Temple observed, after an examination of a number of cases: "The true rule deducible from the recent cases is, that the covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title. Nor is it necessary that the paramount title should have been established by a judgment before the covenantee will be authorized to surrender the possession. It is enough that the

[2] St. John v. Palmer, 5 Hill, 601; Kortz v. Carpenter, 5 Johns. 120; Day v. Chism, 10 Wheat. 452, 6 L. ed. 364. See Holder v. Taylor, Hob. 12.

[3] Beebe v. Swartwout, 3 Gilm. 183; Phelps v. Sawyer, 1 Aiken, 57; Rindskopf v. Farmers' Loan Co., 58 Barb. 49; Jenkins v. Hopkins, 8 Pick. 350; Moore v. Vail, 17 Ill. 185. The owner of wild and uncultivated lands is considered in possession, on the ground that that legal seisin carries with it the possession, provided that they are not, at the time, in the actual adverse possession of another: Proprietors of Kennebeck v. Call, 1 Mass. 484; Bush v. Bradley, 4 Day, 306; Van Brunt v. Schenck, 11 Johns. 385; Mather v. Trinity Church, 3 Serg. & R. 514, 8 Am. Dec. 663.

[4] Turner v. Goodrich, 26 Vt. 709; Kansas Pacific Ry. Co. v. Dunmeyer, 24 Kan. 725; White v. Whitney, 3 Met. 81; Sprague v. Baker, 17 Mass. 586; Bemis v. Smith, 10 Met. 194; Stewart v. Drake, 4 Halst. 139; Estabrook v. Smith, 6 Gray, 572, 66 Am. Dec. 445; Kelly v. Low, 18 Me. 244; Cole v. Lee, 30 Me. 392; Haffey v. Birchetts, 11 Leigh, 88; Claycomb v. Munger, 51 Ill. 374; Gunter v. Williams, 44 Ill. 572; Whitney v. Dinsmore, 6 Cush. 124.

true owner asserts his title, and demands the possession. If it is his right to have possession, it certainly is the duty of the covenantee to surrender it to him. The covenant is for quiet possession, and against a rightful eviction. To constitute a breach of this covenant, it cannot be required that the covenantee should maintain a wrongful possession, and subject himself to be treated as a trespasser. The object of a suit by the true owner would be to compel the covenantee to do that which he ought to have done without suit. It could not have been contemplated by the parties to the covenant that the covenantee should refuse to do what the law enjoins upon him as a duty. Nor can we perceive how the covenantor would be benefited by an eviction under a judgment. It was never considered necessary that the covenantor should have notice of the pendency of the suit. The judgment might be obtained without any real trial of the merits of the title; and, besides, in the action upon the covenant, it is incumbent upon the plaintiff to establish that the title to which he has submitted is a paramount title. Although there must be an eviction, it is not necessary that there should be an actual dispossession of the grantee. If the paramount title is so asserted that he must yield to it or go out, the covenantee may purchase or lease of the true owner, and this will be considered a sufficient eviction to constitute a breach. He then no longer claims under his former title. So far as that title is concerned, he has been evicted, and is in under the paramount title." [5] A mortgagee threatened to sue the purchaser of the land, whose deed contained covenants of warranty and quiet enjoyment, and to prevent a suit, the purchaser paid the amount of the mortgage.

[5] In McGary v. Hastings, 39 Cal. 360, 366, 2 Am. Rep. 456, citing Sugden on Vendors, 745, and note; Lomis v. Bedell, 11 N. H. 74; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Turner v. Goodrich, 26 Vt. 709; Sprague v. Baker, 17 Mass. 586; Rawle on Covenants, 278, et seq., and cases cited; Noonan v. Lee, 2 Black, 507; Funk v. Cresswell, 5 Clarke, 86; Brady v. Spurck, 27 Ill. 478; Stewart v. Drake, 4 Halst. 139.

The court said: "The plaintiff has been disturbed in the enjoyment of his possession, and he has been compelled to purchase in another title for his own security, which we think very clearly has been a lawful interruption, and a breach of the covenant of quiet enjoyment." [6] This is believed to be the general rule supported by the weight of authority, although decisions may be found which countenance or uphold a different doctrine.[7]

[6] Sprague v. Baker, 17 Mass. 590. See, also, Harding v. Larkin, 41 Ill. 422; McConnell v. Downs, 48 Ill. 271.

[7] Thus, in Waldron v. McCarty, 3 Johns. 471, a demurrer was interposed to a complaint which alleged that the premises were encumbered with a mortgage at the time the deed to plaintiff was executed; that afterward they were sold under a decree of foreclosure of the mortgage, and the plaintiff had been compelled to purchase them to prevent his ouster. The demurrer was sustained on the ground, as stated by the court, that "the covenant for quiet enjoyment has reference merely to the undisturbed possession, and not to the grantor's title." The court further said in its opinion, per Spencer, J.: "From precedents, and as no authority has been shown that the covenant for quiet enjoyment is broken by any other acts than an entry and eviction, or a disturbance of a possession itself, we are of opinion that the demurrer is well taken." See, also, Witty v. Hightower, 12 Smedes & M. 478; Hannah v. Henderson, 4 Ind. 174; Reasoner v. Edmundson, 5 Ind. 393; Burrus v. Wilkinson, 31 Miss. 537; Hunt v. Amidon, 1 Hill, 147. The buying in of an invalid tax claim will not entitle the purchaser, who is the grantee in the warranty deed, to recover the amount paid from his warrantor: Bruington v. Barber, 63 Kan. 28, 64 Pac. 963 (citing text).

The case of Waldron v. McCarty, 3 Johns. 471, has been severely criticised. In McGary v. Hastings, 39 Cal. 360, 364; 2 Am. Rep. 456, it is said: "The principal question involved in this appeal, is whether the acts set out in the complaint constitute a breach of the covenant of quiet enjoyment. The defendant contends that there must have been an actual eviction by a title paramount, under the judgment of a competent court. Many early cases, especially in the State of New York, seem to sustain this view, and two cases are cited from our own reports. The first is the case of Fowler v. Smith, 2 Cal. 39. That was an attempt to resist the payment of purchase money for premises conveyed, without special warranty, prior to the adoption of the common law in this State, and it was claimed that by the civil law certain covenants were implied. Justice Murray, in discussing the question, said that no covenants

§ 929. Redemption on tax sales.—In a case in New York, a deed was executed for certain land, with a covenant for quiet enjoyment. A portion of it had been before the

were implied, except those for quiet possession, and that to constitute a breach of that covenant, there must be an eviction under a judgment of a competent court, founded upon a paramount title. He relies upon the case of Waldron v. McCarty, 3 Johns. 471. In that case, there was a foreclosure and sale of the premises, under a mortgage which existed at the time of the covenant. The covenantee purchased at this sale, and brought suit upon his covenant. The court held that there had been no eviction. It was not necessary in that case to hold that eviction must, in all cases, be by legal process. This is a leading case upon that side of the question, and was followed by several others in that State. When understood, however, as establishing the general proposition that there must be an actual eviction under a judgment, these cases are contrary to the more recent decisions of that State, as we shall presently show. The other case from our reports is Norton v. Jackson, 5 Cal. 262. It was a suit for the purchase money, and was resisted on the ground that there had been a breach of covenant of warranty, which for all the purposes of this case is identical with the covenant for quiet enjoyment. The purchaser was still in possession. Mr. Justice Heydenfeldt, in delivering the opinion of the court, says: 'There is no breach of the covenant without eviction, because there would be no correct measure of damages. It would be a hardship to allow the purchaser to remain in possession, and recover the purchase money also.' In this case, there had been no eviction, either actual or constructive; the purchaser was still in possession under the title of his covenantor, and no question can be raised as to the correctness of the decision. The broad statement in the conclusion of the opinion, that there must be an eviction, by process of law, cannot be sustained by authority, either in this country or in England: Copp v. Wellburn, 2 Dev. 390; Foster v. Pierson, 4 Lev. 617; Stewart v. Drake, 4 Halst. 141; Rawle on Covenants, 242. Indeed, there are many cases where an eviction without process of the law has always been considered a breach of the covenant, as in the case where the true owner at common law had the right to enter without suit, and where the covenantee was never able to obtain possession of the granted premises which were in possession of the owner of the paramount title. The case of Waldron v. McCarty, as understood, is contrary, to the doctrine laid down in Greenvault v. Davis, 4 Hill, 643. In that case Mr. Justice Bronson says: 'There are some *dicta* in the books that there must be an eviction by process of law, but I have met with no case where it was so adjudged.' And again: 'Upon principle, I can see no reason for requiring an eviction by legal proc-

execution of the deed sold for unpaid taxes. On the last day for the redemption of the land the purchaser paid the amount of taxes and accruing costs. The plaintiff brought an action

ess. Whenever the grantee is ousted of possession by one having a lawful right to the property paramount to the title of the grantor, the covenants of warranty and for quiet enjoyment are broken, and the covenantee may sue. . . . When the grantee surrenders or suffers the possession to pass from him without a legal contest, he takes upon himself the burden of showing that the person who entered had a title paramount to that of his grantor. But there is no reason why such surrender, without the trouble and expense of a lawsuit, should deprive him of a remedy on the covenant. The grantor is not injured by such an amicable ouster. On the contrary, it is a benefit to him, for he thus saves the expenses of an action against the grantee to recover the possession. It may be inferred in this case that the premises were unoccupied. Blodget then entered and still holds the land. This was an ouster or disseisin of the plaintiff, and he is well entitled to an action on the defendant's covenant.' In the case of Fowler v. Poling, 6 Barb. 165, Mr. Justice Edmunds, after reviewing the decisions in that State, says: 'From these conflicting authorities, I deduce the true rule in this State to be that there must be an actual disturbance of the possession; and where the covenantee is rightfully out of possession, either by due process of law, or by an entry of the rightful owner, or by a surrender to one having a paramount title, there is an eviction, the covenant is broken, and an action will lie.'"

In Brown v. Dickerson, 2 Jones, 372, it is said by Burnside, J: "The rule, as settled in Waldron v. McCarty, 3 Johns. 471, has not met the approbation of the profession in many States of this Union. It is too technical, and puts a grantee to unnecessary expense and trouble, and has been properly overruled in many of the courts."

In Loomis v. Bedel, 11 N. H. 74, the opinion was delivered by Parker, C. J., who said: "It is well settled that an entry under the paramount title amounts to a breach of a covenant of warranty; and the grantee may, upon demand, surrender the land to a claimant having a good title, and resort to his action: Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222. But in Waldron v. McCarty, 3 Johns. 471, where there was an outstanding mortgage at the time of the conveyance to the plaintiff, and the premises were afterward sold upon the mortgage in pursuance of a decree of the court of chancery, and purchased by the plaintiff, who then brought his action upon the covenant of warranty in his deed, the court held that an entry and expulsion were necessary, and that there was no sufficient eviction or disturbance of the possession. In our opinion this is carrying the principle too far. If the claimant holding the paramount title should enter upon the

on his covenant, but it was held that in the absence of a covenant against encumbrances the plaintiff could not acquire a claim against the defendant by making a voluntary payment without the defendant's request.[8] "The plaintiffs' covenant for quiet enjoyment," said Greene, J., "has never been broken, for the reason that there never was any eviction. . . . And as they had no covenant against encumbrances, they had no right to pay them voluntarily, and without any request on the part of the defendant, and charge him with such payment. It is no answer to say that it would be a hardship for the plaintiffs to be compelled to wait until they were evicted, and then sue for the purchase money, and lose the enhanced value of the land and improvements. But for the covenant for quiet enjoyment they could not even recover the purchase money in a case free from fraud; and if they desired a remedy adequate to other contingencies they should have provided for it by appropriate covenants." [9] But if, by statute, one form of covenant is made to include them all, the

land, and the grantee should thereupon yield up the possession, he would immediately have a right of action upon the covenant of warranty in his deed; and this right would not be barred or forfeited should he forthwith purchase the premises from the claimant, to whose superior title he has thus yielded the possession. He might, on such repurchase, immediately re-enter into the possession, and still maintain his action on the covenant. If, instead of this formality, he yields to the claims of a paramount title, and purchases without an actual entry of the claimant under it, where is the substantial difference? For all practical purposes his title under the grant to which his covenant is attached, and under which he originally entered, is as much defeated in the one case as in the other. He is, in fact, dispossessed, so far as that title is concerned. He is still in possession, but he is so under another title, adverse and paramount to his former one; and his purchase is, therefore, equivalent to an entry of the claimant. It is an ouster by his consent, and a re-entry by himself under the superior title without going through what would be, at best, a mere formality, where, conscious of the defect of the title under which he originally entered, he chooses to yield peaceably to the assertion of a better tile and to purchase it."

[8] McCoy v. Lord, 19 Barb. 18.

grantee may, of course, pay off a tax on the land, and recover the amount paid on his covenant.[1]

§ 930. **Covenant for further assurance.**—This covenant which, however, is seldom used in the United States, is defined as "one by which the covenantor undertakes to do such reasonable acts, in addition to those already performed, as may be necessary for the completion of the transfer made, or intended to be made, at the requirement of the covenantee. It relates both to the title of the vendor and the instrument of conveyance to the vendee, and operates as well to secure the performance of all acts for supplying any defects in the former, as to remove all objections to the sufficiency and security of the latter."[2] Its object is to give effect and operation to the estate conveyed but not to enlarge that estate.[3] The acts which under this covenant the covenantor will be required to perform, must be necessary and practicable.[4] A purchaser cannot recover as damages the expenses incurred by him in removing a cloud upon the title as a covenant for further assurance relates only to those defects which the vendor himself can supply.[5]

§ 931. **Covenant of warranty.**—This covenant, which is considered the broadest and most effective, and is the one in general use, is equivalent to a covenant for quiet enjoyment.[6] It is "an assurance by the grantor of an estate that

[1] Funk v. Cresswell, 5 Clark, 91. Further Assurance; Platt onETA

[2] Bouv. Law. Dict. tit. Covenant for Further Assurance; Platt on Covenants, 341.

[3] Uhl v. Ohio etc. Co., 51 W. Va. 106, 41 S. E. 340.

[4] Gwynn v. Thomas, 2 Gill & J. 420; Warn v. Beckford, 7 Price, 550; Pet and Cally's Case, 1 Leon. 304.

[5] Luther v. Brown, 66 Mo. App. 227.

[6] Fowler v. Poling, 2 Barb. 303; 6 Barb. 165; Emerson v. Proprietors, 1 Mass. 464, 2 Am. Dec. 34; Bostwick v. Williams, 36 Ill. 70, 85 Am. Dec. 385; Athens v. Nale, 25 Ill. 198; Rea v. Minkler, 5 Lans. 196. See Williams v. Wetherbee, 1

[3] McCoy v. Lord *supra*. But see Hall v. Dean, 13 Johns. 105.

the grantee shall enjoy the same without interruption by virtue of paramount title."[7] The covenant is extinguished by a reconveyance to the grantor before a breach, and a new conveyance will not revive it in the absence of a new express covenant.[8] The covenant does not extend to claims which possess no legal foundation.[9] Where a deed purports to convey only the right, title, and interest of the grantor, the scope of the covenant of warranty may be limited by the subject matter of the conveyance.[1] Laches in bringing suit does not commence until the party has been damnified.[2] The grantor

Aiken, 240; Dobbins v. Brown, 2 Jones, 75; Russ v. Steele, 40 Vt. 310. Real v. Hollister, 20 Neb. 112, 29 N. W. 189; Thompson v. Richmond, 102 Me. 335, 66 Atl. 649; Cain v. Fisher, 57 W. Va. 492, 50 S. E. 752; Oliver v. Rush, 125 Ala. 537, 27 So. 923. This section was cited with approval in Reynolds v. Shaver, 59 Ark. 299, 43 Am. St. Rep. 36.

[7] Bouv. Law Dict. tit. Cov. War. See Moore v. Lanham, 3 Hill (S. C.), 304; Rindskopf v. Farmers' Loan Co., 58 Barb. 36; Hull v. Hull, 35 W. Va. 155, 29 Am. St. Rep. 800, 13 S. E. Rep. 49; Adams v. Ross, 30 N. J L. 510, 82 Am. Dec. 237.

[8] Brown v. Metz, 33 Ill. 339, 85 Am. Dec. 277.

[9] Gleason v. Smith, 41 Vt. 296.

[1] Allen v. Holton, 20 Pick. 458; Blanchard v. Brooks, 12 Pick. 47; Adams v. Ross, 1 Vroom, 510, 82 Am. Dec. 237; Raymond v. Raymond, 10 Cush. 134; Wight v. Shaw, 5 Cush. 56; Sweet v. Brown, 12 Met. 175; 45 Am. Dec. 243; Brown v. Jackson, 3 Wheat. 452, 4 L. ed. 432; Hoxie v. Finney, 16 Gray, 332; Van Rensselaer v. Kearney, 11 How. 325, 13 L. ed. 715; McNear v. McComber, 18 Iowa, 12; Merritt v. Harris, 102 Mass. 328; Blodgett v. Hildreth, 103 Mass. 488; Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406. In Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406, the holder of an equity of redemption granted to him by another, conveyed the estate and title which his grantor had given him, by metes and bounds, with covenants of warranty. It was held that his covenant did not warrant title against the mortgage. In a case where property was conveyed by the use of the words "grant, bargain, and sell," and the deed contained a covenant "to warrant and defend the title to the conveyed premises against the claim of every person whomsoever," it was held that an action for breach of covenant would not lie because of the existence of an outstanding deed of trust on the land: Koenig v. Branson, 73 Mo. 634. A warranty of title to land conveyed does not extend to a tract included by mistake. Laufer v. Moppins, 44 Tex. Civ. App. 472, 99 S. W. 109.

[2] Post v. Campau, 42 Mich. 90.

is not liable for a mortgage where the *habendum* clause states that the conveyance is subject to it, followed by a warranty not expressly excepting the mortgage.[3] Where the land is subject to the lien of a judgment, which is subsequently assigned to the grantor, the grantee has no right to any part of the judgment save to the measure to which the proceeds of the sale of the land conveyed is applicable to its payment.[4] A grantor is not liable for defending against an unfounded claim under a covenant to defend against lawful claims.[5]

§ 932. **Breach of covenant of warranty.**—As the covenant of warranty is considered tantamount to that for quiet enjoyment, what is a breach of the latter is also a breach of the former, and therefore something equivalent to an eviction must occur to operate as a breach of this covenant.[6] The effect of full covenants of warranty is not to be limited by a subsequent clause of ambiguous signification, and which may be construed as an affirmation of the previous recitals.[7] The covenant, however, is not broken by the act of a mere stranger having no valid title, though he may pretend to have one.[8]

[3] Hopper v. Smyser, 90 Md. 363, 45 Atl. 206.

[4] Flanary v. Kane, 102 Va. 547, 46 S. E. 312.

[5] Rittmaster v. Richner, 14 Colo. App. 361, 60 Pac. 189. See as to other cases of general warranty, Thorne v. Clarke. 112 Iowa, 548, 84 N. W. 701, 84 Am. St. Rep. 356; Lehman v. Given, 177 Pa. St. 580, 35 Atl. 864; Hynes v. Packard, 92 Tex. 44. 45 S. W. 562; Balch v. Arnold, 9 Wyo. 17, 59 Pac. 434.

[6] Scott v. Kirkendall, 88 Ill. 465, 30 Am. Rep. 562; Townsend v. Morris, 6 Cowen, 126; Caldwell v. Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36. See Green v. Collins, 20 Hun, 474. See, also, Lennig v. Land & Imp. Co. 107 Va. 458, 59 S. E. 400; Cain v. Fisher, 57 W. Va. 492, 50 S. E. 752; Britten v. Ruffin, 123 N. C. 67, 31 S. E. 271; Merrill v. Suing, 66 Neb. 404, 92 N. W. 618; Oliver v. Rush, 125 Ala. 537, 27 So. 923; Ravenel v. Ingram, 131 N. Y. 549, 42 S. E. 967; Burns v. Vereen, 132 Ga. 349, 64 S. E. 113; Brown v. Thompson, 81 S. C. 380, 62 S. E. 440; Savage v. Cauthorn, 109 Va. 694, 64 S. E. 1052. For monographic note on Breach of Covenant of Warranty by Eviction, see 122 Am. St. Rep. 852 et seq.

[7] Locke v. White, 89 Ind. 492.

[8] Hannah v. Henderson, 4 Ind. 174; Hale v. New Orleans, 13 La.

But the existence of a public or private way,[9] or the right to use a wall situated on the premises for a party wall, are breaches of the covenant.[1] So likewise a sale of the land for nonpayment of taxes charged thereon against the grantor prior to the conveyance and while he owned the land, is a breach of a covenant of special warranty.[2] And, generally, what in the case of a covenant for quiet enjoyment is considered an eviction, is deemed such under a covenant of warranty. If a deed contains a covenant of general warranty, and at the time it is made another has actual possession of the premises, holding them by a paramount title, an eviction occurs *eo instanti*, and an action can be immediately commenced.[3] If a person executes a deed with a covenant of

Ann. 499; Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173. See Kincaid v. Brittain, 5 Sneed, 124; Norton v. Jackson, 5 Cal. 262; Gleason v. Smith, 41 Vt. 293. A covenant of warranty does not protect the grantee against claims for which the grantor is not responsible, but only against claims based upon a legal foundation. Thorne v. Clark, 112 Ia. 548, 84 N. W. 701, 84 Am. St. Rep. 356.

[9] Butt v. Riffe, 78 Ky. 352; Russ v. Steele, 40 Vt. 310; Haynes v. Young, 36 Me. 561; Harlow v. Thomas, 15 Pick. 66.

[1] Lamb v. Danforth, 59 Me. 324, 8 Am. Rep. 426. See Hendricks v. Stark, 37 N. Y. 106, 93 Am. Dec. 549. The right in another to draw water from the premises is a breach: Day v. Adams, 42 Vt. 510; Clark v. Conroe, 38 Vt. 469. So is suffering taxes to remain unpaid: Rinehart v. Rinehart, 91 Ind. 89. Where a deed purports to convey only the right, title, and interest of the grantor, a general covenant will not enlarge the conveyance: Young v. Clippinger, 14 Kan. 148; Gee v. Moore, 12 Cal. 472; Sweet v. Brown, 12 Met. 175, 45 Am. Dec. 243; Locke v. White, 89 Ind. 492; Habig v. Dodge, 127 Ind. 31, 25 N. E. Rep. 182; Bryan v. Utland, 101 Ind. 477; Reynolds v. Shaver, 59 Ark. 299, 43 Am. St. Rep. 36; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396; Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406; Kimball v. Semple, 25 Cal. 440; McNear v. McComber, 18 Iowa, 12; McDonough v. Martin, 88 Ga. 675; Bowen v. Thrall, 28 Vt. 382; Cummings v. Dearborn, 56 Vt. 441; Marsh v. Fish, 66 Vt. 213; Stockwell v. Couillard, 129 Mass. 231; Allen v. Holton, 20 Pick. 458.

[2] Carr v. Fischer, 57 W. Va. 492, 50 S. E. 752.

[3] Rex v. Creel, 22 W. Va. 373. See, also, Harr v. Shaffer, 52 W. Va. 207, 43 S. E. 89. But otherwise where the holder of the paramount title is not in possession of

warranty, and the deed under which he holds contains a condition against the erection of buildings on a portion of the land, there is a breach of the covenant.[4] A grantor who has become the purchaser of an existing mortgage is not compelled to foreclose the mortgage for his protection, but may recover on his covenants of warranty.[5] A general warranty in a deed relates to the title of the land, not its quantity.[6] A judgment of injunction depriving grantees of the beneficial enjoyment of a part of the land granted is a constructive eviction and a breach of a covenant of warranty.[7] So, also, a purchase of a paramount title asserted against the covenantee is an eviction sufficient to amount to a breach of the covenant.[8]

the land nor positively asserting title against the grantee: Jones v. Paul, 59 Tex. 41. That plaintiff to prove a prima facie case is required merely to prove that he has either been evicted or kept out of possession by one in actual possession claiming title paramount to his own in an action for breach of covenants of quiet enjoyment and warranty see Heyn v. Ohman, 42 Neb. 693, 60 N. W. 952. The covenant is broken by eviction, actual or constructive under a lawful and paramount title. Sheppard v. Reese, 114 Ga. 411, 40 S. E. 282; Messervey v. Reese, 94 Ia. 222, 62 N. W. 767, 58 Am. St. Rep. 391; Leonard v. Cary (Ky.) 65 S. W. 124; McLennan v. Prentice (Wis.) 55 N. W. 764. See, also, Carpenter v. Carpenter, 88 Ark. 169, 113 S .W. 1032; White v. Stewart, 131 Ga. 460, 62 S. E. 590; Lennig v. Land etc. Co., 107 Va. 458, 59 S. E. 400.

[4] Kramer v. Carter, 136 Mass. 504. Where the premises conveyed were not described as a millsite, but a waterpower and flouring-mill were situated on them, the exercise subsequently by an adjoining owner of a right possessed by him to raise the dam, thus throwing the water back, injuring the buildings and overflowing the land, constitutes a breach; Scriver v. Smith, 30 Hun, 129.

[5] Royer v. Foster, 62 Iowa, 321.

[6] Adams v. Baker, 50 W. Va. 249, 40 S. E. 356; Burbridge v. Sadler, 46 W. Va. 39, 32 S. E. 1028; Maxwell v. Wilson, 54 W. Va. 495, 46 S. E. 349.

[7] Ensign v. Colt, 75 Conn. 111, 52 Atl. 829. See as to breach by enforcement of tax or assessment lien: Coleman v. Ins. Co. (Ky.) 82 S. W. 616; Conley v. Asphalt Co. 130 Ky. 262, 113 S. W. 125; Bigelow v. Stearns, 137 Mich. 26, 100 N. W. 125; Carswell v. Habberzettle, 99 Tex. 1, 86 S. W. 738, 122 Am. St. Rep. 597.

[8] Hayden v. Patterson, 39 Colo.

§ 933. **Right of joint possession.**—A person suing upon a covenant of warranty must of course have an interest which has been injured or disturbed. But where a deed contains a proviso that the right of possession shall be reserved to the mother and sister of the grantee as well as to himself, for use as a homestead until he arrives as majority, he has such an interest as entitles him to sue upon the covenant for a breach.[9]

§ 934. **Damages for breach of covenants of quiet enjoyment and of warranty.**—In some of the States the measure of damages for a breach of these covenants is the value of the land at the time of injury by defect of title and eviction.[1] But the general rule now is that the damages for

15, 88 Pac. 437; Brown v. Thompson, 81 S. C. 380, 62 S. E. 440; Morgan v. Haley, 107 Va. 331, 13 L.R.A.(N.S.) 732, 58 S. E. 564.

[9] Mason v. Kellogg, 38 Mich. 132. Said Graves, J., in delivering the opinion of the court: "The grantors do not appear to have retained anything. The grant was to the plaintiff, in fee, with a qualified use to him and his mother and sister for a term limited to a few months, and which might be cut short by the occurrence of his mother's death sooner. Let it be admitted that plaintiff and his mother and sister were vested with a right to the land itself under this clause: Shep. Touch. 93; Co. Litt. 4 *b*; Green v. Biddle, 8 Wheat. 1, 70, 5 L. ed. 547, 566. Let it be conceded that in virtue of being entitled to the described special kind of use and enjoyment for the time limited, they were by force of the deed and the statute (Comp. Laws, §§ 4116, 4118) vested for such time with a legal estate of the same quality and duration, and subject to the same conditions as the beneficial interest as meant by the grantor; and still the plaintiff had all the estate and right not embraced by the clause in question, and likewise the right under that clause to present possession and enjoyment in common with his mother and sister. His interest was severable from theirs. It was much more extensive. It covered everything except the trifling matter of their right to use and enjoy with him in the special mode limited up to August 9, 1876. That he had an interest and present right capable of being so disturbed and infringed as to give him an immediate right of action upon the covenant cannot be doubted, and the nature of his right and interest entitled him to sue alone: Rawle on Cov. 599; Barbour on Parties, 33."

[1] Park v. Bates, 12 Vt. 381, 36

a breach of these covenants are measured by the consideration, or what the land was worth as determined by the parties or by the consideration price, together with interest for the time the purchaser has lost the mesne profits, and also the costs and expenses incurred by the covenantee in defending the suit to evict him.[2] For a partial breach, damages are re-

Am. Dec. 347; Keeler v. Wood, 30 Vt. 242; Keith v. Day, 15 Vt. 660; Drury v. Shumway, Chip. D. 111, 1 Am. Dec. 704; Sterling v. Peet, 14 Conn. 245; Horsford v. Wright, Kirby, 3, 1 Am. Dec. 8; Sweet v. Patrick, 12 Me. 9; Doherty v. Dolan, 65 Me. 87; 20 Am. Rep. 677; Cushman v. Blanchard, 2 Greenl. 268, 11 Am. Dec. 76; Hardy v. Nelson, 27 Me. 525; Elder v. True, 30 Me. 104; Caswell v. Wendell, 4 Mass. 108; Norton v. Babcock, 2 Met. 516; White v. Whitney, 3 Met. 81; Gore v. Brazier, 3 Mass. 523, 3 Am. Dec. 182; Bigelow v. Jones, 4 Mass. 512. And see, also, where once recognized, Nelson v. Matthews, 2 Hen. & M. 164, 3 Am. Dec. 620; Witherspoon v. McCalla, 3 Desaus. Eq. 245; Liber v. Parsons, 1 Bay, 19; Mills v. Bell, 3 Call, 277; Guerard v. Rivers, 1 Bay, 265; Erebright v. Still, 1 Bay, 92. See, also, Farwell v. Bean, 82 Vt. 172, 72 Atl. 731; Olmstead v. Rawson, 188 N. Y. 517, 81 N. E. 456.

[2] McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456; Tong v. Matthews, 23 Mo. 437; McClure v. Gamble, 27 Pa. St. 288; Drew v. Towle, 30 N. H. 531, 64 Am. Dec. 309; Brown v. Dickerson, 12 Pa. St. 372; Cathcart v. Bowman, 5 Pa. St. 317; Cox v. Henry, 32 Pa. St. 18; Williamson v. Test, 24 Iowa, 138; Hallam v. Todhunter, 24 Iowa, 166; Elliott v. Thompson, 4 Humph. 99, 40 Am. Dec. 630; Dalton v. Bowker, 8 Nev. 190; Phillips v. Reichert, 17 Ind. 120, 79 Am. Dec. 463; Clark v. Burr, 14 Ohio, 188; Harding v. Larkin, 41 Ill. 413; Whitlock v. Crew, 28 Ga. 289; Marshall v. McConnell, 1 Litt. 419; Cummins v. Kennedy, 3 Litt. 118, 14 Am. Dec. 45; Lloyd v. Quimby, 5 Ohio St. 262; Wade v. Comstock, 11 Ohio St. 71; Swafford v. Whipple, 3 Greene, G. 261, 54 Am. Dec. 498; Gridley v. Tucker, Freem. Ch. 209; Pence v. Duvall, 9 Mon. B. 48; Robertson v. Lemon, 2 Bush, 301; Davis v. Smith, 5 Ga. 274, 47 Am. Dec. 279; Wood v. Kingston Coal Co. 48 Ill. 356, 95 Am. Dec. 554; Bond v. Quattlebaum, 1 McCord, 584, 10 Am. Dec. 702; Cox's Heirs v. Strode, 2 Bibb, 277, 5 Am. Dec. 603; Booker v. Bill, 3 Bibb, 173, 6 Am. Dec. 641; Davis v. Hall, 2 Bibb, 590; Robards v. Netherland, 3 Bibb, 529; Holmes v. Senneckson, 15 N. J. L. 313; Pearson v Davis, 1 McMull. 37; Grist v. Hodges, 3 Dev. 198; Bennett v. Jenkins, 13 Johns. 50; Burton v. Reeds, 20 Ind. 87; Cincinnati etc. R. R. Co. v. Pearce, 28 Ind. 502; Threkheld v. Fitzhugh, 2 Leigh, 451; Jackson v. Turner, 5 Leigh, 127; Foster v. Thompson, 41 N.

coverable, according to the same rule, in proportion to the extent of the breach.[3] If the eviction is by a paramount lien, damages may be recovered to the extent of the lien, if this does not exceed the amount that could be recovered for an eviction for failure of title.[4] If the adverse title has been extinguished, the covenantee may recover what he has

H. 373; Wallace v. Talbot, 1 McCord, 466; Talbot v. Bedford, Cooke, 447; Lowther v. Commonwealth, 1 Hen. & M. 202; Earle v. Middleton, 1 Cheves, 127; Crenshaw v. Smith, 5 Munf. 415; McMillan v. Ritchie, 3 Mon. 348, 16 Am. Dec. 107; Kennedy v. Davis, 7 Mon. 76; Hanson v. Buckner, 4 Dana, 251, 29 Am. Dec. 401; Morris v. Rowan, 17 N. J. L. 304; Taylor v. Holton, 1 Mont. 688; Stebbins v. Wolf, 33 Kan. 765; Rogers v. Golson (Tex. Civ. App.) 31 S. W. Rep. 200; Sheffey v. Gardiner, 79 Va. 313; Barnett v. Hughey, 54 Ark. 195, 15 S. W. Rep. 464; Taylor v. Wallace, 20 Colo. 211, 37 Pac. Rep. 693; Rhea v. Swain, 122 Ind. 272; Bellows v. Litchfield, 83 Iowa, 36, 48 N. W. Rep. 1062; Boyers v. Amet, 41 La. Ann. 721, 6 So. Rep. 734; Cook v. Curtis, 68 Mich. 611; Devine v. Lewis, 38 Minn. 24, 35 N. W. Rep. 711; Matheny v. Stewart, 108 Mo. 73, 17 S. W. Rep. 1014; Hoffman v. Bosch, 18 Nev. 360, 4 Pac. Rep. 703; Taylor v. Holter, 1 Mont. 688; Winnipiseogee Paper Co. v. Eaton, 65 N. H. 13, 18 Atl. Rep. 171; Ramsey v. Wallace, 100 N. C. 75, 6 S. E. Rep. 638; Rash v. Jenne, 26 Or. 169, 37 Pac. Rep. 538; Thiele v. Axell, 5 Tex. Civ. App. 548. See, also, Herington v. Clark, 60 Kan. 855, 55 Pac. 462; Parkinson v. Woulds, 125 Mich. 325, 84 N. W. 292; Madden v. Land Co. 16 Ida. 59, 21 L.R.A. (N.S.) 332, 100 Pac. 358; Folk v. Graham, 82 S. C. 66, 62 S. E. 1106; Blanten v. Nunley (Tex.) 119 S. W. 881; Mfg. Co. v. Imp. Co. 31 Wash. 610, 72 Pac. 455; Cheney v. Straube, 35 Neb. 521, 53 N. W. 479 (citing text.)

[3] Mayor v. Donnovant, 25 Ill. 262; Griffin v. Reynolds, 17 How. 609, 15 L. ed. 229; Dougherty v. Duvall's Heirs, 9 Mon. B. 57; Raines v. Calloway, 27 Tex. 678; Boyle v. Edwards, 114 Mass. 373; Dickins v. Sheppard, 3 Murph. 526; Morris v. Harris, 9 Gill. 19; Hunt v. Orwig, 17 Mon. B. 73, 66 Am. Dec. 144; Dimmick v. Lockwood, 10 Wend. 142; Williams v. Beeman, 2 Dev. 483; Hoot v. Spade, 20 Ired. 326; Brooks v. Mohl, 104 Minn. 404, 17 L.R.A.(N.S.) 1195, 116 N. W. 931, 124 Am. St. Rep. 629 (citing text.)

[4] Tufts v. Adams, 8 Pick. 547; Donohoe v. Emery, 9 Met. 63; White v. Whitney, 3 Met. 81; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Holbrook v. Weatherbee, 12 Me. 502; Winslow v. McCall, 32 Barb. 241. And see, also, Norton v. Babcock, 2 Met. 510; Stewart v. Drake, 9 N. J. L. 139; Elder v. True, 32 Me. 104; Chapel v. Bull, 17 Mass. 213;

paid therefor, with a fair remuneration for his trouble, and he will also be allowed the reasonable incidental expenses. But the total amount cannot exceed what he could recover on a total loss of title.[5] The covenantee can have but one satisfaction, although he may sue the first or any succeeding covenantor.[6] An intermediate grantee who has conveyed the land may, in case of damage, maintain an action against a remote grantor.[7]

Copeland v. Copeland, 30 Me. 446; Harper v. Jeffries, 5 Whart. 26; Lloyd v. Quimby, 5 Ohio St. 262; Burk v. Clements, 16 Ind. 132; Pittman v. Connor, 27 Ind. 337; Miller v. Halsey, 14 N. J. L. 48; McGinnis v. Noble, 7 Watts & S. 454; Mellon's Appeal, 32 Pa. St. 121; Blood v. Wilkins, 43 Iowa, 565; Smith v. Dixon, 27 Ohio St. 471.

[5] Swett v. Patrick, 12 Me. 9; Bailey v. Scott, 13 Wis. 619; Lane v. Fury, 31 Ohio St. 574; McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456; Leffingwell v. Elliott, 10 Pick. 204, 8 Pick. 457, 19 Am. Dec. 343; Loomis v. Bedel, 11 N. H. 74; Dale v. Shively, 8 Kan. 276; Jones v. Lightfoot, 10 Ala. 17; Thayer v. Clemence, 22 Pick. 490; Estabrook v. Smith, 6 Gray, 572, 66 Am. Dec. 445; Yokum v. Thomas, 15 Iowa, 67; Richards v. Iowa Homestead Co., 44 Iowa, 304, 24 Am. Rep. 745; Claycomb v. Munger, 51 Ill. 373; Fawcett v. Woods, 5 Iowa, 400; Spring v. Chase, 22 Me. 505, 39 Am. Dec. 595; Kelly v. Lowe, 18 Me. 244; Allis v. Nininger, 25 Minn. 525; Hurd v. Hall, 12 Wis. 112; Lewis v. Harris, 31 Ala. 689; Lane v. Desire, 23 Mo. 151; McKee v. Bain, 11 Kan. 569. And see Martin v. Atkinson, 7 Ga. 228, 50 Am. Dec. 403; Ferris v. Mosher, 27 Vt. 218, 65 Am. Dec. 192; Baxter v. Ryerss, 13 Barb. 267; Beasley v. Phillips, 20 Ind. App. 182, 50 N. E. 488; Holloway v. Miller, 84 Miss. 776, 36 So. 531; Lemly v. Ellis, 146 N. C. 221, 59 S. E. 683; Tatum v. Kincannon (Tex.) 119 S. W. 113.

[6] Crooker v. Jewell, 29 Me. 527; Birney v. Hann, 3 Marsh. A. K. 322, 13 Am. Dec. 167; Lowe v. McDonald, 3 Marsh. A. K. 354, 13 Am. Dec. 181; Wilson v. Taylor, 9 Ohio St. 595, 75 Am. Dec. 488; King v. Kerr, 5 Ohio, 154, 22 Am. Dec. 777; Crisfield v. Storr, 36 Me. 129; Withy v. Mumford, 5 Cowen, 137; Lot v. Parish, 1 Litt. 393; Williams v. Beeman, 2 Dev. 483; Hunt v. Orwig, 17 Mon. B. 73, 66 Am. Dec. 144; Claycomb v. Munger, 51 Ill. 373; Suydam v. Jones, 10 Wend. 180, 25 Am. Dec. 552; Thompson v. Sanders, 5 Mon. 58; Williams v. Beeman, 2 Dev. 483.

[7] Birney v. Hann, 3 Marsh. A. K. 322, 13 Am. Dec. 167. "As the indorser of a commercial instrument," said Mills, J., "who has paid its contents can sustain his

§ 935. Notice to the covenantor of suit.—If an action is brought by a person claiming a paramount title to recover the premises from the covenantee, the latter, by giving notice to the covenantor of such suit, and requesting him to undertake its defense, may liberate himself from the necessity of proving, in case the claimant of the paramount title is successful, the validity of such title, when suing upon his covenant.[8] If the grantor himself defended the suit, it is no de-

action against his remote indorser without a reindorsement, because his indorsement, by the act of payment, *per se*, has become *functus officio* as to him, so ought Hann, who has rendered his own deed inoperative further against him, to be restored to the situation he was in before it was made, without a conveyance formally executed." And see, also, Wheeler v. Sohier, 3 Cush. 219; Claycomb v. Munger, 51 Ill. 373; Herrin v. McEntyre, 1 Hawks, 410; Thompson v. Sanders, 5 Mon. 357; Lot v. Parish, 1 Litt. 393; Baxter v. Ryerss, 13 Barb. 267; Booth v. Starr, 1 Conn. 244, 6 Am. Dec. 233; Redwine v. Brown, 10 Ga. 311; Withy v. Mumford, 5 Cow. 137; Markland v. Crump, 1 Dev. & B. 94, 27 Am. Dec. 230; Thompson v. Shattuck, 2 Met. 618.

[8] Greenlaw v. Williams, 2 Lea (Tenn.), 533; Park v. Bates, 12 Vt. 381, 36 Am. Dec. 347; Swenk v. Stout, 2 Yeates, 470; Hinds v. Allen, 34 Conn. 195; Bender v. Bromberger, 4 Dall. 436, 1 L. ed. 898; Wimberly v. Collier, 32 Ga. 13; Leather v. Poulteny, 4 Binn. 356; Williams v. Weatherbee, 2 Aikens, 307; Collingwood v. Irwin, 3 Watts, 310; Mooney v. Burchard, 84 Ind. 285; Ives v. Niles, 5 Ind. 323; King v. Kerr, 5 Ohio, 158, 22 Am. Dec. 777; City of St. Louis v. Bissell, 46 Mo. 157; Morgan v. Muldoon, 82 Ind. 347; Paul v. Witman, 3 Watts & S. 409; Wendel v. North, 24 Wis. 223; Somers v. Schmidt, 24 Wis. 419, 1 Am. Rep. 191; Jones v. Whitsett, 79 Mo. 188; Middleton v. Thompson, 1 Spear, 67; Pitkin v. Leavitt, 13 Vt. 379; Brown v. Taylor, 13 Vt. 631, 37 Am. Dec. 618; Turner v. Goodrich, 26 Vt. 708; Cooper v. Watson, 10 Wend. 205; Chapman v. Holmes, 5 Halst. 20; Booker v. Bell, 3 Bibb. 173; 6 Am. Dec. 641; Prewit v. Kenton, 3 Bibb. 282; Cox v. Strode, 4 Bibb, 4; Miner v. Clark, 15 Wend. 427; Morris v. Rowan, 2 Har. (N. J.) 307; Kelly v. The Dutch Church, 2 Hill, 105; Wilson v. McElwee, 1 Strob. 65; Jones v. Waggoner, 7 Marsh. J. J. 144; Davis v. Wilbourne, 1 Hill (S. C.), 28, 26 Am. Dec. 154; Boyd v. Whitfield, 19 Ark. 469; Graham v. Tankersley, 15 Ala. 634. See Cummings v. Harrison, 57 Miss. 275; Walton v. Cox, 67 Ind. 164. See, also, Chenault v. Thomas, 119 Ky. 130, 83 S. W. 109; Richmond v. Ames, 164 Mass. 467, 41 N. E. 671.

fense that the defendant in the ejectment suit was not in possession.[9] When proper notice has been given, and suit is brought by the covenantee against his covenantor, the latter, in the absence of fraud or collusion, will not be permitted to make the issue that the recovery against the former was not obtained by virtue of a paramount title.[1] But this rule, it seems, does not prevail in North Carolina.[2] If the covenantee is compelled to bring suit, in the first instance, to acquire possession of the premises, it is generaly held, that if he gives notice to the covenantor to prosecute the suit, the judgment will be conclusive upon him.[3] But in Tennessee, a different conclusion was reached by the court, on the ground that the law only authorized the making the covenantor a defendant, and not a plaintiff.[4] The notice may be by parol.[5] But mere knowledge derived from third persons, as distinguished from notice, is not sufficient.[6] The notice should be certain, explicit, and unequivocal.[7] In some states it is held that to entitle a purchaser to the benefit of a covenant of warranty conclusive against the covenantor he must not only have been notified of the suit but requested to appear and defend.[8]

[9] Jones v. Whitsell, 79 Mo. 188.

[1] McConnel v. Downs, 48 Ill. 271; Sisk v. Woodruff, 15 Ill. 15.

[2] Martin v. Cowles, 2 Dev. & B. 101; Wilder v. Ireland, 8 Jones (N. C.). 88; Shober v. Robinson, 2 Murph. 33; Saunders v. Hamilton, 2 Hayw. (N. C.) 282.

[3] Pitkin v. Leavitt, 13 Vt. 379; Brown v. Taylor, 13 Vt. 631, 37 Am. Dec. 618; White v. Williams, 13 Tex. 258; Gragg v. Richardson, 25 Ga. 570, 71 Am. Dec. 190; Park v. Bates, 12 Vt. 381, 36 Am. Dec.

[4] Ferrell v. Alder, 8 Humph. 44.

[5] Miner v. Clark, 15 Wend. 427. But see Mason v. Kellogg, 38 Mich. 132.

[6] Somers v. Schmidt, 24 Wis. 417, 1 Am. Rep. 191; Collins v. Baker, 6 Mo. App. 588.

[7] Paul v. Witman, 3 Watts & S. 410; Boyd v. Whitfield, 19 Ark. 470; Collins v. Baker, 6 Mo. App. 588. It is for the jury to decide whether the notice was received or not: Collingwood v. Irwin, 3 Watts, 310. But whether it was a proper notice as to time is a question for the court: Davis v. Wilbourne, 1 Hill (S. C.) 28, 26 Am.

[8] Morgan v. Haley, 107 Va. 331, 13 L.R.A.(N.S.) 732, 58 S. E. 564, 13 A. & E. Ann. Cas. 204. See, also, Johns v. Hardin, 81 Tex. 37, 16 S. W. 623; Sampson v. Zimmerman, 73 Kan. 654, 85 Pac. 757; and see Hubbard v. Stanaford

§ 936. **Comments.**—Although it seems that a parol notice is sufficient, yet as a matter of practice, it is obvious that it is better always to give it in writing. The notice must be direct and certain, and after the lapse of a considerable period of time it would, considering the infirmity of human memory, be almost impossible to remember the exact language in which the notice was given. The notice given to the covenantor should be considered as a notice in a legal proceeding, and ought on general principles to be couched in writing. Mr. Justice Bronson has aptly said, in a dissenting opinion, after referring to the practice under the old system of voucher by a writ of summons, where the right could only be exercised by means of a writ served by an officer, "he ought not, in the other, to be prejudiced by anything less definite and formal than a writing which will advise him of what has been done, and what he is required to do." [9] And probably now under statutory provisions requiring notices in legal proceedings to be in writing, a written notice would be necessary.

§ 937. **Where no notice is given to the covenantor.**—There has been some discussion, resulting in a variance of opinion, as to what effect a judgment possesses when the covenantor had not been notified of the suit, and was not requested to defend. Of course, such a judgment cannot bind the covenantor. The only question that can arise is one of evidence. It has been asserted that, although the defendant might inquire into the merits of the judgment, yet it was *prima facie* evidence of the existence of a paramount title.[1]

(Ky.) 100 S. W. 232; Richstein v. Welch, 197 Mass. 224, 83 N. E. 417; Fitzpatrick v. Hoffman, 104 Mich. 228, 62 N. W. 349; Olmstead v. Rawson, 188 N. Y. 517, 81 N. E. 456; Browning v. Stillwell, 86 N. Y. Supp. 707, 42 Misc. 346; Teague v. Whaley, 20 Ind. App. 26, 50 N. E. 41; Richmond v. Ames, 164 Mass. 467, 41 N. E. 671.

[9] Miner v. Clark, 15 Wend. 427.

[1] Collingwood v. Irwin, 3 Watts, 310; Pitkins v. Leavitt, 13 Vt. 384; Paul v. Whitman, 3 Watts & S. 407.

But the more reasonable rule, and the one sustained by authority, is that the judgment, where no notice has been given, and the covenantor is not a party to the suit, is not even *prima facie* evidence that the eviction was founded upon an adverse and paramount title.[2] "It is a familiar principle of law that a man shall not be bound by a judgment pronounced in a proceeding to which he is not a party, actually or constructively. He should be allowed to appear in the case, and adduce evidence in support of his rights before he is concluded by the judgment. If a warrantor has no notice of the action against his grantee, and no opportunity of showing therein that he transferred a good title, he cannot, in any sense, be considered a party to the action, and therefore ought not to be bound by any adjudication of the question of title. But, if he has notice, he may become a party to the suit, and it is his own fault if his title is not fully presented and investigated. He then has an opportunity of sustaining the title that he has warranted and defeating a recovery by the plaintiff in ejectment. If he fails to do this successfully, he is concluded from afterward asserting the superiority of that title, and compelled to refund the purchase money, with interest. By giving the warrantor notice, the defendant in ejectment may relieve himself from the burden of afterward proving the validity of the title under which he is evicted. But, if he neglects to give the notice, he must come prepared to prove, on the trial of the

[2] Hanson v. Buckner, 4 Dana, 254, 29 Am. Dec. 401; Booker v. Bell, 3 Bibb, 175, 6 Am. Dec. 641; Graham v. Tankersley, 15 Ala. 645; Stevens v. Jack, 3 Yerg. 403; Devour v. Johnson, 3 Bibb, 410; Prewitt v. Kenton, 3 Bibb, 282; Cox v. Strode, 4 Bibb, 4; Rhode v. Green, 26 Ind. 83. See, also, Osburn v. Pritchard, 104 Ga. 145, 30 S. E. 656; Richstein v. Welch, 197 Mass. 224, 83 N. E. 417; McCrillis v. Thomas, 110 Mo. App. 699, 85 S. W. 673; Morrette v. Bostwick, 111 N. Y. S. 1021, 127 App. Div. 701; Baumgarten v. Chipman, 30 Utah, 466, 86 Pac. 411; Wallace v. Perles, 109 Wis. 316, 53 L.R.A. 644, 85 N. W. 371, 83 Am. St. Rep. 898 (quoting text).

action of covenant, that he was evicted by force of an adverse and superior title; in other words, he must show that the warrantor, by appearing and defending the action of ejectment, could not have prevented a recovery."[3] It does not follow as a necessary conclusion that the defendant has been defeated in a suit in ejectment because his title was defective. He may have suffered judgment to go against him, or the plaintiff may have recovered on some technical ground. It, perhaps, is unnecessary to remark that want of notice to the covenantor of the pendency of the prior suit, while giving him an opportunity to show his title when sued upon the covenant, cannot defeat a recovery on the part of the covenantee. The latter is under no obligation to give notice to enable him to recover.[4]

§ 938. **Mortgagee entitled to benefit of covenant.**— Where land has been purchased by a mortgagor with covenants of warranty, the mortgagee is entitled to the benefit of such covenants. Thus, a person purchased land with covenants of warranty, and subsequently executed a mortgage upon it, and finally the title passed to another. It was then

[3] Sisk v. Woodruff, 15 Ill. 15, per Treat, C. J. See, also, Fields v. Hunter, 8 Mo. 128. In some cases a judgment has been deemed evidence of the bare fact of an eviction: Hanson v. Buckner, 4 Dana, 254, 29 Am. Dec. 401; Booker v. Bell, 3 Bibb, 175, 6 Am. Dec. 641; Rhode v. Green, 26 Ind. 83. See, also, Richstein v. Welch, 197 Mass. 224, 83 N. W. 417. But in other cases it is held that unless there is evidence of some change of possession, actual or constructive, a judgment is not evidence of an eviction: Hoy v. Taliaferro, 8 Smedes & M. 741; Miller v. Avery, 2 Barb. Ch. 582; McDowell v. Hunter, Dud. (Ga.) 4; Webb v. Alexander, 7 Wend. 286; Paul v. Witman, 3 Watts & S. 407; Dennis v. Heath, 11 Smedes & M. 218, 49 Am. Dec. 51.

[4] King v. Kerr, 5 Ohio, 158, 22 Am. Dec. 777; Claycomb v. Munger, 51 Ill. 378; Rhode v. Green, 26 Ind. 83; Smith v. Compton, 3 Barn. & Adol. 408; Duffield v. Scott, 3 Term Rep. 376. Where a grantee has surrendered possession to one claiming adversely, he must show that the title of such person is paramount to that of his grantor: Snyder v. Jennings, 15 Neb. 372.

found that the title originally acquired by the mortgagor had totally failed, whereupon the grantor of the mortgagor paid to the last grantee, in ignorance of the existence of the mortgage, the amount of his liability on the covenant. An action was brought to foreclose the mortgage, and the court decided that equity had jurisdiction to compel the last grantee to whom the money was paid to repay so much of the amount received by him as was necessary for the protection of the mortgagor.[5] The court considered that the mistake of the parties as to the fact of the nonexistence of the mortgage was a sufficient reason upon which to found a right of recovery. To the argument that this liability was purely legal, and that a complete remedy might be had at law, Mr. Chief Justice Beck replied: "But mistakes whereby parties are deprived of their property or money have always been subjects of chancery cognizance, and remedies to relieve therefrom are never refused in that forum. While it is true that money paid by mistake may be recovered at law, and when no circumstances attend the case which will bring it within chancery jurisdiction, the remedy must be sought at law, yet if for any reason the case is of equitable cognizance, the party will not be required to go to another forum to recover the money, but will have full relief in equity." [6]

§ 939. **Interest and counsel fees as damages.**—The plaintiff is generaly allowed to recover interest upon the purchase money as part of the damages to which he is entitled, as an offset to the right of the owner of the paramount title to mesne profits.[7] But the recovery of interest is confined

[5] Rose v. Schaffner, 50 Iowa, 483.

[6] Rose v. Schaffner, supra. But see Davidson v. Cox, 10 Neb. 150.

[7] Sumner v. Williams, 8 Mass. 222, 5 Am. Dec. 83; Downer v. Smith, 38 Vt. 464; Staats v. Ten Eyck, 3 Caines, 111, 2 Am. Dec. 254; Brandt v. Foster, 5 Iowa, 295; Winslow v. McCall, 32 Barb. 241; McNear v. McComber, 18 Iowa, 12; Partridge v. Hatch, 18 N. H. 494. See Dalton v. Bowker, 8 Nev. 190; Leffingwell v. Elliott, 10 Pick. 204.

within the limits for which a recovery of the mesne profits may be had. "The buyer in the covenant of seisin recovers back the consideration money and interest, and no more. The interest is to countervail the claim for mesne profits, and is, and ought to be, commensurate in point of time with the legal claim to mesne profits." [8] Whether counsel fees can be recovered or not is a mooted question. In some cases they have been considered a proper element of damages.[9] In others, however, they have been held not to be recoverable.[1] But where the covenant is to indemnify the covenantee and save him harmless from all loss and expenses, aside from a covenant for title as such, counsel fees are recoverable as damages.[2] Where notice of the pendency of an action has been given to the covenantor, and he has been requested to

[8] 4 Kent's Com. 375. See, also, Patterson v. Stewart, 6 Watts & S. 528, 40 Am. Dec. 586; Flint v. Steadman, 36 Vt. 210; Caulkins v. Harris, 9 Johns. 324; Ela v. Card, 2 N. H. 175, 9 Am. Dec. 46; Guthrie v. Pugsley, 12 Johns. 126; Williams v. Beeman, 2 Dev. 485; Partridge v. Hatch, 18 N. H. 494; Clark v. Parr, 14 Ohio, 118, 45 Am. Dec. 529; Rich v. Johnson, 1 Chand. 20, 52 Am. Dec. 144; Kyle v. Fauntleroy, 9 Mon. B. 620; Bennett v. Jenkins, 13 Johns. 50. But see Whiting v. Dewey, 15 Pick. 428.

[9] Rowe v. Heath, 23 Tex. 620; Harding v. Larkin, 41 Ill. 420; Rickert v. Snyder, 9 Wend. 416; McAlpin v. Woodruff, 11 Ohio St. 130; Haynes v. Stevens, 11 N. H. 28; Keeler v. Wood, 30 Vt. 242; Robertson v. Lemon, 2 Bush, 303; Kingsbury v. Smith, 13 N. H. 125; Pitkin v. Leavitt, 13 Vt. 379; Turner v. Goodrich, 26 Vt. 709; Drew v. Towle, 10 Fost. (N. H.) 531, 64 Am. Dec. 309; Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 83.

[1] Jeter v. Glenn, 9 Rich. 380; Williams v. Burg, 9 Lea (Tenn.), 455; Gragg v. Richardson, 25 Ga. 566, 71 Am. Dec. 190. See Cushman v. Blanchard, 2 Greenl. 266, 11 Am. Dec. 76; Kennison v. Taylor, 18 N. H. 220; Williamson v. Williamson, 71 Me. 442; Harding v. Larkin, 41 Ill. 413; Swartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470; Morris v. Rowan, 17 N. J. L. 304; Drew v. Towle, 30 N. H. 531, 64 Am. Dec. 309; Holmes v. Sinnickson, 15 N. J. L. 313; Robertson v. Lemon, 2 Bush, 301; Morgan v. Haley, 107 Va. 331, 13 L.R.A.(N.S.) 732, 58 S. E. 564.

[2] Rohinson v. Bakewill, 25 Pa. St. (1 Casey), 426; Cox v. Henry, 32 Pa. St. (8 Casey), 21; Anderson v. Washabaugh, 43 Pa. St. 115. But see Morgan v. Haley, 107 Va. 331, 13 L.R.A.(N.S.) 732, 58 S. E. 564.

defend, and refuses to do so, the legal elements of damage are said to be the costs of the suit, the costs to which the covenantee was subjected in defending it, with interest from the time of payment, and the value of the premises at the date of eviction, with interest from that time.[3]

§ 940. **Covenants running with the land.**—Certain covenants are appurtenant to the estate granted by the deed in which such covenants are contained, and bind the assigns of the covenantor, and vest in the assigns of the covenantee in the same manner as if they had personally made them. Covenants of this kind are said to run with the land. A covenant by a grantor that he will not erect, or suffer to be erected, any structure upon a lot adjoining the property which he has conveyed, is a covenant that runs with the land.[4] A covenant to pay assessments will run with the land.[5] So will a covenant made by a grantee that he will not carry on, or allow to be carried on, any offensive trade upon the premises conveyed to him.[6] A covenant in a deed of city lots, providing that any house which should be built upon such lots should be placed back a specified distance from the line of the street on which such lots front, is held to be a covenant running

[3] Williamson v. Williamson, 71 Me. 442. See, also, Gragg v. Richardson, 25 Ga. 570, 71 Am. Dec. 190; Haynes v. Stevens, 11 N. H. 28; Merritt v. Morse, 108 Mass. 270; Pitkin v. Leavitt, 13 Vt. 379; White v. Williams, 13 Tex. 258.

[4] Trustees etc. v. Cowen, 4 Paige, 510, 27 Am. Dec. 80. The covenant must respect the estate conveyed. Indiana etc. Co. v. Hinton, 159 Ind. 398, 64 N. E. 224; Northern etc. R. Co. v. McClure, 9 N. D. 73, 47 L.R.A. 149, 81 N. W. 52; West Va. etc. R. Co. v. McIntire, 44 W. Va. 210, 28 S. E. 696; Deason v. Findley, 145 Ala. 407, 40 So. 220; Mfg. Co. v. Mills, 126 Ga. 210, 7 L.R.A.(N.S.) 1139, 54 S. E. 1028; Tract Co. v. Harbaugh, 38 Ind. App. 115, 78 N. E. 80; Sjoblom v. Mark, 103 Minn. 193, 15 L.R.A.(N.S.) 1129, 114 N. W. 746; Clement v. Willett, 105 Minn. 267, 17 L.R.A.(N.S.) 1094, 117 N. W. 491, 127 Am. St. Rep. 562; L. & T. Co. v. Fuller, 114 Mo. App. 633, 91 S. W. 58; Hurxthal v. Boom etc. Co. 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954.

[5] Kearney v Post, 2 N. Y. 394.

[6] Barron v. Richard, 8 Paige, 351.

with the land.[7] But an agreement by the grantee contained in a deed-poll to keep in repair a building of the grantor on land adjoining that conveyed, does not run with the land, and hence a subsequent grantee of the adjoining land cannot maintain an action on it.[8] A covenant to maintain fences already built will run with the land.[9] But a covenant to build a fence seems to be personal only.[1] In England, all covenants for title are considered as appurtenant to the land, and to run with it.[2] But in this country, the covenants for title considered as running with the land are those for quiet enjoyment, for further assurance, and of warranty.[3] A covenant for the maintenance of a dam and adjacent works for the benefit of an adjoining estate which the covenantor conveys, will run with the land.[4] If at the time the deed is executed a bond is also executed containing a covenant, binding the purchaser, his

[7] Winfield v. Henning, 21 N. J. Eq. 188.

[8] Martin v. Drinan, 128 Mass. 515.

[9] Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Easter v. Little Miami R. R. Co. 14 Ohio St. 48; Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550; Hazlett v. Sinclair, 76 Ind. 488, 40 Am. Rep. 254. See, also, Sterling Hydraulic Co. v. Williams, 66 Ill. 393; Gaines v. Poor, 3 Met. 503, 79 Am. Dec. 559; Thomas v. Van Kopff, 6 Gill & J. 372; Fairbanks v. Williamson, 7 Me. 96; Stockett v. Howard, 34 Md. 121; Countryman v. Deck, 13 Abb. N. C. 110; Van Rensselaer v. Dennison, 35 N. Y. 393; Worthington v. Hewes, 19 Ohio St. 66; Van Rensselaer v. Smith, 27 Barb. 104; Hickey v. Lake Shore etc. Ry. Co., 51 Ohio St. 40, 46 Am. St. Rep. 545. But see Kennedy v. Owen, 136 Mass. 199.

[1] Hartung v. Witte, 59 Wis. 285; Kennedy v. Owen, 36 Mass. 199.

[2] Kingdom v. Nottle, 1 Maule & S. 355.

[3] Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 338; White v. Whitney, 3 Met. 81; Chandler v. Brown, 59 N. H. 370; Withy v. Munford, 5 Cowen, 137; Crisfield v. Storr, 36 Md. 129, 11 Am. Rep. 480; Rindskopf v. Farmers' etc. Trust Co., 58 Barb. 36; Burtners v. Keran, 24 Gratt. 42; Hunt v. Amidon, 4 Hill, 345, 40 Am. Dec. 283; Markland v. Crump, 1 Dev. & B. 94, 27 Am. Dec. 230; Claycomb v. Munger, 51 Ill. 372; Civil Code Cal. § 1463; Kimball v. Bryant, 25 Minn. 496.

[4] Fitch v. Johnson, 104 Ill. 111. A covenant by a railroad company to build a fence, in a deed conveying to it a right of way, runs with the land, and a new corporation succeeding by foreclosure to the rights of the old is bound to per-

representatives and assigns, not to permit a warehouse of a certain kind to be built on the land, the covenant runs with the land.[5] A covenant made by a railroad company in consideration of a grant of a right of way, to build and forever maintain a switch from the railroad to the grantor's mill, will run with the land.[6] So it is held, where a deed conveying a right of way to a railroad company, stipulated that the company should build a depot on the right of way, to be used for the purposes of the railroad, but to be the property of the grantor, that the covenant runs with the land. It can be enforced against another company purchasing the property and franchises of the first.[7]

§ 940a. **Grantee bound by acceptance of deed.**—After acceptance of the deed by the grantee, and entry into possession of the land conveyed, he is bound as effectually by the conditions contained in the deed as though he had signed and executed the deed himself. He is deemed by such acts to have expressly agreed to do what it is stipulated in the deed that he shall do. Whether or not such an obligation is to be deemed, technically speaking, a covenant running with the land, it is, at all events, an agreement on the part of the grantee evidenced by his acceptance of the deed.[8] Thus, the

form it as a duty blended with its right to use and occupy the land with its track: Midland Railway Co. v. Fisher, 125 Ind. 19, 8 L.R.A. 604, 21 Am. St. Rep. 189.

[5] Robbins v. Webb, 68 Ala. 393. See, for an instance, a covenant running with the land in relation to the quantity of water flowing in a creek: Shaber v. St. Paul Water Co., 30 Minn. 179.

[6] Lydick v. Baltimore & Ohio R. R. Co., 17 W. Va. 427.

[7] Georgia Southern R. R. Co. v. Reeves, 64 Ga. 492. What covenants run with the land is the subject of an exhaustive note in 82 Am. St. Rep. page 664 *et seq.* and reference is made to this note for an elaborate discussion of the law relating thereto.

[8] Hickey v. Lake Shore etc. Ry. Co., 51 Ohio St. 40, 23 L.R.A. 396, 46 Am. St. Rep. 545; Georgia Southern R. R. Co. v. Reeves, 64 Ga. 492; Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633. See, also, Atlanta etc. R. Co. v. McKinney, 124 Ga. 929, 6 L.R.A.(N.S.) 436, 53 S. E. 701, 110 Am. St. Rep.

grantee is bound by accepting a deed declaring that it is made subject to the condition that the grantee, his heirs and assigns, shall build and maintain a fence. Such a condition is binding perpetually on the owners of the land conveyed, and in the event of a failure of the grantee and his assigns to comply with it, the grantor may construct or repair the fence, and maintain an action against the original grantee, and those deriving title from him, to charge each with his proper share of the expense.[9] The acceptance of the deed constitutes a contract and all the covenants bind the grantee and his successors.[1] Where a deed contains a clause that it is subject to the condition that he, "his heirs and assigns shall make and maintain good and sufficient fences on each side of the right of way" etc. "which condition and obligation shall be perpetually binding on the owners of the land," the stipulation will run with the land. The acceptance of the deed implies

215; Pittsburgh etc. R. Co. v. Wilson, 34 Ind. App. 324, 72 N. E. 666; Sexauer v. Wilson, 136 Ia. 357, 14 L.R.A.(N.S.) 185, 113 N. W. 941; Chloupek v. Perotka, 89 Wis. 551, 62 N. W. 537.

[9] Hickey v. Lake Shore etc. Ry. Co., 51 Ohio St. 40, 23 L.R.A. 396, 46 Am. St. Rep. 545. The grantee is estopped by the acceptance of a deed as fully as the grantor: Hubbard v. Marshall, 50 Wis. 327; Bowman v. Griffith, 35 Neb. 361; Chloupek v. Perotka, 89 Wis. 551, 46 Am. St. Rep. 858; Lowber v. Connit, 36 Wis. 176; Hutchinson v. Chicago etc. Ry. Co., 37 Wis. 582; Orthwein v. Thomas, 127 Ill. 554, 4 L.R.A. 434, 11 Am. St. Rep. 159.

[1] Midland R. Co. v. Fisher, 125 Ind. 19, 8 L.R.A. 604, 24 N. E. 756, 21 Am. St. Rep. 189; Harlan v. Logansport Natural Gas Co. 133 Ind. 328, 32 N. E. 230; Thiebaud v. Union Furniture Co. 143 Ind. 344, 42 N. E. 741; Pittsburgh, C. C. & St. L. R. Co. v. Wilson, 34 Ind. App. 324, 72 N. E. 666; Finley v. Simpson, 22 N. J. Eq. 311, 53 Am. Dec. 252; Earl v. New Brunswick, 38 N. J. L. 47; Hagerty v. Lee, 54 N. J. L. 580, 20 L.R.A. 631, 25 Atl. 319; Maynard v. Moore, 76 N. C. 158; Kentucky C. R. Co. v. Kenney, 82 Ky. 154; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816; Van Rensselaer v. Hays, 19 N. Y. 68, 75 Am. Dec. 278; Brockmeyer v. Sanitary District, 118 Ill. App. 49; Peden v. Chicago, R. I. & P. R. Co. 73 Iowa, 328, 5 Am. St. Rep. 680, 35 N. W. 424; Lake Erie & W. R. Co. v. Priest, 131 Ind. 413, 31 N. E. 77; Gibson v. Porter, 12 Ky. L. Rep. 917, 15 S. W. 871; Flege v. Covington & C. Elev. Co. R. T. & B. Co. 28 Ky. L. Rep. 1257, 91 S. W. 738.

an undertaking on the part of the grantee to perform the condition and a subsequent grantee is equally bound.[2] The acceptance of a deed poll makes it the mutual act of the parties.[3] In some States the technical rule prevails that an agreement not sealed by the party charged with performance cannot create a covenant running with the land, but it is to be regarded as the personal agreement of the grantee.[4] But if an action cannot be maintained on the deed, assumpsit will lie.[5]

§ 941. **Markethouse.**—If in a deed to a city of real estate there is a covenant that the lot shall revert, and the grantee shall reconvey when the ground conveyed is no longer used for a market, the fee, subject to the easement, is retained by the grantor. The covenant runs with the land, a right of re-entry arising upon an abandonment, and the covenant for a reconveyance dispenses with the necessity of an entry by the reversioner.[6]

§ 942. **Covenants not running with the land.**—In this country, the covenants of seisin against encumbrances, and of good right to convey, are regarded as covenants *in præsenti,* and do not run with the land.[7] "The covenants of

[2] Hickey v. Lake Shore & M. S. R. Co. 51 Ohio St. 40, 23 L.R.A. 396, 36 N. E. 672, 46 Am. St. 545.

[3] Midland R. Co. v. Fisher, 125 Ind. 19, 8 L.R.A. 604, 24 N. E. 756, 21 Am. St. Rep. 189.

[4] Parish v. Whitney, 3 Gray, 516; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Hinsdale v. Humphrey, 15 Conn. 431; Trustees of Section No. 160 v. Spencer, 7 Ohio pt. 2, 149; Maule v. Weaver, 7 Pa. 329; Maine v. Cumston, 98 Mass. 317; Johnson v. Muzzy, 45 Vt. 419, 12 Am. Rep. 214; Dawson v. R. Co. 107 Ind. 70, 14 L.R.A. (N.S.) 809, 15 A. & E. Ann. Cas. 678 and note.

[5] Huff v. Nickerson, 27 Me. 106; Goodwin v. Gilbert, 9 Mass. 510; Newell v. Hill, 2 Met. 180; Nugent v. Riley, 1 Met. 117, 35 Am. Dec. 355; West Virginia C. & P. R. Co. v. McIntire, 44 W. Va. 210, 28 S. E. 696; Shoenberger v. Hay, 40 Pa. 132.

[6] Baker v. St. Louis, 75 Mo. 671; s. c. 7 Mo. App. 429.

[7] Lawrence v. Montgomery, 37 Cal. 188. See Greenby v. Wil-

seisin, and of a right to convey, and that the land is free from encumbrances, are personal covenants, not running with the land or passing to the assignee; for, if not true, there is a breach of them as soon as the deed is executed, and they become *choses in action,* which are not technicaly assignable." [8] A covenant that the grantee, "his heirs and assigns, owner or owners of the land for the time being," would on a notice of six months resell the land conveyed for a fixed price, does not, it is held, run with the land.[9] So, it is held that a covenant by an owner of land not to erect a gristmill on his premises does not run with the land.[1] A covenant that the tract

cocks, 2 Johns. 1, 3 Am. Dec. 379; Fuller v. Jillette, 9 Biss. 296; Pillsbury v. Mitchell, 5 Wis. 21; McCarty v. Leggett, 3 Hill, 134; Wilson v. Forbes, 2 Dev. 30; Chapman v. Holmes, 5 Halst. 20; Hacker v. Storer, 8 Greenl. 228; Smith v. Jeffts, 44 N. H. 482; Wilson v. Cochran, 46 Pa. St. 229; Heath v. Whidden, 24 Me. 383; Garfield v. Williams, 2 Vt. 327; Coit v. McReynolds, 2 Rob. (N. Y.) 655; Carter v. Denman, 3 Zab. 260; Ross v. Turner, 2 Eng. 132, 44 Am. Dec. 531; Logan v. Moulder, 1 Ark. 313; 33 Am. Dec. 338; Grist v. Hodges, 3 Dev. 200; Pence v. Duvall, 9 Mon. B. 48; South v. Hoy, 3 Mon. 94; Brady v. Spurck, 27 Ill. 482; Pierce v. Johnson, 4 Vt. 253; Richardson v. Dorr, 5 Vt. 9; Potter v. Taylor, 6 Vt. 676; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Clark v. Swift, 3 Met. 390; Wheelock v. Thayer, 16 Pick. 68; Bickford v. Page, 2 Mass. 455; Thayer v. Clemence, 22 Pick. 490; Blydenburgh v. Cotheal, 1 Duer, 197; Williams v. Wetherbee, 1 Aiken, 233; Mitchell v. Warner, 5 Conn. 497; Davis v. Lyman, 6 Conn. 249; Hamilton v. Wilson, 4 Johns. 72, 4 Am. Dec. 253; Beddoe v. Wadsworth, 21 Wend. 120; Townsend v. Morris, 6 Cowen, 123; Garrison v. Sandford, 7 Halst. 261. But it is held in Cole v. Kimball, 52 Vt. 639, that a covenant against encumbrances runs with the land. And see, also, to same effect, Richard v. Bent, 59 Ill. 38, 14 Am. Rep. 1; Foote v. Burnet, 10 Ohio, 317, 36 Am. Dec. 90; Eaton v. Lyman, 30 Wis. 41; Pillsbury v. Mitchell, 5 Wis. 17; Mecklem v. Blake, 22 Wis. 495; Devere v. Sunderland, 17 Ohio, 60; Jeler v. Glynn, 9 Rich. 376; Dickson v. Desire, 23 Mo. 151, 66 Am. Dec. 661; Backus v. McCoy, 3 Ohio, 211, 17 Am. Dec. 585; Overheiser v. McCallister, 10 Ind. 41; McCready v. Brisbane, 1 Nott & McC. 104.

[8] 4 Kent's Com. 471.

[9] London etc. Railway Co. v. Gomm, 30 Week. R. 620, 21 N. Y. Daily Reg. No. 150.

[1] Harsha v. Reid, 45 N. Y. 415. See Brown v. McKee, 57 N. Y. 684. See, also, Wheelock v. Thayer, 16

conveyed includes a specific quantity of land does not run with the land. The grantee of the covenantee cannot maintain an action for its breach.[2] An agreement that the products of land shall be transported by a certain common carrier is not a covenant running with the land.[3] An agreement for the payment of taxes outstanding does not run with the land.[4] Nor does a covenant made by a landowner to contribute to the construction of a party wall, when he shall use it, run with the land.[5]

Pick. 68; Mayor etc. v. Pattison, 10 East, 136; Breever v. Marshall, 19 N. J. Eq. 537. And see Hammond v. Port Royal & Augusta Ry. Co., 16 S. C. 567.

[2] Salmon v. Vallejo, 41 Cal. 481. Crockett, J., in delivering the opinion of the court, said: "A covenant of seisin, or that the grantor has lawful right to convey, or that the land is free from encumbrances, is a personal covenant, and when broken is broken as soon as made. The right of action upon it is a mere chose in action and does not run with the land: Lawrence v. Montgomery, 37 Cal. 188. A covenant that the tract conveyed, or that the grant under which it is held includes a specified quantity, stands on the same footing and is broken as soon as made. It either did or did not contain the stipulated quantity, and the fact could not be changed by anything which subsequently transpired. The difficulty of ascertaining the fact does not touch the question of the nature of the covenant. If the deficiency could not be ascertained except by a final official survey under the decree of confirmation that fact might possibly prevent the statute of limitations from running until survey was made, though on this point I express no opinion. But the nature of the covenant remains the same, and is not affected by the fact that there was no proof by which the breach of it could be established until the final survey was made. The breach existed as soon as the covenant was made; but the proof to establish it may not have been attainable until the final survey. The same difficulty might arise under a covenant of seisin, or against encumbrances, which, it is well settled, are personal covenants not running with the land."

[3] West Virginia Transportation Co. v. Ohio River etc. Co., 22 W. Va. 600, 46 Am. Rep. 527. See, also, Miller v. Noonan, 12 Mo. App. 370, where it is held that an agreement by a mortgagor to convey to a person to whom the mortgagee may sell, that foreclosure should not be had for a year, and providing for a division of the proceeds of sale, is not a covenant running with the land.

[4] Graber v. Duncan, 79 Ind. 565.

[5] Scott v. McMillan, 76 N. Y. 141, 8 Daly, 320; Gibson v. Holden, 115 Ill. 199, 56 Am. Rep. 146.

§ 942a. **Covenant converted into lien.**—An agreement by which a landowner agrees to take water from a water company for the use of the land for a specified term and price, and stating "that the covenant should run with the land," will create a lien on the land for the water supplied for such purposes, binding as against the landowner and his successors in interest with notice. But it is not a covenant running with the land so as to bind personally successors in interest without notice.[6]

§ 943. **Change in character of neighborhood.**—The exercise of the authority of a court of equity to compel the observance of covenants which the owner of land has made with an owner of adjoining land, limiting the use of the lands to the purposes of private residences, in consideration of similar covenants reciprocally made by the latter owner, is within the discretion of the court. Such relief will not be granted if the object of the agreement has been defeated by a change in the character of the neighborhood, so that to deprive the owner of the power of having his property conform to that of the neighborhood would be inequitable.[7] Adjoining owners mutually covenanted for themselves, their heirs and assigns, that none but dwelling-houses should be erected upon their respective premises, and that neither party would allow nor carry on "any stable, schoolhouse, enginehouse, tenement, or community house, or any kind of manufactory, trade, or business. The general current of business had been such that an elevated railroad was built in front of the premises, which injuriously affected the premises, and made them less profitable than they had been for the purpose of a dwelling-house. From the platform of the station persons could look into the windows. This fact, added to the noise of the trains, made

[6] Fresno Canal etc. Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112.

[7] Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365.

it impossible to obtain privacy and quiet, and hence the rental value of the property was lowered. As a contingency had occurred which had not been contemplated by the parties, and which placed upon the property a condition defeating their objects, rendering the enforcement of the covenant oppressive and inequitable, the court refused to decree its enforcement.[8]

§ 944. **Estopped from covenants.**—When a deed shows by a recital or covenant that there was an actual intention to grant and receive a certain estate, the parties are estopped from denying the effect of the deed as so intended.[9] Mr. Justice Nelson, after the examination of several cases, says upon this subject: "The principle deducible from these

[8] Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365. Said Danforth, J., in delivering the opinion of the court (p. 320): "It is true the covenant is without exception or limitation, but I think this contingency which has happened was not within the contemplation of the parties. The road was authorized by the legislature, and by reason of it there has been imposed upon the property a condition of things which frustrates the scheme devised by the parties, and deprives the property of the benefit which might otherwise accrue from its observance. This new condition has already affected in various ways and degrees the uses of property in its neighborhood and property values. It has made the defendant's property unsuitable for the use to which, by the covenant of the grantor, it was appropriated, and if, in face of its enactment and the contingencies flowing from it, the covenant can stand anywhere, it surely cannot in a court of equity."

[9] Williams v. Presbyterian Society, 1 Ohio St. 478; Carver v. Jackson, 4 Pet. 86; Fitzhugh v. Tyler, 9 B. Mon. 561; Elder v. Derby, 98 Ill. 228; Bowman v. Taylor, 2 Ad. & E. 278; Wadhams v. Swan, 109 Ill. 46; Williams v. Claiborne, 1 Smedes & M. Ch. 365; Doe v. Errington, 8 Scott, 210; McBurney v. Cutler, 18 Barb. 208; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Van Rensselaer v. Kearney, 11 How. 297, 13 L. ed. 703; Gibson v. Chouteau, 39 Mo. 536; Taggart v. Risley, 4 Or. 235; French v. Spencer, 21 How. 240, 16 L. ed. 100; Root v. Crock, 7 Pa. St. (Barr.) 380; Decker v. Caskey, 2 Green Ch. (3 N. J. Eq.) 446; Kinsman v. Loomis, 11 Ohio, 478; Smith v. Pendell, 19 Conn. 107, 48 Am. Dec. 146; Jackson v. Parkhurst, 9 Wend. 209.

authorities seems to be that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterward denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever precluded from gainsaying it. The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of everyone. And although it debars the truth in the particular case, and therefore is not unfrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood; would be the denial of a previous affirmation upon the faith of which persons had dealt, and pledged their credit or expended their money. It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak."[1] A title subsequently acquired by the vendor to land conveyed at a sale prohibited by law will not

[1] In Van Rensselaer v. Kearney, 11 How. 297, 325, 13 L. ed. 703, 715. But see Cameron v. Lewis, 59 Miss. 134; Carter v. Bustamente, 59 Miss. 559; Bradford v. Russell, 79 Ind. 64.

pass to the purchaser.[2] An heir apparent who conveys land in which his interest is to arise will be estopped by his deed.[3] If a grantor having no title executes a quitclaim deed, a title subsequently acquired by him will not pass to the grantee.[4] The rule concerning the passing of an after-acquired title to the grantee applies to corporations as well as to individuals.[5]

§ 945. **The necessity for a covenant.**—In the absence of statutory enactment, the general rule is that the deed must contain a covenant of some kind to cause an after-acquired title to pass by estoppel.[6] In some of the early New York cases, it was held that an after-acquired title passed without any covenant;[7] but these cases were subsequently overruled, and the doctrine announced that a subsequently acquired title would not, in the absence of some covenant or stipulation, pass to the grantee.[8] If land is conveyed with covenants of warranty in payment of a debt, the only remedy of the grantee in case the title proves defective is upon the covenants in the deed.[9]

[2] Holmes v. Jones, 56 Tex. 41.

[3] Bohon v. Bohon, 78 Ky. 408. But not his heirs, it seems, if there be no covenant of warranty.

[4] Benneson v. Aiken, 102 Ill. 284, 40 Am. Rep. 592.

[5] Jones v. Green, 41 Ark. 363.

[6] Dart v. Dart, 7 Conn. 256; Mitchell v. Woodson, 37 Miss. 578; Bennett v. Waller, 23 Ill. 182; Jackson v. Hubble, 1 Cowen, 613; Varick v. Edwards, 1 Hoff. Ch. 382; Fox v. Widgery, 4 Greenl. 218; Jackson v. Winslow, 9 Cowen, 18; Pelletreau v. Jackson, 11 Wend. 119; Jackson v. Bradford, 4 Wend. 662; Frink v. Darst, 14 Ill. 308, 58 Am. Dec. 575; Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 280; Sparrow v. Kingman, 1 Const. 247; Taft v. Stevens, 3 Gray, 504; Howe v. Harrington, 18 N. J. Eq. (3 Green, C. E.) 495; Freeman v. Thayer, 29 Me. 369; Tillotson v. Kennedy, 5 Ala. 413, 39 Am. Dec. 330; Comstock v. Smith, 13 Pick. 116, 23 Am. Dec. 670; Kinsman v. Loomis, 11 Ohio, 475; Blanchard v. Brooks, 12 Pick. 47. See Cadiz v. Majors, 33 Cal. 288; Quivey v. Baker, 37 Cal. 465; Green v. Green, 103 Cal. 408; Dalton v. Hamilton, 50 Cal. 423.

[7] Jackson v. Bull, 1 Johns. Cas. 81; Jackson v. Murray, 12 Johns. 201.

[8] Jackson v. Wright, 14 Johns. 193.

[9] Van Riswick v. Wallace, 3 McAr. 388.

§ 946. **Statutory regulation.**—In several of the States, it is provided that where title is conveyed by grant, an after-acquired title will pass by operation of law to the grantee and his assigns. Thus, in California, the provision of the Civil Code on this subject is: "Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title or claim thereto, the same passes by operation of law to the grantee, or his successors." [1] The court commenting upon an early statute of the same purport said that the effect of its provisions is the same as if it were written upon the face of the deed, that the grantor conveyed all the estate which he then possessed, or which he might at any time afterward acquire.[2] Equity will not allow the grantor to deprive the grantee of the benefit of the after-acquired title, by having the deed made to a third person who has no real interest in the transaction.[3] Where covenants for title are contained in the deed, the after-acquired title will pass with the same effect as if it had originally been conveyed to the grantee and his successors.[4]

[1] Civil Code Cal. § 1106. And see Valle v. Clemens, 18 Mo. 490; Gibson v. Chouteau, 39 Mo. 567; Bogy v. Shoab, 13 Mo. 379; Geyer v. Girard, 22 Mo. 159; Amonett v. Amis, 16 La. Ann. 226; Frink v. Darst, 14 Ill. 308, 58 Am. Dec. 575; Morrison v. Wilson, 30 Cal. 344; Green v. Clark, 31 Cal. 591; San Francisco v. Lawton, 18 Cal. 477, 79 Am. Dec. 187.

[2] Clark v. Baker, 14 Cal. 612, 630, 76 Am. Dec. 449.

[3] Quivey v. Baker, 37 Cal. 465.

[4] Kimball v. Schoff, 40 N. H. 190; Irvine v. Irvine, 9 Wall. 617, 19 L. ed. 800; Funk v. Newcomer, 10 Md. 316; Logan v. Moore, 7 Dana 76; Paterson v. Pease, 5 Ohio, 90; Robertson v. Gaines, 21 Tenn. (2 Humph.) 383; Terrett v. Taylor, 9 Cranch, 52, 3 L. ed. 653; Tillotson v. Kennedy, 5 Ala. 413, 39 Am. Dec. 330; Middlebury College v. Cheney, 1 Vt. 349; Lawry v. Williams, 13 Me. 281; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; Rathbun v. Rathbun, 6 Barb. 107; Scott v. Douglas, 7 Ohio, 227; Barton v. Morris, 15 Ohio, 408; Jackson v. Winslow, 9 Cowen, 18; Hoyt v. Dimon, 5 Day, 479; Kellogg v. Wood, 4 Paige, 578; Williams v. Thurlow, 31 Me. 395; Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476; Sparrow v. Kingman, 1 Const. 246; Sherwood v. Barlow, 19 Conn. 476; Pike v. Galvin, 29 Me. 183; Kennedy v. McCartney, 4 Port. 141; Bean v. Welsh, 17 Ala. 772; Pierce

§ 947. **Limitations on this rule.**—If the deed is imperfectly executed, and for this reason is not sufficient to pass the title, there being no right of action, there is no estoppel.[5] Where the grantor uses the words "right, title, and interest," showing that he intended to transfer no greater title than that which he possessed, an after-acquired title will not pass by estoppel.[6] When the covenants have been extinguished, no estoppel arises.[7] The grantor may acquire a title by the disseisin of his grantee, or those claiming under him, and adverse possession for the requisite time, and he is not estopped from asserting the title thus acquired against his grantee.[8] "We consider that a grantee can, under circumstances, be

v. Milwaukee R. R. Co., 24 Wis. 553, 1 Am. Rep. 203; Dickerson v. Talbot, 14 Mon. B. 64; Dewolf v. Haydn, 24 Ill. 525; King v. Gilson, 32 Ill. 348, 83 Am. Dec. 269; Reeder v. Craig, 3 McCord, 411; O'Bannon v. Paremour, 24 Ga. 493; Somes v. Skinner, 3 Pick. 52; Trull v. Eastman, 3 Met. 121, 37 Am. Dec. 126; Wade v. Lindsey, 6 Met. 413; Mason v. Muncaster, 9 Wheat. 445, 6 L. ed. 131; Thorndike v. Norris, 24 N. H. (4 Fost.) 454; Jewell v. Porter, 31 N. H. (11 Fost.) 39; Hayes v. Tabor, 41 N. H. 521; Blake v. Tucker, 12 Vt. 44; Blanchard v. Brooks, 12 Pick. 47; Comstock v. Smith, 13 Pick. 116, 23 Am. Dec. 670; Gibbs v. Thayer, 6 Cush. 30; Ruggles v. Barton, 13 Gray, 506; Thomas v. Stickle, 32 Iowa, 72; Massie v. Sebastian, 4 Bibb, 436; Logan v. Steel, 4 Mont. 433; Rigg v. Cook, 4 Gilm. 348, 46 Am. Dec. 462; Jones v. King, 25 Ill. 384; Bennett v. Waller, 23 Ill. 183; Gochenour v. Mowry, 33 Ill. 333; Mitchell v. Woodson, 37 Miss. 578; Wightman v. Reynolds, 24 Miss. 675; Davis v. Keller, 5 Rich. Eq. 434; Brundred v. Walker, 1 Beasl. 140.

[5] Connor v. McMurray, 2 Allen, 104; Patterson v. Pease, 5 Ohio, 191; Kercheval v. Triplett, 1 Marsh. A. K. 493; Wallace v. Miner, 6 Ohio, 370. See Dominick v. Michael, 4 Sand. 417.

[6] Blanchard v. Brooks, 12 Pick 47; Adams v. Ross, 1 Vroom, 509, 82 Am. Dec. 237; White v. Brocaw, 14 Ohio St. 343. And see Allen v. Holton, 20 Pick 463; Sweet v. Brown, 12 Met. 175, 45 Am. Dec. 243; Bates v. Foster, 59 Me. 158, 8 Am. Rep. 406; Ballard v. Child, 46 Me. 153; McNear v. McComber, 18 Iowa, 14; Wynn v. Harman, 5 Gratt. 157; Mills v. Catlin, 22 Vt. 98; Whiting v. Dewey, 15 Pick. 434; Hubbard v. Apthorp, 3 Cush. 419.

[7] Goodel v. Bennett, 22 Wis. 565.

[8] Hines v. Robinson, 57 Me. 330, 99 Am. Dec. 772; Stearns v. Hendersass, 9 Cush. 497, 57 Am. Dec. 65; Johnson v. Farlow, 13 Ired. 84; Eddleman v. Carpenter, 7 Jones (N. C.), 616; Reynolds v. Cathers, 5

disseised by his own grantor, as well as by another."[9] An estoppel does not arise from a covenant of seisin in those States where an actual though a tortious possession is sufficient to satisfy this covenant.[1] Where the grantor covenants against his own acts only, an estoppel will not be created by the acquisition of another title.[2]

§ 948. **Estoppel of State.**—Where a grant is made by a State, a general rule is, that the doctrine of estoppel applies to the same extent as if the conveyance had been made by a private individual.[3] But in North Carolina, a different view obtains. It is there held that only the title evidenced by matter of record will pass by a grant made by the sovereign power, and hence there can be no estoppel.[4]

§ 949. **Acquisition of title by trustee.**—In order to create an estoppel so as to give the grantee the benefit of a title subsequently acquired by the grantor, such title must be acquired by him in the same right as that in which he made his deed. If the grantor executes a deed in his own right, and afterward acquires a title to the same property as trustee, the doctrine of estoppel manifestly can have no application.[5]

Jones (N. C.), 437; Tilton v. Emery, 17 N. H. 536; Smith v. Montes, 11 Tex. 24.

[9] Franklin v. Dorland, 28 Cal. 175, 180, 87 Am. Dec. 111.

[1] Allen v. Sayward, 5 Greenl. 231, 17 Am. Dec. 221; Fox v. Widgery, 4 Greenl. 218; Doane v. Willcutt, 5 Gray, 333, 66 Am. Dec. 369.

[2] Comstock v. Smith, 13 Pick. 116, 23 Am. Dec. 670.

[3] People v. Society, 2 Paine, 557; Carver v. Jackson, 4 Peters, 87, 7 L. ed. 791; Menard v. Massey, 8 How. 313, 12 L. ed. 1093; Denn v. Cornell, 3 Johns. Cas. 174; Magee v. Hallett, 22 Ala. 718; Nieto v. Carpenter, 7 Cal. 527; Commonwealth v. Pejepscot, 10 Mass. 155; Commonwealth v. Andre, 3 Pick. 224.

[4] Taylor v. Shuffold, 4 Hawks, 116, 15 Am. Dec. 512; Wallace v. Maxwell, 10 Ired. 112, 51 Am. Dec. 380; Candler v. Lunsford, 4 Dev. & B. 407.

[5] Sinclair v. Jackson, 8 Cowen, 587; Jackson v. Mills, 13 Johns. 463; Burchard v. Hubbard, 11 Ohio, 316; Jackson v. Hoffman, 9 Cowen,

§ 950. **General covenant when grantor's interest only conveyed.**—It will be admitted that where a deed, either by recital, admission, covenant, or otherwise, distinctly shows the actual intention of the parties to have been to convey and receive reciprocally a certain estate, they are estopped from denying the operation of the deed in accordance with this intent. But in Oregon a case arose where the grantor conveyed all his right, title, and interest in and to a certain lot, which was properly described. The deed also contained this covenant: "That I am the owner in fee simple of said premises; that they are free from all encumbrances, and that I will warrant and defend the same from all lawful claims whatsoever." The grantor owned, however, only one-half of such lot. An action was brought on the covenant, and the defense made was that the grantor did not sell all of the lot, but only the right, title, and interest which he then had in the lot, and that the half of the lot was all that was bargained for at the time, and that the covenant related only to this, and was so understood at the time of purchase. The court, however, held that the grantor was estopped from asserting these facts, as the word "premises" used in the covenant referred to the whole of the lot, and not to the one-half.[6] If, however, a person conveys an undivided one-fourth of an estate with a covenant against encumbrances, and as guardian of his minor child, conveys to the same grantee the remaining three-fourths without such covenant, the grantee, if forced to pay an assessment of betterments laid upon the

271. It is not necessary that the trust should be expressed, as long as it exists: Kelley v. Jenness, 50 Me. 455, 79 Am. Dec. 623.

[6] Bayley v. McCoy, 8 Or. 259, citing Van Rensselaer v. Kearney, 11 How. 325, 13 L. ed. 715; Fairbanks v. Williamson, 7 Greenl. 96; Jackson ex dem. Monroe v. Parkhurst, 9 Wend. 209; Taggart v. Risley, 4 Or. 235; Rawle on Covenants, 388; Jackson v. Waldron, 8 Wend. 178. Mr. Chief Justice Kelly dissented, however, considering that the word "premises" did not mean the entire lot, but only the interest sold, and saying that his position was supported by the case of Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 83.

whole estate, which became an encumbrance before the execution of the deeds, can recover from the grantor in an action on the covenant only one-quarter of the amount altogether paid.[7] But a general covenant will not enlarge the title under a deed conveying in terms the grantor's right, title, and interest, but will be confined to the interest of the grantor.[8]

§ 951. **Estoppel of grantee.**—At one time it seems to have been thought that a grantee by accepting the deed of his grantor, admitted the validity of his title, and could not show that it was defective for the purpose of defeating the wife's right to dower.[9] But the principle is now firmly established that the grantee is not estopped by the acceptance of a deed from disputing the grantor's title, either as against the grantor or anyone else.[1]

[7] Smith v. Carney, 127 Mass. 179.

[8] Gibson v. Chouteau, 39 Mo. 536; Kimball v. Semple, 25 Cal. 440; Lee v. Moore, 14 Cal. 472; McNear v. McComber, 18 Iowa, 12; Bowen v. Thrall, 28 Vt. 382; Cummings v. Dearborn, 56 Vt. 441; Marsh v. Fish, 66 Vt. 213; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396; Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406; Bryan v. Uland, 101 Ind. 477; Locke v. White, 89 Ind. 492; Habig v. Dodge, 127 Ind. 31; Reynolds v. Shaver, 59 Ark. 299, 43 Am. St. Rep. 36; Koenig v. Branson, 73 Mo. 634; Stockwell v. Couillard, 129 Mass. 231; Blanchard v. Brooks, 12 Pick. 47; Allen v. Holton, 20 Pick. 458.

[9] Collins v. Torry, 7 Johns. 278, 5 Am. Dec. 273; Bowne v. Potter, 17 Wend. 164; Hitchcock v. Harrington, 6 Johns. 290, 5 Am. Dec. 229; Sherwood v. Vandenburgh, 2 Hill, 308; Hamblin v. Bank of Cumberland, 19 Me. 69; Gayle v. Price, 5 Rich. 525; Stimpson v. Thomaston Bank, 28 Me. 259; Hains v. Gardner, 1 Fairf. 383; Davis v. Darrow, 12 Wend. 65.

[1] Sparrow v. Kingman, 1 Const. 245; Finn v. Sleight, 8 Barb. 406; Gardner v. Greene, 5 R. I. 104; Clee v. Seaman, 21 Mich. 287; Blair v. Smith, 16 Mo. 273; Macklot v. Dubreuil, 9 Mo. 483, 43 Am. Dec. 550; Cutler v. Waddingham, 33 Mo. 282; Joeckel v. Easton, 11 Mo. 118, 47 Am. Dec. 142; Landes v. Perkins, 12 Mo. 239; Porter v. Sullivan, 7 Gray, 441; Kingman v. Sparrow, 12 Barb. 208; Averill v. Wilson, 4 Barb. 180. Although the covenantor may have obtained a discharge in bankruptcy, the estoppel arising from his covenants will continue to operate upon the estate: Stewart v. Anderson, 10 Ala. 510; Bush v. Cooper, 26 Miss. 599, 59 Am. Dec. 270; Dorsey v. Gassa-

§ 952. **What covenants will create an estoppel.**—An estoppel, of course, will arise from a covenant of warranty, and in a majority of the States it is held that not only will it create an estoppel, but will have the effect of actual transferring the estate.[2] When the only covenant in the deed is that for further assurance, this has been considered in Wisconsin and Illinois as possessing the same power for the purpose of creating an estoppel as the covenant of warranty;[3] but in Minnesota and Missouri it is regarded as creating only an equity in favor of the grantee, which he may enforce by proper proceedings so as to avail himelf of the after-acquired title.[4] Attention has already been called to the fact that in some of the States, the covenants for seisin and good right to convey are satisfied by the transfer of a tortious seisin, but in Mississippi and New Hampshire, covenants for good right to convey and for quiet enjoyment will create an estoppel, so as to affect a subsequently acquired title.[5]

§ 953. **Implied covenants.**—At common law a covenant of warranty was implied from an exchange of lands. But to create this effect it was necessary to use the word "escambium."[6] So at common law a covenant of warranty

way, 2 Har. & J. 411, 3 Am. Dec. 557; Chamberlin v. Meeder, 16 N. H. 384.

[2] Kimball v. Blaisdell, 57 N. H. 533, 22 Am. Dec. 476; Thomas v. Stickle, 32 Iowa, 72; Kennedy v. McCartney, 4 Port. 141; Hoyt v. Dimon, 5 Day, 479; Thorndike v. Norris, 4 Fost. (N. H.) 454; Dudley v. Caldwell, 19 Conn. 226; Jackson v. Winslow, 9 Cowen, 18; Somes v. Skinner, 3 Pick. 52; Dickerson v. Talbot, 14 Mon. B. 65; Jones v. King, 25 Ill. 384; Lawry v. Williams, 13 Me. 281; Davis v. Keller, 5 Rich. Eq. 434; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; Williams v. Thurlow, 31 Me. 395; Blake v. Tucker, 12 Vt. 44; Ruggles v. Barton, 13 Gray, 506.

[3] Pierce v. Milwaukee R. R., 24 Wis. 553, 1 Am. Rep. 203; Bennett v. Waller, 23 Ill. 183.

[4] Hope v. Stone, 10 Minn. 141; Chauvin v. Wagner, 18 Mo. 531.

[5] Wightman v. Reynolds, 24 Miss. 675; Foss v. Strachm, 42 N. H. 40.

[6] Bustard's case, 4 Coke, 121; Grimes v. Redmon, 14 Mon. B. 237; Dean v. Shelly, 7 Smith, P. F. 427, 98 Am. Dec. 235. And see Walker v. Renfro, 26 Tex. 142.

was implied from a partition between coparceners.[7] But it seems that in a partition between joint tenants and tenants in common, no such covenant was implied.[8] In many of the States it has been provided by statute that certain covenants shall be implied from the use of certain words in the deed. For instance, in California, the use of the word "grant" in a deed implies, unless restrained by express terms, the following covenants: "(1) That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee. (2) That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him."[9] Where land is particularly described by metes and bounds, and an enumeration of the quantity of acres is added, the latter is merely a matter of description, and a covenant for quantity will not be implied therefrom, and the covenants for title will apply, not to any particular number of acres, but only to the land contained within the designated boundaries.[1] But if it is apparent from the

[7] See Bustard's case, 4 Coke, 121; Co. Litt. 174*a*; Walker v. Hall, 15 Ohio St. 361, 86 Am. Dec. 482; Feather v. Strohoecker, 3 Pa. 508, 24 Am. Dec. 342.

[8] Weiser v. Weiser, 5 Watts, 279, 30 Am. Dec. 313; Cashion v. Faina, 47 Mo. 133; Rector v. Waugh, 17 Mo. 26, 57 Am. Dec. 251; Morris v. Harris, 9 Gill, 26; Smith v. Sweringen, 26 Mo. 567; Picot v. Page, 26 Mo. 420. See Sawyers v. Cator, 8 Humph. 256, 287; Patterson v. Lanning, 10 Watts, 135, 36 Am. Dec. 154; Seaton v. Barry, 4 Watts & S. 184.

[9] Civil Code Cal. § 1113. See Bryan v. Swain, 56 Cal. 616; Lawrence v. Montgomery, 37 Cal. 183; Fowler v. Smith, 2 Cal. 39; Lyles v. Perrin, 134 Cal. 417, 66 Pac. 472, and see also for other examples Hood v. Clark, 141 Ala. 397, 37 So. 550; Crawford v. McDonald, 84 Ark. 415, 106 S. W. 206; Stoepler v. Silberberg, 220 Mo. 258, 119 S. W. 418; Waldemeyer v. Loebig, 222 Mo. 540, 121 S. W. 75; Bullitt v. Coryell, 38 Tex. Civ. App. 42, 85 S. W. 482; Sherman v. Goodwin, 11 Ariz. 141, 89 Pac. 517; Allen v. Coffee, 85 Miss. 766, 38 So. 186.

[1] Rogers v. Peebles, 72 Ala. 529; Whitehill v. Gotwalt, 3 Pa. 327; Perkins v. Webster, 2 N. H. 287; Large v. Penn, 6 Serg. & R. 488; Tucker v. Cocke, 2 Rand. 51; Roat v. Puff, 3 Barb. 353; Bauskett v.

deed itself that it was intended to assure a particular quantity of land to the purchaser by the covenants, of course they will have this effect.[2] Where the land conveyed is described as bounded by a street, alley or other way, a covenant will be implied that such street, alley, or other way exists.[3] It is said, however, that this rule is applicable only where the grantor owns the land on which the street, alley or other way is supposed to be located and that if he does not own it, no covenant will be implied.[4] It has also been held that no covenant or warranty can be implied from a mere recital in a deed or other instrument.[5]

§ 954. Restriction of covenants.—Where there are several covenants having the same object, although they may be distinct, yet restrictive words contained in the first covenant will be construed as extending to all.[6] But a limited

Jones, 2 Spear, 68; Mann v. Pearson, 2 Johns. 41; Lorick v. Hawkins, 1 Rich. 417; Davis v. Atkins, 9 Cush. 13; Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661; Ferguson v. Dent, 8 Mo. 667; Whallon v. Kauffman, 19 Johns. 101; Rickets v. Dickens, 1 Murph. 343, 4 Am. Dec. 555; Huntly v. Waddell, 12 Ired. 33. See, also, Rich v. Scales, 116 Tenn. 57, 91 S. W. 50; Burbridge v. Sadler, 46 W. Va. 39, 32 S. E. 1028; Adams v. Baker, 50 W. Va. 249, 40 S. E. 356; Brassel v. Fisk, 45 So. 70, 153 Ala. 558.

[2] Steiner v. Baughman, 2 Jones, 106; Morris v. Owens, 3 Strob. 190; Pecare v. Chouteau, 13 Mo. 527. And see Kilmer v. Wilson, 49 Barb. 88; Long Island R. R. v. Conklin, 32 Barb. 388.

[3] Talbert v. Mason, 136 Ia. 373, 14 L.R.A.(N.S.) 878, 113 N. W. 918, 125 Am. St. Rep. 259; Garstang v. Davenport, 90 Ia. 359, 57 N. W. 876; Loring v. Otis, 7 Gray, 563; Re Sixty-Seventh Street, 60 How. Pr. 264; Greenwood v. Wilton, 23 N. H. 261.

[4] Fulmer v. Bates, 118 Tenn. 731, 10 L.R.A.(N.S.) 964, 102 S. W. 900, 121 Am. St. Rep. 1059.

[5] O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; Rawle on covenants, sec. 280.

[6] Browning v. Wright, 2 Bos. & P. 13; Whallon v. Kauffman, 19 Johns. 98; Foord v. Wilson, 8 Taunt. 543; Davis v. Lyman, 6 Conn. 252; Miller v. Heller, 7 Serg. & R. 32, 10 Am. Dec. 413; Stannard v. Forbes, 6 Ad. & E. 572. And see Howell v. Richards, 11 East, 633; Crossfield v. Morrison, 7 Com. B. 286; Young v. Raincock, 7 Com. B. 310; Dickinson v. Hoomes, 8 Gratt. 353; Estabrook v. Smith, 6 Gray, 572, 66 Am. Dec.

covenant subsequently occurring will not restrain the first covenant if the latter is general, unless this be the express intention, or there is an inconsistency between the covenants.[7] Nor will a subsequent limited covenant be enlarged by a preceding general covenant.[8] Words of restriction added to one covenant do not affect the generality of others when they are of different kinds and relate to different things.[9]

§ 955. **Liability of covenantor.**—If two or more persons enter into a covenant, the obligation which they assume is generally presumed to be a joint one.[1] To make the liability several, words of severance should be used.[2] Where the common-law restriction upon the power of married women to convey their separate estate prevails, a married woman, by the execution jointly with her husband of a deed with covenants of her estate, does not become liable in damages for a breach of the covenants.[3] Where the covenant runs

445; Bricker v. Bricker, 11 Ohio St. 240; Nind v. Marshall, 1 Brod. & B. 319; Duval v. Craig, 2 Wheat. 45, 4 L. ed. 180; Norman v. Foster, 1 Mod. 101; Bender v. Fromberger, 4 Dall. 441; Allemong v. Gray, 92 Va. 216, 23 S. E. 298.

[7] Rowe v. Heath, 23 Tex. 619; Gainsford v. Griffith, 1 Saund. 58; Peters v. Grubb, 9 Harris, 460; Summer v. Williams, 8 Mass. 162, 5 Am. Dec. 83. And see Cornell v. Jackson, 3 Cush. 506; Smith v. Compton, 3 Barn. & Adol. 189; Phelps v. Decker, 10 Mass. 267; Cole v. Hawes, 2 Johns. Cas. 203; Crum v. Lord, 23 Iowa, 219; Attorney General v. Purmort, 5 Paige, 620; Duroe v. Stephens, 101 Ia. 358, 70 N. W. 610.

[8] Trenchard v. Hoskins, Winch. 91; Rawle on Covenants (4th ed.), 519.

[9] Crayford v. Crayford, Cro. Car. 106; Kean v. Strong, 9 Irish Law, 74.

[1] Carleton v. Tyler, 16 Me. 392, 33 Am. Dec. 673; Donohue v. Emery, 9 Met. 67; Comings v. Little, 24 Pick. 266; Platt on Covenants, 117; Shep. Touchstone, 375; Rawle on Covenants (4th ed.), 536. See Carthrae v. Browne, 3 Leigh, 98, 23 Am. Dec. 255; Bradburne v. Botfield, 14 Mees. & W. 559; Anderson v. Martindale, 1 East, 497.

[2] Fields v. Squires, 1 Deady, 366; Evans v. Sanders, 10 Mon. B. 291.

[3] Fowler v. Shearer, 7 Mass. 21; Aldridge v. Burlison, 3 Blatchf. 201; Fletcher v. Coleman, 2 Head. 388; Porter v. Bradley, 7 R. I. 541; Sumner v. Wentworth, 1 Tyler, 43; Wadleigh v. Glines, 6 N. H. 17, 23 Am. Dec. 705; Colcord v. Swan, 7 Mass. 291; Whitbeck v. Cook, 15

with the land and the liability of the covenantor is founded on privity of estate, the action is local in its character, and the land must be within the jurisdiction of the court in which the action is prosecuted.[4]

§ 956. **Covenant to pay mortgage.**—A grantor may sue a grantee who has taken a deed with the stipulation that he will pay a sum due on a certain mortgage then existing on the property.[5] "That covenant," said Mr. Chief Justice Beasley, "is an absolute one to pay a certain sum of money, and the obligation to pay was entirely disconnected with any act to be done, or with any event to happen in the future. The assumed duty was to pay the stipulted money within a reasonable time, and by the failure in performing that duty the covenant was broken. As, therefore, on the breach of a covenant, the law implies nominal damages at least, actionable misconduct on the part of the defendant is shown in the declaration." The court held that while the grantor had a cause of action, yet it would not intimate what rate of damages should be awarded to him, as the covenant was to pay the mortgagee and not the grantor.[6]

§ 957. **Failure of title.**—Where there has been no fraud, mistake, or accident, a purchaser who has taken a

Johns. 483, 8 Am. Dec. 272; Falmouth v. Tibbatts, 16 Mon. B. 641; Curd v. Dodds, 6 Bush, 685; Strawn v. Strawn, 50 Ill. 37; Chambers v. Spencer, 5 Watts, 406; Nash v. Spofford, 10 Met. 192, 43 Am. Dec. 425; Carpenter v. Schermerhorn, 2 Barb. Ch. 314; Hempstead v. Easton, 33 Mo. 146; Lowell v. Daniels, 2 Gray, 168, 61 Am. Dec. 448; Jackson v. Vanderheyden, 17 Johns. 167, 8 Am. Dec. 378; Dominick v. Michael, 4 Sand. 374; Martin v. Dwelly, 6 Wend. 9, 21 Am. Dec. 245; Nunally v. White, 3 Met. (Ky.) 593.

[4] Clark v. Scudder, 6 Gray, 122; Birney v. Haim, 2 Litt. 262; Lienow v. Ellis, 6 Mass. 331; White v. Sanborn, 6 N. H. 220; Mostyn v. Fabrigas, Cowp. 161, 1 Chitty Pleading, 270.

[5] Golden v. Knapp, 41 N. J. L. 215.

[6] Golden v. Knapp, 41 N. J. L. 215. And see Wilcox v. Musche, 39 Mich. 101.

deed without covenants has no right, for a defect in the title, or for the existence of an encumbrance, to detain the purchase money, or to recover it in case of payment.[7] The prior contract for the purchase is merged in the deed, and resort must be had to that to determine the rights of the parties.[8]

[7] See Falconer v. Clark, 3 Md. Ch. 530, 7 Md. 178; Buckner v. Street, 15 Fed. Rep. 365; Soper v. Stevens, 14 Me. 133; Peabody v. Phelps, 9 Cal. 213; Reese v. Gordon, 19 Cal. 147; Young v. Adams, 6 Mass. 182; United States Bank v. Bank of Georgia, 10 Wheat. 333, 6 L. ed. 334; Doyle v. Knapp, 3 Scam. 334; Cannon v. White, 16 La. Ann. 89; Nance v. Elliott, 3 Ired. Eq. 408; Commonwealth v. McClanachan, 4 Rand. 482; Laughery v. McLean, 14 Ind. 108; Lowry v. Brown, 1 Cold. 457; Sutton v. Sutton, 7 Gratt. 238, 56 Am. Dec. 109; Allen v. Pegram, 16 Iowa, 172; Johnson v. Houghton, 19 Ind. 361; Starkey v. Neese, 30 Ind. 224; Beale v. Sieveley, 8 Leigh, 658; Carr v. Roach, 2 Duer, 20; Middle Kauf v. Barrick, 4 Gill. 300; Butman v. Hussey, 30 Me. 266; Frost v. Raymond, 2 Caines, 192, 2 Am. Dec. 228; Harris v. Morris, 4 Md. Ch. 530; Condrey v. West, 11 Ill. 146; Brandt v. Foster, 5 Clarke, 293; Maney v. Porter, 3 Humph. 347; Williamson v. Raney, 1 Freem. Ch. 114; Alexander v. McCauley, 22 Ark. 533; Butler v. Miller, 15 Mon. B. 627; Allen v. Hopson, 1 Freem. Ch. 276; Earle v. De Witt, 6 Allen, 526; Abbott v. Allen, 2 Johns. Ch. 519, 7 Am. Dec. 554; Price v. Neale, 3 Burr. 1355; Jones v. Ryde, 5 Taunt. 488; Smith v. Mercer, 6 Taunt. 76.

[8] Seitzinger v. Weaver, 1 Rawle, 377; Ludwick v. Huntzinger, 5 Watts & S. 51; Griffith v. Kempshall, 1 Clarke Ch. 571; Howes v. Barker, 3 Johns. 506, 3 Am. Dec. 526; Coleman v. Hart, 25 Ind. 256; Bull v. Willard, 9 Barb. 642; Houghtaling v. Lewis, 10 Johns. 297.

CHAPTER XXVII.

CONDITIONS, LIMITATIONS, RESERVATIONS, EXCEPTIONS, RESTRICTIONS, AND STIPULATIONS.

§ 958. Distinction between conditions precedent and subsequent.
959. Fee passes upon condition subsequent.
960. Absolute deed with subsequent grant on condition.
961. Subsequent impossibility.
962. Prevention of performance of condition.
963. Condition against sale of intoxicating liquors.
963 a. Construction of clauses against sale of liquors.
963 b. Condition inserted to enable owner to maintain monopoly of liquor selling.
963c. Public policy.
964. Conditions precedent.
965. Restraint on alienation.
966. Restraint upon partition by tenants in common.
967. Condition against putting in windows.
968. Use of buildings for certain purposes.
968 a. Enforcing personal contract of grantor against grantee with notice.
968 b. Technical accuracy not necessary.
969. Who may take advantage of breach.
970. Conditions subsequent strictly construed.
970 a. Sale not an abandonment.
970 b. Clauses construed as covenants rather than conditions.
970 c. Same subject continued.
970d. Condition subsequent when intent clear.
971. Some instances of construction.
972. Time for performance of condition.
972 a. Breach of condition by life tenant destroys remainder.
973. Clear proof of forfeiture.
974. Distinction between conditions and limitations.
974a. Election of remedies between recission and action for enforcement.
975. Appraisement of improvements.
975 a. Where the estate conveyed is less than the fee.
976. Parol condition.
977. Effect of restriction.
978. Deed in consideration of certain agreements.
979. Reservations and exceptions.
980. Construing a reservation as an exception.
980 a. Title founded on an exception.
980 b. Growing crops conveyed by deed.

980 c. Reservation of growing crops by parol.
981. Reservation by tenant in common.
982 a. Reservation to stranger as estoppel.
983. Reservation of support in deed to trustees.
984. Reservation of plants making them personal property.
985. Right of way.
985 a. Right to pass reserved merely.
986. Maintenance of tollhouse.
987. Unincorporated town.
988. Passageway.
989. Construction in particular cases.
989 a. Removal of timber.
990. Restrictions and stipulations.
990 a. Offensive occupations.
990 b. Building lines.
990 c. Extension of room, window, or piazza.
990 d. Bay windows.
990 e. Restrictions as to purpose of building lots.
991. Removal of restriction.
991 a. Reasonable construction.
991 b. Public policy.
991 c. Changed conditions of city.

§ 958. **Distinction between conditions precedent and subsequent.**—If land is conveyed upon a condition precedent, the title will not pass until the performance of the condition. But if the condition is subsequent, the title passes at the time at which the deed is executed and delivered.[1] Whether a covenant is to be deemed precedent or subsequent depends upon the intention of the parties as shown by the instrument, and not upon the use of any particular set of technical words.[2] A deed was made with the condition that the grantees should build and maintain a dam over a certain brook crossing the land embraced in the deed, and that such dam with its floodgates and sluiceways might be used by the grantors for hydraulic purposes. It was also covenanted that if the grantors sustained any damages in case of a break in the dam or an overflow, the grantees should not be liable unless the same

[1] Sheppard v. Thomas, 26 Ark. 617. See, also, Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072; Randall v. Wentworth, 100 Me. 177, 60 Atl. 871; Spies v. R. Co. 60 W. Va. 389, 55 S. E. 464.

[2] Underhill v. The Saratoga & Washington R. R. Co., 20 Barb. 556; Shinn v. Roberts, 20 N. J. L. (Spencer), 435, 43 Am. Dec. 636; Rogan v. Walker, 1 Wis. 527. This section was quoted as authority in The Bank of Suisun v. Stark, 106 Cal. 202.

happened through their gross negligence. In this case, the condition did not necessarily precede the vesting of the estate, but might accompany or follow it, and the court held that the condition was subsequent, and that the deed passed the fee simple subject to be divested by a neglect or refusal to perform the condition.[3] Where an instrument commencing in the ordinary form of a bargain and sale deed, and purporting to convey to the grantees in consideration of a sum of money certain land, and authorizing the grantees to take possession, sell, and convey or lease the prpoerty in the name of the grantor, and to receive the purchase money and rent, declared that the grantor would not sell the property or revoke the power unless the grantees neglected to pay the sum specified, and contained a covenant that if payment was made at the stipulated time the instrument should operate as a full conveyance, which effect it should also have if the grantor failed to fulfill his part of the agreement, such instrument is intended as a conveyance upon condition precedent. Until performance of the condition, the grantees can acquire no title, but when performed, the grantees' title is complete without further action by the grantor.[4]

§ 959. Fee passes upon condition subsequent.—The fee passes by a deed upon a condition subsequent, in the same

[3] Underhill v. The Saratoga & Washington R. R. Co., 20 Barb. 556; Glocke v. Glocke, 57 L.R.A. 458, 113 Wis. 303, 89 N. W. 118.

[4] Brennan v. Mesick, 10 Cal. 95. See Mesick v. Sunderland, 6 Cal. 297. See, also, Cheete v. Washburn, 44 Minn. 312. It is a question of intention whether a condition is precedent or subsequent, and this intention is to be derived from the deed as a whole; Mesick v. Sunderland, 6 Cal. 297; Blacksmith v. Fellows, 7 N. Y. 401; Martin v. Ballon, 13 Barb. 119; Finlay v. King, 3 Pet. 346, 7 L. ed. 701; Chapin v. School District, 35 N. H. 445; Rogan v. Walker, 1 Wis. 527; Horne v. Dorrance, 2 Dall. 304; Raley v. Umatilla Co., 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. Rep. 890; Jones v. Chesapeake & O. R. Co., 14 W. Va. 514; Shinn v. Roberts, 20 N. J. L. 435, 43 Am. Dec. 636; Osgood v. Abbott, 58 Me. 73.

manner and to the same extent as if the condition did not exist, subject to the contingency of being defeated as provided in the condition, the grantor possessing a right of entry upon condition broken.[5] This is true, even where a homestead is conveyed upon condition that the grantee shall make certain specified payments, and the deed provides that when the conditions have been performed the title shall vest in the grantee absolutely.[6] The word "family," where a deed is made on condition that the grantor and his family should have free passage from a railroad company, means those living in the grantor's house and under his management, and does not include a granddaughter not living with him.[7] A, who was the owner of a lot, gave a bond to B, by which he obligated himself to convey the lot to B, whenever the latter should convey to A or his assigns a certain other lot. A subsequently executed a deed to C of the lot, on condition that the grantee should convey it to B whenever B tendered a like deed of the lot to be granted as provided in the bond, and took back a mortgage upon it with the same condition inserted. At the same time that C executed the mortgage to A, he executed a warranty deed to B containing the clause "for conditions and obligations see said deed from A to me," but did not receive the other lot in exchange. It was held that A's deed to C passed the title subject only to defeasance upon breach of the condition, and that C's deed to B conveyed the lot subject to the mortgage from C to A.[8] After the breach of a condition subsequent, the estate vested in the grantee is not divested at

[5] Memphis & Charleston R. R. Co. v. Neighbors, 51 Miss. 412; Spect v. Gregg, 51 Cal. 198. See Spofford v. True, 33 Me. 283, 54 Am. Dec. 621; Evenson v. Webster, 3 S. Dak. 382, 44 Am. St. Rep. 802. See also S. v. Salt Lake City, 29 Utah 361, 81 Pac. 273; Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072; Randall v. Wentworth, 100 Me. 177, 60 Atl. 871; Spies v. R. Co., 60 W. Va. 389, 55 S. E. 464.

[6] The Bank of Suisun v. Stark, 106 Cal. 202.

[7] Dodge v. Boston etc. Ry. Co., 154 Mass. 299, 13 L.R.A. 318, 28 N. E. 243.

[8] Shattuck v. Hastings, 99 Mass. 23.

common law until an actual entry by one having the right to enter for the forfeiture.[9] At the present day an action of ejectment would have the same effect.[1] The waiver of a forfeiture may be inferred from the neglect of the party entitled to the estate to assert his claim in a reasonable time after the termination of the estate.[2] Where land was conveyed on con-

[9] Willard v. Henry, 2 N. H. 120; Osgood v. Abbott, 58 Me. 73; Cross v. Carson, 8 Blackf. 138, 44 Am. Dec. 742; Hubbard v. Hubbard, 97 Mass. 188, 93 Am. Dec. 75; Chalker v. Chalker, 1 Conn. 79, 6 Am. Dec. 206; Kenner v. American Contract Co., 9 Bush, 202; Phelps v. Chesson, 12 Ired. 194. And see Thomas v. Record, 47 Me. 500, 74 Am. Dec. 500; Chapman v. Pingree, 67 Me. 198; Guild v. Richards, 16 Gray, 309; Memphis R. R. Co. v. Neighbors, 51 Miss. 412; Chalker v. Chalker, 1 Conn. 79, 6 Am. Dec. 206; Frost v. Butler, 7 Greenl. 225, 22 Am. Dec. 199.

[1] Osgood v. Abbott, 58 Me. 73; Green v. Pettingill, 47 N. H. 375, 93 Am. Dec. 444. And see McKelway v. Seymour, 29 N. J. L. 321; Stearns v. Harris, 8 Allen, 598; Austin v. Cambridgeport Parish, 21 Pick. 224; Tallman v. Snow, 35 Me. 342; Canal Co. v. Railroad Co., 4 Gill. & J. 1, 121; Cory v. Cory, 86 Ind. 567.

[2] Kenner v. American Contract Co., 9 Bush, 202; Willard v. Henry, 2 N. H. 120; Ludlow v. New York etc. R. R., 12 Barb. 440; Hooper v. Cummings, 45 Me. 359. In the case first cited the court said: "The more modern authorities on the subject of such forfeitures establish the doctrine that it is with the party in whose favor the condition is, or who becomes entitled to the estate by reason of the forfeiture, to say whether the estate shall be forfeited or not; and although the user from which the grant of a public passway may be implied must have continued for a period required to toll the right of entry in ejectment, the waiver of a forfeiture may nevertheless be inferred by reason of the failure of the party entitled to the estate to re-enter or assert some claim in a reasonable time terminating the estate; and particularly in a case where the party to whom the grant is made is permitted to use and make valuable improvements on the premises after the condition is broken. The courts adjudge the waiver of the forfeiture upon the principle that the happening of the condition does not *ipso facto* determine the estate, the same remaining in the grantee, but only subjects it to be defeated at the election of the grantor and his heirs, etc; and for the additional reason that the forfeitures of estates are not favored either in courts of law or equity." See Jackson v. Crysler, 1 Johns. 126; Doe v. Gladwin, 6 Q. B. (51 Eng. C. L.) 953; Williams v. Dakin, 22 Wend. 209; Sharon Iron Co. v. City of Erie, 41 Pa. St. 349; Gray v. Blanchard, 8 Pick. 284. But a mere acquiescence in the

dition that it should be used for a burying ground, and that the grantee should erect and maintain a fence around the land, and where it was used for the purposes intended for many years, but no fence had ever been erected, and no complaint had ever been made of the failure to build the fence, it was said to be too late for the successor in interest of the grantor to enter for breach of the condition.[3]

§ 960. **Absolute deed with subsequent grant on condition.**—An absolute deed of land conveys the title to the grantee. If the grantor subsequently executes a conveyance to the grantee or the latter's grantee charged with conditions, the conditions can have no operative effect, because there is no estate remaining in the grantor.[4]

§ 961. **Subsequent impossibility.**—Conditions subsequent, incapable of execution at the time at which they are made, or subsequently becoming impossible, either by the act of God or of law, do not have the effect of divesting the estate vested in the grantee. As the condition cannot be performed, the grantee is not at fault.[5] If at the time of the

breach of a condition without a license would not constitute a waiver of subsequent breaches: Hubbard v. Hubbard, 97 Mass. 192, 93 Am. Dec. 75; Guild v. Richards, 16 Gray, 326; Andrews v. Senter, 32 Me. 397; Gray v. Blanchard, 8 Pick. 284; Cleveland etc. Ry Co. v. Coburn, 91 Ind. 557. Waiver may be inferred from a failure to re-enter; Marsh v. Bloom, 133 Wis. 646, 14 L.R.A.(N.S.) 1187, 114 N. W. 457; Rannels v. Rowe, 145 Fed. 296, 74 C. C. A. 376.

[3] Scoville v. McMahon, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350. See, also, School Dist. v. Patrick, 31 Ky. L. Rep. 287, 102 S. W. 237.

[4] Alemany v. Daly, 36 Cal. 90.

[5] Merrill v. Emory, 10 Pick. 507; Taylor v. Stratton, 15 Ga. 103, 60 Am. Dec. 682; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682. See Barksdale v. Elam, 30 Miss. 694; Brandon v. Robinson, 18 Ves. 428; Blackstone Bank v. Davis, 12 Pick. 42, 32 Am. Dec. 241; Jones v. Doe, 2 Ill. 276; Bradley v. Peixoto, 3 Ves. 324; Gadberry v. Sheppard, 27 Miss. 203; Badlam v. Tucker,

execution of an absolute deed the grantee delivers a writing to the grantor, stating that the "deed shall be null and void," unless the grantee shall procure two witnesses to testify to certain things, and that in case he succeeds in obaining such witnesses the deed shall operate only as a mortgage, the legal title has been conveyed with an unlawful condition subsequent. In such a case the grantor must bear the loss. He can neither in law nor in equity recover the title.[6] But if the grantor purchases the land back, and executes a mortgage as security for the payment of the purchase money, he cannot defeat the enforcement of the mortgage for the reason that the condition subsequent was against public policy, or that there was no consideration.[7] Where a husband and wife, grantors, execute a conveyance with the condition that they shall retain the entire use and control of the property so long as they, or either of them, shall live, a court of equity has power to determine the rights of the parties, and for the purpose of preventing future complications may decree the execution of a formal conveyance of the fee from the grantors to the grantee, and a reconveyance by the latter for the lives of the grantors.[8] A condition repugnant to the grant is void.[9] Where a deed is made on the condition subsequent that the

1 Pick. 284, 11 Am. Dec. 202; Davis v. Gray, 16 Wall. 203; Rogers v. Sebastian Co., 21 Ark. 440; Burnham v. Burnham, 79 Wis. 557, 48 N. W. Rep. 661; Culin's Appeal, 20 Pa. St. 243; Whitney v. Spencer, 4 Cow. 39; Jones v. Walker, 13 B. Mon. 163, 56 Am. Dec. 557; Randall v. Marble, 69 Mead. 310, 31 Am. Rep. 281; Jones v. Chesapeake etc. R. R. Co., 14 W. Va. 514; Lamb v. Miller, 18 Pa. St. 448; Morse v. Hayden, 82 Me. 227; Martin v. Ballou, 13 Barb. 119; Parker v. Parker, 123 Mass. 584; Wheeler v. Moody, 9 Tex. 372.

[6] Patterson v. Donner, 48 Cal. 369.

[7] Patterson v. Donner, 48 Cal. 369.

[8] Chandler v. Chandler, 55 Cal. 267.

[9] Littlefield v. Mott, 14 R. I. 288; Pynchon v. Stearns, 11 Met. 312, 45 Am. Dec. 210; Gadberry v. Sheppard, 27 Miss. 203; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Bassett v. Budlong, 77 Mich. 338, 18 Am. St. Rep. 404.

premises should be used as a cemetery, and an act of the legislature renders further performance of the condition unlawful, the condition is discharged, and the title of the grantee is no longer subject to it.[1]

§ 962. **Prevention of performance of condition.**— Where the grantor prevents the performance of a condition, its nonperformance will be excused.[2] Where a grantor conveyed an undivided third of a tract of land, upon the condition that the grantee should proceed to recover the possession of the lot at his own expense, by legal proceedings, and the grantee employed a competent attorney, who assumed the management of an action then pending against the parties in the possession of the land, and subsequently, on the motion of the grantor, and against the wishes of the grantee and his attorney, another attorney was substituted, who dismissed the action and instituted another in which the possession of the land was recovered, it was held that the action of the grantor excused the nonperformance of the condition by the grantee.[3]

[1] Scoville v. McMahon, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350. See, also, Ricketts v. Louisville etc. Ry. Co., 91 Ky. 221, 11 L.R.A. 422, 34 Am. St. Rep. 176.

[2] Jones v. Chesapeake & Ohio R. R. Co., 14 W. Va. 514; Houghton v. Steele, 58 Cal. 421, and cases cited; Jones v. Walker, 13 B. Mon. 163, 56 Am. Dec. 557; Mezell v. Burnett, 4 Jones L. 249, 69 Am. Dec. 744; Elkhart Car Co. v. Ellis, 113 Ind. 215, 15 N. E. Rep. 249; Young v. Hunter, 6 N. Y. 203; Leonard v. Smith, 80 Iowa, 194; Gray v. Blanchard, 8 Pick. 284.

[3] Houghton v. Steele, 58 Cal. 421. A grantor cannot, after the execution and delivery of a deed, impose conditions, for he then has no estate: Alemany v. Daly, 36 Cal. 90. The condition must be expressed in the deed or in some writing referring to it: Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Scantlin v. Garvin, 46 Ind. 262; Marshall Co. High School v. Iowa Synod, 28 Iowa, 360; Schwalbach v. Chicago M. & St. P. Ry. Co., 73 Wis. 137; Moser v. Miller, 7 Watts, 156; Galveston etc. Ry. Co. v. Pfeuffer, 59 Tex. 66; Gaberry v. Sheppard, 27 Miss. 203. A deed by referring to another instrument containing a condition may, by reference, adopt the condition: Bear v. Whisler, 7 Watts, 144; Merritt v. Harris, 102 Mass. 326.

§ 963. **Condition against sale of intoxicating liquors.**—A condition inserted in a deed that intoxicating liquors shall never be manufactured or sold, or disposed of as a beverage in any place of public resort upon the land conveyed by the deed, and providing that in case of a breach of the condition by the grantee or his assigns, the deed shall become null and void, and the title thereupon shall revert to the grantor, is not repugnant to the estate granted, nor is it unlawful or against public policy.[4] In a suit to obtain the benefit of the forfeiture, the grantee is estopped from denying the validity of the title conveyed by the deed under which he acquired possession.[5] Such a condition, until broken, runs with the land.[6] No forfeiture will occur by reason of a sale which is not chargeable to the fault or negligence of the grantee, and the question of the grantee's knowledge or negligence is one of fact.[7] A condition of this character is a condition subsequent.[8]

§ 963a. **Construction of clauses against sale of liquors.**—A clause: "Provided always, and these presents are upon the express condition that the aforesaid premises shall

[4] Cowell v. Springs Co., 100 U. S. 55, 25 L. ed. 547; Plumb v. Tubbs, 41 N. Y. 442; Collins v. Marcey, 25 Conn. 242; O'Brien v. Wetherell, 14 Kan. 616; Jenks v. Pawlowski, 98 Mich. 110, 39 Am. St. Rep. 522; Bad River Lumbering etc. Co. v. Kaiser, 82 Wis. 116, 33 Am. St. Rep. 29; Chippewa Lumber Co. v. Tremper, 75 Mich. 36, 13 Am. St. Rep. 420; Sioux City etc. R. R. Co. v. Singer, 49 Minn. 301, 15 L.R.A. 751, 51 N. W. 905, 32 Am. St. Rep. 554; Smith v. Barrie, 56 Mich. 314, 56 Am. Rep. 391; Lehigh Coal etc. Co. v. Early, 162 Pa. St. 338, 29 Atl. Rep. 736; Odessa Improvement Co. v. Dawson, 5 Tex. Civ. App. 487. See also Sioux City etc R. Co. v. Davis, 49 Minn. 308, 51 N. W. 907; Min. Co. v. Mulari, 152 Mich. 607, 116 N. W. 360; Jetter v. Lyon, 70 Neb. 429, 97 N. W. 596; Watrous v. Allen, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363; Fly v. Guinn, 2 Tex. Unrep. Cas. 300; Halcher v. Andrews, 5 Bush (Ky.) 561; Plumb v. Tubbs, 41 N. Y. 442.

[5] Cowell v. Springs Co., 100 U. S. 55, 25 L. ed. 547.

[6] O'Brien v. Wetherell, 14 Kan. 616.

[7] Collins v. Marcy, 25 Conn. 242. And see, also, Barrie v. Smith, 47 Mich. 130.

[8] Jeffrey v. Graham, 61 Tex. 481.

not be, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public house of any kind," will be construed as a mere covenant, and not as a condition subsequent, a breach of which will defeat the title.[9] By an agreement not to use a drugstore for the sale of intoxicating liquors, the keeping of a drugstore where liquors are sold in the manner usual with druggists, but not to be drunk upon the premises, is not prohibited.[1] Where one parcel of land is conveyed with a restriction against the sale of intoxicating liquors, and the grantor subsequently conveys adjoining land to another without such restriction, he waives the right to enforce the restriction contained in the first deed, even though the omission of the restriction in the second deed was by mistake, if no step has been taken to correct the mistake.[2] Such a condition is valid, though such sales are not illegal.[3]

§ 963b. **Condition inserted to enable owner to maintain monopoly of liquor selling.**—While there can be no question that a condition inserted in a deed for the prohibition of the sale of intoxicating liquor is perfectly valid, yet this condition must be inserted for an honest purpose. The law is just as firm against the creation of a monopoly as it is in the enforcement of a condition, otherwise valid, in a deed. It will not allow a man to create a monopoly in himself for the sale of whisky. In the words of Mr. Justice Morse: "Courts will not enforce such a condition inserted for a dishonest purpose, and to the end that the grantor may thereby obtain a monopoly in any business, and all others be restrained therefrom, and there can be no difference in this

[9] Post v. Weil, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809.

[1] Hall v. Solomon, 61 Conn. 476, 29 Am. St. Rep. 218.

[2] Jenks v. Pawlowski, 98 Mich. 110, 22 L.R.A. 863, 39 Am. St. Rep. 522.

[3] Smith v. Barrie, 56 Mich. 314, 56 Am. Rep. 391.

regard whether the business so sought to be centered in one person in a community is one acknowledged by every one to be of great benefit to mankind, or one regarded by many good people of detriment to the community, provided both are lawful; and certainly one cannot ask a court of justice to enforce such a condition as this against a person selling liquor otherwise lawfully, that he may reap the benefit of unlawful sales. Courts will not enforce forfeitures of estates for any such purposes."[4] For the purpose of showing a waiver of such a condition in a deed, the grantee may prove that the grantor's agent is engaged, with the knowledge of the grantor, in the unlawful sale of liquor in the tract subject to the condition. The jury are authorized from such evidence to draw the inference that such sale was made with the acquiescence and consent of the grantor for the purpose of securing a monopoly in himself.[5]

§ 963c. **Public policy.**—In one case, the condition was not held to be void, but the court decided that the fact that the grantor or his agent, with the grantor's acquiescence was engaged in the sale of intoxicating liquor would warrant the grantee in assuming that the condition had been waived, upon which assumption he would have a right to act, until he should be notified to the contrary. Until the giving of such a notice the court decided that no forfeiture would result from the breach of the condition.[6] But in a case in California it was decided that if this condition is inserted solely for the purpose of reserving to the grantee a monopoly of the business, then the condition itself is against public policy. Consequently, under this view, the estate would

[4] Chippewa Lumber Co. v. Tremper, 75 Mich. 36, 4 L.R.A. 373, 13 Am. St. Rep. 420, 42 N. W. 532.

[5] Chippewa Lumber Co. v. Tremper, 75 Mich. 36, 4 L.R.A. 373, 13 Am. St. Rep. 420, 42 N. W. 532.

[6] Chippewa Lumber Co. v. Tremper, 75 Mich. 36, 4 L.R.A. 373, 13 Am. St. Rep. 420, 42 N. W. 532.

[6] Cheppewa Lumber Co. v. Tremper, 75 Mich. 36, 4 L.R.A. 373, 13 Am. St. Rep. 420, 42 N. W. 532.

not be liable to forfeiture for a breach of the condition.[7] In the case just cited the lower court found that the conditions imposed by the grantor were made for the purpose of giving

[7] Burdell v. Grandi, 152 Cal. 379, 14 L.R.A.(N.S.) 909. The opinion of the court was delivered by Mr. Justice Lorigan, who said:

"It is insisted by appellant that a condition inserted in a deed that intoxicating liquors shall not be sold on the conveyed premises, and providing that for a breach thereof the estate granted shall be forfeited is entirely lawful, and that there is nothing in the other findings made by the court in this case—the condition and the breach being found—which warranted the court in awarding judgment for the defendants, and in refusing to sustain the forfeiture. As an abstract proposition, the contention of appellant that such conditions are lawful and enforceable is undoubtedly correct. The books are full of cases in which restrictions as to the use of property have been sustained. It has been uniformly held that conditions inserted in deeds precluding the establishment of various occupations or industries—as for instance distilleries, machine-shops, livery-stables, and saloons, or places where intoxicating liquors might be obtained—in certain specified localities intended for and desirable as places of residence have been sustained, the intent and purpose of the restriction being, as to the industries, to free such localities from offensive sights, disturbing noises, or noxious vapors, and, as to saloons, in aid of the social and moral welfare of the community by preventing intemperance, which is universally recognized as a social evil. Under this general rule, and confining ourselves now to the condition in the deed relative to the sale of intoxicating liquors, broken by the defendant Grandi, if the plaintiff in the formation of the town of Point Reyes Station, and in pursuance of a scheme to prevent intoxicating liquors being sold within its limits, had by condition in all deeds made by him provided against it, and for forfeiture of the land conveyed in case it was done, no contention could arise as to the validity of such condition and the consequent forfeiture of the property if it were violated. Or if the plaintiff, under a general scheme for establishing such town, had contemplated and intended that the sale of intoxicating liquors should be confined and restricted to some given locality or territory within the town, and restricted it to such given locality by imposing conditions against its sale elsewhere, we are not prepared to say that such a scheme would not be entirely proper, and conditions in deeds harmonizing therewith lawful and enforceable. But nothing of this kind appears to have been intended or designed by the plaintiff, according to the findings. Whatever his views may have been on the question of temperance, or the restriction of the liquor traffic, he neither intended by the imposition of these

him a monopoly in the sale of intoxicating liquor upon other property which he owned in the tract, and not for the purpose of promoting temperance and that not only was this his intent, but that, as a matter of fact, he was through his agents in the actual enjoyment of a monopoly. The Supreme court observed that if the grantor "under a general scheme for establishing such town, had contemplated and intended that the sale of intoxicating liquors should be confined and restricted to some given locality or territory within the town, and restricted it to such given locality by imposing conditions against its sale elsewhere, we are not prepared to say that such a scheme would not be entirely proper, and conditions in deeds harmonizing therewith lawful and enforceable." [8]

§ 964. **Conditions precedent.**—A condition precedent is one that must take effect before the estate can vest. If a condition precedent is impossible from the beginning, or

conditions to entirely prohibit the sale of such liquor within the town laid out by him nor to confine its sale within any given district or locality for the benefit of the community or its individual members. His purpose was, so the court finds, and we must assume it has so found on sufficient evidence, that he intended by the imposition of such conditions, to reserve and create solely in himself a monopoly of the sale of intoxicating liquors within the town of Point Reyes Station. The court not only finds that this was the intent of the plaintiff, but that in effect, he, through his agents, was in the actual enjoyment of a monopoly as to such business. It hardly needs any citation of authority to the proposition that in the scheme of establishing a town or village, all forfeitures inserted in deeds to lots therein solely for the purpose of restricting a lawful occupation, in order that the grantor may himself enjoy a monopoly in it, are against public policy and void. The retail liquor business conducted under such restrictions and limitations as are imposed by law, is a lawful business in this state, and no more subject to monopoly by restrictive conditions imposed for such purpose, as the lower court finds they were here, than restrictive conditions affecting any other lawful business, and when the intent and purpose of such conditions is to effect a monopoly of any lawful business or occupation in the person imposing them, they are void."

[8] Burdell v. Grandi, 152 Cal. 380, 14 L.R.A.(N.S.) 909.

for any reason is incapable of performance, the estate will not vest.[9] A condition "that this deed is to have effect and be operative only upon the express condition and understanding," that certain things shall first be done, is a condition precedent.[1] Where a father executes a deed of gift of eight undivided ninths of a tract of land, reserving to himself one-ninth, to be laid out on the portion on which he resided, the actual location of the ninth so reserved is not a condition precedent to the operation of the deed as to the undivided portions conveyed to the children.[2] Where a deed of a block of land to a city, to be kept as an ornamental square, and for the erection of public buildings, contains this proviso: "Provided the city, by its legal representatives, obtains authority from the legislature of this State, and makes the necessary removals of the dead from the said block within twelve months from the first day of January, A. D., 1891," the deed is to be construed as made upon a condition precedent, and if the city fails to perform the condition, no title vests in the city.[3]

§ 965. **Restraint on alienation.**—A condition may be imposed in a deed on the power of alienation in certain cases, as that the land shall not be conveyed before a certain date or to a certain person.[4] But an absolute restriction on the power

[9] Harvey v. Aston, 1 Atk. 374; Vanhorne's Lessee v. Dorrance, 2 Dall. 317; Mizell v. Burnett, 4 Jones (N. C.), 249, 69 Am. Dec. 744; Martin v. Ballou, 13 Barb. 119; Taylor v. Mason, 9 Wheat. 325, 6 L. ed. 101. And see Bertie v. Falkland. Freem. Ch. 220; Scott v. Tyler, 2 Bro. C. C. 431; Dunlap v. Mobley, 71 Ala. 102. Conditions precedent must be strictly performed. Helms v. Helms, 137 N. C. 206, 49 S. E. 110; Spies v. R. Co., 60 W. Va. 389, 55 S. C. 464.

[1] Tennessee & Coosa R. R. Co. v. East Alabama Ry. Co., 73 Ala. 426. Not condition precedent, see Mackey v. Kerwin, 222 Ill. 371, 78 N. E. 817.

[2] Salmon v. Wilson, 41 Cal. 595.

[3] Stockton v. Weber, 98 Cal. 433. See, also, Jones v. Bramblet, 2 Ill. 276; Blean v. Messenger, 33 N. J. L. 499.

[4] Attwater v. Attwater, 18 Beav. 330; Hunt v. Wright, 47 N. H. 396, 93 Am. Dec. 451. And see McWilliams v. Nisley, 2 Serg. &

of alienation or a condition forbidding the marriage of the grantee is void.[5] A condition in a deed made in consideration of love and affection, conveying an absolute fee, that if the land is not disposed of during the grantee's lifetime it shall revert to the grantor, is repugnant to the grant, and void.[6] A condition that a failure to pay the purchase money shall render the deed void, is not void as repugnant to the grant.[7] A condition in a deed conveying a life estate, with remainder in fee to the grantee's children, or in case of his death, to others, which forbids the grantee to convey his interest, and prohibits the sale of it for his debts, is void.[8] In California, the rule that a condition in restraint of alienation when repugnant to the interest created is void is laid down in

R. 513, 7 Am. Dec. 654; Stewart v. Brady, 3 Bush, 623; Shackleford v. Hall, 19 Ill. 212; Dougal v. Fryer, 3 Mo. 40, 22 Am. Dec. 458. See, also, Realty Co. v. Graves (Ky.) 113 S. W. 420; Harkness v. Lisle, 132 Ky. 767, 117 S. W. 264.

[5] Murray v. Green, 64 Cal. 363; McCleary v. Ellis, 54 Iowa, 311, 37 Am. Rep. 205; Anglesea v. Church Wardens, 6 Q. B. 114; Blackstone Bank v. Davis, 21 Pick. 42, 32 Am. Dec. 241; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Brandon v. Robinson, 18 Ves. 429; Hall v. Tuffts, 18 Pick. 455; De Peyster v. Michael, 6 N. Y. 467, 57 Am. Dec. 470; Williams v. Cowden, 13 Mo. 211, 53 Am. Dec. 143; Walker v. Vincent, 19 Pa. St. 369; Schermerhorn v. Negus, 1 Denio, 448; Willis v. Hiscox, 4 Mylne & C. 197; Munroe v. Hall, 97 N. C. 206; Dick v. Pitchford, 1 Dev. & B. Eq. 480; Pritchard v. Bailey, 113 N. C. 521, 18 S. E. Rep. 668; Hardy v. Galloway, 111 N. C. 519, 32 Am. St. Rep. 828, 15 S. E. Rep. 890; Yard's Appeal, 64 Pa. St. 95; Reifsnyder v. Hunter, 19 Pa. St. 41; Doebler's Appeal, 64 Pa. St. 9; Oxley v. Lane, 35 N. Y. 340; Smith v. Clark, 10 Md. 186; Norris v. Hensley, 27 Cal. 439; Lawrence v. Singleton, (Tenn. Oct. 23, 1895), 17 S. W. Rep. 265; McCleary v. Ellis, 54 Iowa, 311, 37 Am. Dec. 205; Mandelbaum v. McDonnell, 29 Mich. 78, 18 Am. Rep. 61; Hawley v. Northampton, 8 Mass. 3, 5 Am. Dec. 66; Gleason v. Fayerweather, 4 Gray, 348. See Sprague v. Edwards, 48 Cal. 239. Walker v. Shepard, 210 Ill. 100, 71 N. E. 422; Harkness v. Lisle, (Ky.) 117 S. W. 264.

[6] Case v. Dewire, 60 Iowa, 442.

[7] Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682.

[8] McCleary v. Ellis, 54 Iowa, 311, 37 Am. Rep. 205. A deed contained this clause: "The said J. B. Galloway and wife, Alice L. Galloway, retaining for themselves and their heirs and assigns the right to repurchase said land when sold, the

the Civil Code.[9] Where a restraint against alienation is void as against public policy the grantee may convey an absolute title, and his grantee is not estopped by any act or declaration made by him to allege its invalidity.[1] Where land is purchased by a son and conveyed to his mother as a gift, a contract made subsequently, which recites that the land was acquired by her by money supplied by the son as a gift and which contains a covenant that no part of such land "shall be sold or conveyed without the consent" of the son and which, also, provides that he was to be known and considered as the manager and superintendent of the land conveyed for the benefit of the mother to whom all the income was to be paid, and that in case of her death the property should be divided among her lawful heirs who were named, is void, because it places a restraint upon alienation repugnant to the interest conveyed by the deed. A daughter to whom the mother without the son's consent conveyed the property in consideration of love and affection excluding the son, will take the entire title.[2] The rule invalidating repugnant conditions in restraint of alienation does not apply where it appears from a fair consideration of all the parts of a deed and

said Jefferson Evans conveying a title for said land either by deed or mortgage to any person without first giving J. B. Galloway and wife and their heirs and assigns the privilege of repurchasing the same, renders this deed null and void, otherwise to remain in full force." This provision was held to be void because it was uncertain as to time and manner of performance, was repugnant to the grant, and was a restraint on the power of alienation: Hardy v. Galloway, 111 N. C. 519, 32 Am. St. Rep. 828. See, also, Tillinghast v. Bradford, 5 R. I. 205; Blackstone Bank v. Davis, 21 Pick. 42, 32 Am. Dec. 241; Mebane v. Mebane, 4 Ired. Eq. 131, 44 Am. Dec. 102.

[9] Civil Code Cal. § 711.

[1] Prey v. Stanley, 110 Cal. 423.

[2] Prey v. Stanley, 110 Cal. 423, 42 Pac. 908. See as restraint on alienation: Teaney v. Mains, 113 Iowa, 53, 84 N. W. 953; Latimer v. Waddell, 119 N. C. 370, 3 L.R.A. (N. S.) 668, 26 S. E. 122; Lewis v. Lewis, 76 Conn. 586, 57 Atl. 735; Bennett v. Chapin, 77 Mich. 526, 7 L.R.A. 377, 43 N. W. 893; Simonton v. White, 93 Tex. 50, 53 S. W. 339, 77 Am. St. Rep. 824.

of contemporaneous instruments forming parts of the same transaction, that it was the intention by other expressions contained in the deed to qualify and limit the meaning and effect of the words of grant, unless the conditions are referable to the limited estate actually conveyed by the deed. "In such cases" says Mr. Justice Shaw, "the other provisions of the deed operate on and affect its true meaning, the granting clause is to be taken in the limited sense which the entire instrument shows it was intended to have, and, the limitations and conditions relating to the fee are not to be considered as repugnant to the grant, but as descriptive of the estate conveyed, and in harmony with the grant when truly interpreted." He continued to say that "conditions which would be void as restrictions upon the alienation of a fee conveyed by the deed, may contain expressions, which show that no such fee is granted, and in construing a deed, such language must be given due weight. Where the intent to be gathered from the deed as a whole, including the otherwise void conditions, is that a lesser estate was to be conveyed, then such intention must prevail, and as the effect will be that no fee is conveyed by the deed, there will be nothing upon which the restrictions upon the alienation of the fee can operate." [3]

§ 966. **Restraint upon partition by tenants in common.** —Whether a restraint upon the right of partition by tenants in common is a restraint upon the power of alienation or not depends, in a great measure, upon the character of the property and the purposes for which it has been purchased. As an abstract proposition the right to partition is an inseparable incident to ownership, and, in many cases, it has been asserted that every estate in common is subject to partition. This was said in a case in Massachusetts where there was no agreement that partition should not be had, but where the right to partition was resisted on the ground of

[3] Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603.

prescription.[4] But where the use of the property as a whole is essential for the benefit of all, and it has been acquired for a definite purpose, under an agreement that it shall not be divided by partition, the agreement is not subject to the objection that it is a restraint upon alienation, as each tenant may convey his undivided interest. Hence, if land purchased for the site of a hotel to be erected by an association is conveyed to the members forming the association upon condition that each member and his heirs and assigns shall hold the same in common without partition or division, subject to the articles of the association, such a condition is not repugnant to the estate granted, or void upon grounds of public policy. Each of the grantees is, as against the others, estopped to demand partition.[5] But a covenant by tenants in common that a certain part of their land shall be occupied in common as a yard, by them and their heirs and assigns forever, does not prevent partition of such lot. The right of occupation will remain after partition as it existed previously.[6] And so if a deed conveying an undivided interest in land contains a stipulation that the parties, their heirs and assigns, shall never commence proceedings for the partition of a certain designated part of the land, the stipulation is void because it is an unreasonable restraint of the use and enjoyment of the property.[7]

[4] Mitchell v. Starbuck, 10 Mass. 11.

[5] Hunt v. Wright, 47 N. H. 396, 93 Am. Dec. 451; Spalding v. Woodward, 53 N. H. 573, 16 Am. Rep. 392; Avery v. Payne, 12 Mich 549.

[6] Fisher v. Dewerson, 3 Met. 544. And see Savage v. Mason, 3 Cush. 500.

[7] Haeussler v. Missouri Iron Co., 110 Mo. 188, 16 L.R.A. 220, 33 Am. St. Rep. 431. Said Thomas, J., for the court: "Restraints and fetters upon the alienation and enjoyment of property are opposed to the common law, and especially to the jurisprudence of today, which, in the United States at least, has almost wholly lost the spirit and genius of the feudal system and feudal tenures: 9 Am. Law Reg., N. S. 393, 457. Primogeniture and estates tail, with all their incidents, find but little favor in the laws of this century. The right of partition is an absolute right which yields to no consideration of hardship or inconvenience: Freeman on Cotenancy and Partition, sec. 443. Anything that militates against this

§ 967. **Condition against putting in windows.**—A condition in a deed of a house that there shall be no windows in it, would, probably, be considered a restriction inconsistent with the estate granted, and hence, void. But a condition that no window shall be placed on a certain side would be valid. A clause in a deed, "provided, however, this conveyance is upon the condition that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises within thirty years from the date hereof," was construed to be a condition, and not a covenant, giving the grantor a right to re-enter upon a breach.[8]

§ 968. **Use of buildings for certain purposes.**—Where the owner of a block of land divided it into lots, and sold the lots from time to time to different persons, and the deeds contained mutual covenants against the erection of buildings for certain trades, the covenants in the various deeds are for the mutual benefit and protection of all the purchasers of lots in the block.[9] Persons who are not parties to a deed containing a covenant providing against certain constructions which may be offensive to neighboring inhabitants, are, if they have suffered from a breach of it, entitled to relief in equity.[1] An

right is repugnant to the essential characteristics of cotenancy: Mitchell v. Starbuck, 10 Mass. 11; and the tendency of our times is to greater freedom of sale and transfer of property, unfettered by conditions or limitations of the right of alienation."

[8] Gray v. Blanchard, 8 Pick. 283. And see, Chapin v. School District, 35 N. H. 445; Wood v. County of Cheshire, 32 N. H. 421; Gillis v. Bailey, 21 N. H. 150; s. c. 17 N. H. 18; Parsons v. Miller, 15 Wend. 564; Stuyvesant v. Mayor etc. of New York, 11 Paige, 414; Collins v. Marcey, 25 Conn. 242; Savage v. Mason, 3 Cush. 500; Hooper v. Cummings, 45 Me. 359.

[9] Barrow v. Richard, 8 Paige, 351, 35 Am. Dec. 713.

[1] Gilbert v. Peteler, 3 N .Y. 165. See Linzee v. Mixer, 101 Mass. 512; Clark v. The Inhabitants of the Town of Brookfield, 81 Mo. 503; 51 Am. Rep. 243. If a person has agreed not to build flats in a neighborhood, and subsequently purchases land there, it becomes in his hands restricted and limited in its uses by that agreement, and continues subject to the restriction in

habendum in a deed, "to have and to hold for the use of said religious Society of Friends so long as it may be needed for meeting purposes, then said premises to fall back to the original tract," is not broken by a transfer of the church property to neighboring land, where use was still to be made of the premises for meetings.[2] Where a county erects a courthouse and jail on land conveyed to it for county purposes, and afterward the county site is removed to another place, the title of the county is not divested by such removal. The removal is not evidence of the county's intention to abandon the property or to use it for purposes not for the use of the county.[3] In a deed containing the condition, "no buildings which may be erected on said lot shall be less than three stories in height, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone, or iron, nor be used or occupied for any other purpose, or in any other way than as a dwelling-house, for the term of twenty years," from a day named in the deed, the limitation of time is considered as applying only to the character of occupation, and not to the other conditions.[4]

the hands of a purchaser from him with notice: Louis v. Gollner, 129 N. Y. 227, 26 Am. St. Rep. 516.

[2] Carter v. Branson, 79 Ind. 14.

[3] Poitevent v. Hancock County Supervisors, 58 Miss. 810.

[4] Keening v. Ayling, 126 Mass. 404. See as to the construction of a condition that the premises should be used for the manufacture of cars, Ellis v. Elkhart etc. Co., 97 Ind. 247. The question of the extent to which an agreement that the grantee will use, or abstain from using, the granted premises in a specified manner is valid was exhaustively considered in the case of Hodge v. Sloan, 107 N. Y. 244, 1 Am. St. Rep. 816. In that case, the owner of forty acres of land was engaged in the business of selling sand therefrom, and he sold a half acre to a grantee under an agreement that the latter should not sell any sand off the premises. The original contract of sale contained an agreement to this effect, and the deed contained this covenant: "Said party of the second part hereby agreeing not to sell any sand off said premises." The grantee conveyed to another, who, notwithstanding his knowledge of the agreement, opened a bed on the premises and commenced to sell sand therefrom. The original grantor brought an action to restrain the sale of sand, and the court, in

§ 968a. **Enforcing personal contract of grantor against grantee with notice.**—Although an agreement made by the owner of land restricting its use, may not be a covenant

considering the effect of this stipulation, per Mr. Justice Danforth, said: "Parties competent to contract have contracted, the one to sell a portion of his land, but only upon such conditions as will protect himself in the prosecution of business carried on upon the residue, the other agreeing to buy for a consideration affected by that condition, and enabled to do so only by acceding to it, and he therefore binds himself by contract to limit the use of land purchased in a particular manner. There seems no reason why he and his grantee, taking title with notice of the restriction, should not be equally bound. The contract was good between the original parties, and it should in equity, at least, bind whoever takes title with notice of such covenant. By reason of it the vendor received less for his land, and the plain and expressed intention of the parties would be defeated if the covenant could not be enforced as well against a purchaser with notice as against the original covenantor. In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land, and so running with the title. It is enough that a purchaser has notice of it; the question in equity being, as is said in Tulk v. Moxhay, 11 Beav. 571, 2 Phill. Ch. 774, not whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. This principle was applied in Tallmadge v. East River Bank, 26 N. Y. 105, where the equity in regard to the manner of improvement and occupation of certain land grew out of a parol contract made by the owner with the purchaser, and was held binding upon a subsequent purchaser with notice, although his legal title was absolute and unrestricted. In Trustees v. Lynch, 70 N. Y. 446, 26 Am. Rep. 615, the action was brought to restrain the carrying on of business on certain premises in the city of New York, of which the defendant was the owner, upon the ground that the premises were subject to a covenant reserving the property exclusively for dwelling-houses. The court below held, among other things, that the covenant did not run with the land, and that the restriction against carrying on any business on the premises was liable to conflict with the public welfare, and judgment was given for the defendant. Upon appeal it was reversed, and the covenant held to be binding upon a subsequent grantee with notice as well as upon the original covenantor. So the restraint may be against the use of the premises for one or another particular purpose, as that no building thereon 'shall be used for the sale of ale, beer, spirits,' etc., 'or

running with the land, or a legal exception or reservation, still, it may be enforced in equity by injunction against a grantee who did not purchase innocently and in good faith.

as an inn, publichouse, or beer-house': Carter v. Williams L. R. 9 Eq. Cas. 678. And it is said a man may covenant not to erect a mill on his own lands: Mitchell v. Reynolds, 1 P. Wms. 181. Many other instances of restraint might be referred to, and where it is of such a nature as concerns the mode of occupying or dealing with the property purchased in the way of business operations, or even the omission of all business or certain kinds of business, or the erection or non-erection of buildings upon the property, we see no reason to doubt the validity of an agreement fair and valid in other respects, which secures that restraint. Indeed, it seems well settled by authority that a personal obligation so insisted upon by a grantor and assumed by a grantee, which is a restriction as to the use of the land, may be enforced in equity against the grantee and subsequent purchasers with notice: Parker v. Nightingale, 6 Allen, 341, 344, 83 Am. Dec. 632; Burbank v. Phillsbury, 48 N. H. 475; nor is it essential that the assignees of the covenantor should be named or referred to: Morland v. Cook, L. R. 6 Eq. Cas. 252. In Tulk v. Moxhay, 1 Hall & T. 105, it was said that the jurisdiction of the court in such cases is not fettered by the question whether the covenant does or does not run with the land. In that case the purchaser of land, which was conveyed to him in fee simple, covenanted with the vendor that the land should be used and kept in ornamental repair as a pleasure garden, and it was held that the vendor was entitled to an injunction against the assignees of the purchaser to restrain them from building upon the land. Upon the appeal, the chancellor, Cottenham, said: 'I have no doubt whatever upon the subject; in short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this court ever since I have known it. Where the owner of a piece of land enters into contract with his neighbor, founded, of course, upon a valuable or other good consideration, that he will either use or abstain from using his land in such a manner as the other party by the contract particularly specifies, it appears to me the very foundation of the whole of his jurisdiction to maintain that this court has authority to enforce such a contract. It has never, that I know of, been disputed.' The question before the court was stated to be whether a party taking property with a stipulation to use it in a particular manner will be permitted by the court to use it in a way diametrically opposite to that which the party has stipulated for. 'Of course,—he says—'of course the party purchasing the property which is under such restriction gives less for it than he would have given if he had bought it unencumbered. Can there, then, be anything much

Thus, a builder of flats and tenement houses contracted for the purchase of a lot with the object of building thereon a tenement house. The street was occupied by private residences, and their owners deeming the contemplated structure would be an injury to them, and failing to induce the builder not to erect such a building, purchased and took an assignment of the contract at a considerable advance over the price originally agreed. They did this for the sole and declared purpose of preventing the erection of flats in the neighborhood, and they purchased the contract upon the oral agreement of the builder, that he would not construct any flats in that immediate neighborhood. The builder, however, soon bought other premises

more inequitable or contrary to good conscience than that a party who takes property at a less price because it is subject to a restriction should receive the full value from a third party, and that such third party should then hold it unfettered by the restriction under which it was granted? That would be most inequitable, most unjust, and most unconscientious; and, as far as I am informed, this court never would sanction any such course of proceeding.' And in language very applicable to the case before us he adds: 'Without adverting to any question about a covenant running with land or not, I consider that this piece of land is purchased subject to an equity created by a party competent to create it; that the present defendant took it with distinct knowledge of such equity existing; and that such equity ought to be enforced against him, as it would have been against the party who originally took the land from Mr. Tulk.' This case is cited and followed as to restrictive covenants in many cases: Brown v. Great East. Ry. Co., L. R. 2 Q. B. D. 406; London etc. Ry Co. v. Gomm, L. R. 20 Ch. Div. 562, 576. Each case will depend upon its own circumstances, and the jurisdiction of a court of equity be exercised for their enforcement or refused, according to its discretion: Trustees v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; but where the agreement is a just and honest one, its judgment should not be in favor of the wrongdoer. Such seems to us the character of the covenant in question; it is restrictive, not collateral to the land but relates to its use, and upon the facts found the plaintiff is entitled to the equitable relief demanded." The court in the case cited (Hodge v. Sloan) distinguish the case from Brewer v. Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 679, where the court held that the facts did not justify the interference of a court of equity.

in the neighborhood and commenced the erection of a flat, but when suit was threatened he conveyed the property to his wife in exchange for other property worth considerably less, and as her agent and architect continued the work. The wife knew all the facts, and took the title in her name for the purpose of assisting her husband to avoid his contract. The court held that the builder might be enjoined from continuing the proposed construction, or using any structure on the land as a flat.[5] Where parties purchase land with notice of a covenant relating to it, but not running with the land, they will not be permitted in equity to perform any act contrary to the true meaning of that covenant.[6] An owner possesses an easement where it is agreed by owners fronting upon a square of land in a city, that certain places laid out upon a map shall remain open as appurtenant to several lots, and if the city in the exercise of the right of eminent domain takes such a lot it must compensate the owner of another lot entitled to such easement for its loss.[7]

§ 968b. Technical accuracy not necessary.—Many agreements as to what the grantee may or may not do with the property conveyed to him are not in the strict sense covenants running with the land, but as they are valid in their nature, they are capable of enforcement in equity against those acquiring an interest in the property with notice of them. A purchaser, under such circumstances, is obligated to do that which his grantor agreed to do. Notwithstanding the

[5] Lewis v. Gollner, 129 N. Y. 228, 26 Am. St. Rep. 516.

[6] Tulk v. Moxhay, 2 Phill. Ch. 774; Patching v. Dubbins, Kay, 1. To the same effect, see Brown v. Huber, 80 Ohio St. 183, 28 L.R.A. (N.S.) 705, 88 N. E. 322; Ashland v. Greiner, 58 Ohio St. 67, 50 N. E. 99.

[7] Ladd v. City of Boston, 151 Mass. 585, 21 Am. St. Rep. 481. In the latter volume there is an extended note upon covenants restricting the use of land, to which the reader is referred for a more elaborate discussion of the subject.

covenant may be purely personal in its nature, subsequent grantees and successors in interest will be bound by it, unless they claim as bona fide purchasers without notice to have a superior equity.[8] And even if such agreements, affecting the manner in which real property shall be occupied or used, are not expressed in terms of technical accuracy still courts of equity will enforce them.[9] A grantee with notice is bound by a covenant not to sell sand from the land.[1] Subsequent grantees may be charged with notice of such a covenant in a deed because it is in their line of title.[2] Although a clause in a deed providing for the keeping open of a passageway between two houses, may not operate as a reservation for want of the word "heirs," still it is enforceable against grantees with notice as a contract which equity will specifically enforce.[3] To absolve the grantee, having notice from the covenant would be inequitable and unconscientious as such grantee takes his title subject to all equities of which he has notice.[4] If the right of way of a railroad company may be used by another railroad company upon such reasonable terms and such compensation as may be mutually agreed upon, a court of equity, if they fail to agree, may settle the amount of compensation to be paid.[5] If a deed contains no reservation or exception and does not limit the estate conveyed, it conveys all minerals under the surface as well as upon it.[6] Under a covenant, to convey the mineral in the part of a tract of land, together with all necessary mining rights, a conveyance is included of such easements in the rest of the land as may be

[8] Whitney v. Union R. Co., 11 Gray 359, 71 Am. Dec. 715.

[9] Parker v. Nightingale, 6 Allen, 341, 83 Am. Dec. 632.

[1] Hodge v. Sloan, 107 N. Y. 244, 1 Am. St. 816, 17 N. E. 335.

[2] Middleton v. Newport Hospital, 16 R. I. 319, 1 L.R.A. 191, 15 Atl. 800.

[3] Bailey v. Agawam National Bank, 190 Mass. 20, 3 L.R.A.(N.S.) 98, 76 N. E. 449.

[4] Columbia College v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615.

[5] Joy v. City of St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. R. 243.

[6] Richards v. Potter, 136 Ky. 579, 124 S. W. 850.

found necessary to enable the mining and removal of the material to be accomplished.[7]

§ 969. **Who may take advantage of breach.**—No one can take advantage of a breach of a condition subsequent but the grantor or his heirs. If they do not take steps to enforce a forfeiture of the estate on the ground of a breach of the condition, the title remains unimpaired in the grantee. This rule also prevails where a condition is inserted in a patent or grant made by the government.[8] "In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If a grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or set-

[7] Neal v. Finley, (Ky.), 124 S. W. 348.

[8] Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Smith v. Brannan, 13 Cal. 107; Hooper v. Cummings, 45 Me. 359; Towne v. Bowers, 81 Mo. 491; De Peyster v. Michael, 6 N. Y. 506, 57 Am. Dec. 470; Gray v. Blanchard, 8 Pick. 284; Bangor v. Warren, 34 Me. 324, 56 Am. Dec. 657; Norris v. Milner, 20 Ga. 563; Merritt v. Harris, 102 Mass. 328. See Fonda v. Sage, 46 Barb. 122; Van Rensselaer v. Ball, 19 N. Y. 103; Cross v. Carson, 8 Blackf. 138, 44 Am. Dec. 742; Nicoll v. New York & Erie R. R. Co., 12 N. Y. 121; Southard v. Central R. R. Co., 2 Dutch. 13; Dewey v. Williams, 40 N. H. 222, 77 Am. Dec. 708; People v. Brown, 1 Caines, 416; United States v. Repentigny, 5 Wall. 267, 18 L. ed. 645; Cross v. Carson, 8 Blackf. 138, 44 Am. Dec. 742; Butchers and Drovers' Stock Yard Co. v. Louisville & N. R. Co., 67 Fed. Rep. 35; State v. Lake Short etc. Ry. Co., Com. Pl. 1 Ohio N. P. 292, 2 Ohio Dec. 300; Hayward v. Kinney, 84 Mich. 591, 48 N. W. Rep. 170; Copeland, v. Copeland, 89 Ind. 29; Higbee v. Rodeman, 129 Ind. 244, 28 N. E. Rep. 442; Boone v. Clark, 129 Ill.

tlement."[9] In the case of a private grant, the heirs of the grantor are entitled, as well as the grantor himself, to take advantage of a breach of the condition.[1] Land was conveyed by husband and wife to a person on condition that the latter should maintain the grantors during their lives, and, in case of a failure to comply with the condition, the land should revert. Subsequently, the husband secured a divorce from his wife, and the grantee declined to maintain her except in her former husband's house. It was held that, while the husband only could enforce a forfeiture, yet the wife could enforce her claim for maintenance as a lien on the land, and that the grantee had no power to make the condition that he sought to impose.[2] Where there has been a breach, if the grantor remains in possession, and has not waived the forfeiture, the title becomes vested in him again.[3] If it is stated in a deed that it is made upon condition that the grantee will, within a certain time from the date of the conveyance, erect a factory upon the premises, the condition is annexed to the estate, and is not merely the personal covenant of the grantor.[4] Where a deed contains a condition for the support of the grantor during his life, and does not stipulate that the support shall be furnished by the grantee personally, the condition may be

466, 5 L.R.A. 276, 21 N. E. Rep. 850; Neimeyer v. Knight, 98 Ill. 222; Hooper v. Cummings, 45 Me. 359; Piper v. Union Pac. Ry. Co., 14 Kan. 568; McElroy v. Morley, 40 Kan. 76; Owsley v. Owsley, 78 Ky. 257. See, also, Beaufort etc. Church v. Elliott, 65 S. C. 251, 43 S. E. 674; Helms v. Helms, 135 N. C. 164, 47 S. E. 415.

[9] Schulenberg v. Harriman, 21 Wall. 44, 63, 22 L. ed. 551, 555, per Mr. Justice Field.

[1] Jackson v. Topping, 1 Wend. 388, 19 Am. Dec. 515; Bowen v. Bowen, 18 Conn. 535.

[2] Copeland v. Copeland, 89 Ind. 29.

[3] Adams v. Ore Knob Copper Co., 4 Hughes C. C. 589.

[4] Langley v. Chapin, 134 Mass. 82. In the absence of objection on the part of the grantor, a third party cannot excuse a failure of duty by placing it on the ground of a possible violation of the condition of the grant: Butchers and Drovers' Stockyard Co. v. Louisville & N. R. Co., 67 Fed. Rep. 35.

performed by some other person.[5] When the grantor is entitled to a reversion of the estate for condition broken, his right is not affected by the fact that the grantee has made outlays. The right of entry is a legal right.[6] On the theory that neither executors or trustees, as such, can have heirs, it has been held recently in New York that the heirs of executors or trustees executing a deed have no right of re-entry.[7]

§ 970. Conditions subsequent strictly construed.— Conditions subsequent, having the effect in case of a breach to defeat estates already vested, are not favored in law, and hence always receive a strict construction.[8] "A deed will not be construed to create an estate on condition, unless language is used which according to the rules of law, *ex proprio vigore,*

[5] Joslyn v. Parlin, 54 Vt. 670.

[6] Rowell v. Jewett, 71 Me. 408.

[7] Richter v. Distelhurst, 101 N. Y. Supp. 634, 116 App. Div. 269.

[8] Hunt v. Beeson, 18 Ind. 380; Page v. Palmer, 48 N. H. 385; Hoyt v. Kimball, 49 N. H. 322; Wilson v. Galt, 18 Ill. 431; Laberee v. Carleton, 53 Me. 213; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Ludlow v. New York etc. R. R. Co., 12 Barb. 440; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Weir v. Simmons, 55 Wis. 637; Merrifield v. Cobleigh, 4 Cush. 178; Southard v. Central R. R., 26 N. J. L. 13. And see Board etc. v. Trustees etc., 63 Ill. 204; McKelway v. Seymour, 29 N. J. L. 322; Bradstreet v. Clark, 21 Pick. 389; Voris v. Renshaw, 49 Ill. 432; Gladberry v. Sheppard, 27 Miss. 203; Martin v. Ballou, 13 Barb. 119; McWilliams v. Nisly, 2 Serg. & R. 513, 7 Am. Dec. 654; Crane v. Hyde Park, 135 Mass. 147; Kilpatrick v. Mayor of Baltimore, 81 Md. 179, 27 L.R.A. 643, 48 Am. St. Rep. 509; Emerson v. Simpson, 43 N. H. 475, 82 Am. Dec. 168; Peden v. Chicago etc. Ry. Co., 73 Iowa, 328, 5 Am. St. Rep. 680; Rawson v. School District, 7 Allen, 125, 83 Am. Dec. 670; Cullen v. Sprigg, 83 Cal. 56; Van Horn v. Mercer, 29 Ind. App. 277, 64 N. E. 531; Reclamation Dist. v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638; Hamel v. R. Co., 97 Minn. 334, 107 N. W. 139; Park Co. v. Rohleder (Va.) 61 S. E. 794; Burgson v. Jacobson, 124 Wis. 295, 102 N. W. 563; Coal Co. v. Brown, 147 Fed. 931; Buck v. Macon, 85 Miss. 580, 37 So. 562; Richter v. Distelhurst, 101 N. Y. Supp. 634, 116 App. Div. 269; Yards Co. v. Packing Co., 140 Fed. 701, 72 C. C. A. 195; Thompson v. Hart, 133 Ga. 540, 66 S. E. 270.

imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated." "Conditions are not to be raised readily by inference or argument." [9] Where a deed is made upon condition that the grantee shall forever keep up and maintain a fence on the line between the land conveyed and the land of the grantor, a neglect to keep up the fence after the death of the grantee will not forfeit the land.[1] Or, in other words, to bind the heirs or assigns to the performance of a condition subsequent, the condition must expressly mention them.[2] Where the clause is a covenant, the legal responsibility for its violation is a liability to respond in damages, while a breach of the condition forfeits the estate.[3] A condition sub-

[9] Rawson v. Inhabitants of School District etc., 7 Allen, 125, 127, 83 Am. Dec. 670. As to what words will create a condition subsequent, see Ecroyd v. Coggeshall, 21 R. I. 41, 41 Atl. 260, 79 Am. St. Rep. 741 and see note pages 747 et. seq.

[1] Emerson v. Simpson, 48 N. H. 475, 82 Am. Dec. 168.

[2] Page v. Palmer, 48 N. H. 385.

[3] Woodruff v. Water Power Co. 10 N. J. Eq. (2 Stockt. Ch.) 489. And see Sharon Iron Co. v. Erie, 41 Pa. St. 341; Houston v. Spruance, 4 Har. (Del.) 117; McCullough v. Cox, 6 Barb. 386; Underhill v. Saratoga R. R., 20 Barb. 455. When the language used in a deed, which it is claimed creates a condition subsequent, is capable of any other reasonable construction that will uphold the estate conveyed by the deed, courts are inclined to give the language such a construction. For various cases in which, under the circumstances existing in each particular case, the rule has been applied or recognized that conditions subsequent are strictly construed, and are not favored, see Raley v. Umatilla Co., 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. Rep. 190; Portland v. Terwilliger, 16 Or. 465, 19 Pac. Rep. 90; Coffin v. Portland, 16 Or. 77, 17 Pac. Rep. 580; Blanchard v. Detroit etc. R. Co., 31 Mich. 43, 18 Am. Rep. 142; Hammond v. Port Royal etc. Ry. Co., 15 S. C. 10; Hooper v. Cummings, 45 Me. 359; Laberee v. Carleton, 53 Me. 211; Bray v. Hussey, 83 Me. 329, 22 Atl. Rep. 220; Cullen v. Sprigg, 83 Cal. 56; Jeffery v. Graham, 61 Tex. 481; Jackson v. Silvernail, 15 Johns. 278; Craig v. Wells, 11 N. Y. 315; Woodworth v. Payne, 74 N. Y. 196, 30 Am. Rep. 298; Baker v. Mott, 78 Hun, 141; Duryee v. New York, 96 N. Y. 477; Graves v. Deterling, 120 N. Y. 447; Lyon v. Hersey, 103 N. Y. 264; Post v. Weil, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809; Elyton Land Co. v. South & N. Ala. R. Co., 100 Ala. 396, 14 So. Rep. 207;

sequent is not created by the words that "the land hereinafter described shall be kept by said board of police for the use of a court house and jail for the benefit of said county" and the words, "to have and to hold the same . . . for the use of said county as aforesaid." This language is as consistent with the grantor's intent to repose a trust and confidence in the grantee as they are with an intent to impose a condition the breach of which would work a forfeiture.[4] A condition

Woodfuff v. Water Power Co., 10 N. J. Eq. 489; Southard v. Cent. Ry. Co., 26 N. J. L. 13; Woodruff v. Woodruff, 44 N. J. Eq. 349, 1 L.R.A. 380, 16 Atl. Rep. 4; Lawe v. Hyde, 39 Wis. 345; Wier v. Simmons, 55 Wis. 637; Mills v. Evansville, 58 Wis. 135, 15 N. W. Rep. 133; Greene v. O'Connor, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. Rep. 692; Chapin v. School District, 35 N. H. 445; Emerson v. Simpson, 43 N. H. 475; 82 Am. Dec. 168; Page v. Palmer, 48 N. H. 385; Hoyt v. Kimball, 49 N. H. 322; Scovill v. McMahon, 62 Conn. 378, 36 Am. St. Rep. 350, 26 Atl. Rep. 479; Morrill v. Wabash Ry. Co., 96 Mo. 174, 9 S. W. Rep. 657; Stillwell v. St. Louis & H. Ry. Co., 39 Mo. App. 221; Roanoke Ins. Co., v. Kansas City & S. R. Co., 108 Mo. 50, 17 S. W. 1000; Weinreich v. Weinreich, 18 Mo. App. 364; Studdard v. Wells, 120 Mo. 25, 25 S. W. Rep. 201; Waterman v. Clark, 58 Vt. 601, 2 Atl. Rep. 578; Palmer v. Ryan, 63 Vt. 227, 22 Atl. Rep. 574; Farnham v. Thompson, 34 Minn. 330, 57 Am. Rep. 59; Chute v. Washburn, 44 Minn. 312, 46 N. W. Rep. 555; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Sumner v. Darrell, 128 Ind. 38, 13 L.R.A. 173, 27 N. E. Rep. 162; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Peden v. Chicago etc. R. Co., 73 Iowa, 328, 5 Am. St. Rep. 680; Chapin v. Harris, 8 Allen, 594; Packard v. Ames, 16 Gray, 327; Merrifield v. Cobleigh, 4 Cush. 178; Ayer v. Emery, 14 Allen, 67; Hadley v. Hadley Mfg. Co., 4 Gray, 140; Sohier v. Trinity Church, 109 Mass. 1; Stone v. Houghton, 139 Mass. 175; Curtis v. Topeka, 43 Kan. 138, 23 Pac. Rep. 98; Ruggles v. Clare, 45 Kan. 662, 26 Pac. Rep. 25; Gallagher v. Herbert, 117 Ill. 160; Boone v. Clark, 129 Ill. 466, 5 L.R.A. 276; Stanley v. Colt, 5 Wall. 119, 18 L. ed. 502; Glenn v. Davis, 35 Md. 208, 6 Am. Rep. 389.

[4] Soria v. Harrison County, Miss. 50 South, 443. It was contended that a condition was created by the language of two deeds in the first of which it was stated:
"In trust, nevertheless, that said premises shall be used, kept, maintained and disposed of as a place of divine worship for the use of the ministry and membership of the Methodist Episcopal Church, South, subject to the discipline, usage and ministerial appointments of said church as from time to time

subsequent will not be held to have been created unless the language of the deed creates an estate upon condition in express terms, or unless the entire instrument shows the grantor's intent to create a conditional estate.[5]

§ 970a. **Sale is not an abandonment.**—A sale of property is not an abandonment within the meaning of a clause that the property conveyed shall revert, if the grantees should "abandon" the property.[6] "There is a great difference between abandon and surrender; between abandoning a right or thing and the surrender of such right or thing to another; between giving it up because it is regarded as utterly useless or valueless and surrendering, assigning or transferring it to another as a valuable right or thing."[7] This point has fre-

authorized and declared by the general conference of said church and the annual conferences within those bounds the said premises are situate. To have and to hold said lot of land, with all and singular the rights, members, and appurtenances thereto appertaining, to the only proper use, benefit and behoof of them, the said trustees and their successors in office, in fee simple; and the said Methvin S. Thompson the said bargained premises unto the said trustees as aforesaid for church uses only, and their successors, against the said Methvin S. Thompson, his heirs, executors and administrators and against all and every other person or persons, shall and will warrant and forever defend by virtue of these presents." In the other deed it was recited that the conveyance was made upon "the same conditions of trust for like purposes as the original deed given in 1870." The habendum and warranty clause in the last deed is in the following language: "To have and to hold the said extra ground to the said trustees for the benefit and behoof of themselves and their successors in fee simple; and the said parties of the first part the said bargained premises to the trustees aforesaid and their successors for church uses, also on which to erect a parsonage and other necessary buildings, against the parties of the first part, their heirs, executors, and administrators and all and every other person or persons, shall and will warrant and defend by virtue of these presents." The court said these clauses did not make the deed a grant upon condition subsequent. Thompson v. Hart, 133 Ga. 540, 66 S. E. 271.

[5] Thompson v. Hart, Ga. 66 S. E. 270.

[6] St. Peters Church v. Bryan, 144 N. C. 633, 10 L.R.A.(N.S.) 633, 56 S. E. 688.

[7] Hagan v. Gaskill, 4 N. J. Eq. 217, 6 Atl. 880.

quently arisen in the matter of public lands and it is held that an abandonment of land in favor of a particular individual and for a consideration cannot exist.[8] So in regard to water rights.[9] When a transaction fails as a sale it cannot be transformed into an abandonment.[1] An abandonment contemplates the act of one party only. It cannot arise where the act of two parties has affected the transfer. An abandonment does not exist except where the right abates but if it continues in another by a transfer there has been no abandonment.[2] But a conveyance may amount to an abandonment where a widow claims dower in a mining claim which was sold before title was perfected.[3]

§ 970b. Clauses construed as covenants rather than conditions.—Courts are inclined to construe clauses in a deed as covenants rather than as conditions, when the language employed is capable of construction as a covenant. In all cases of doubt whether a clause is intended as a condition or a covenant, the doubt should be resolved in favor of holding the clause to be a covenant and not a condition. A clause that the deed is subject to the condition that no dwelling house or other buildings, with the exception of necessary outbuildings shall be constructed on the rear of the lot and that no building erected upon the land conveyed shall be less than a certain number of stories in height is a restriction merely.[4] So is a clause a mere restriction that the deed is subject to the condition that no building shall be erected on a part of the land conveyed until other persons have built upon an ad-

[8] Stephens v. Mansfield, 11 Cal. 363.

[9] Middle Creek Ditch Co., v. Henry, 15 Mont. 576, 39 Pac. 1054.

[1] McLeran v. Benton, 43 Cal. 467.

[2] Richardson v. McNulty, 24 Cal. 344. See, also, Doe v. Waterloo Min. Co., 70 Fed. 455, 17 C. C. A. 190, 44 U. S. App. 204.

[3] Black v. Elkhorn Min. Co., 163 U. S. 445, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101.

[4] Ayling v. Kramer, 133 Mass. 12.

joining lot.[5] A clause in a deed to a railroad company that it is executed in consideration of an agreement on the part of the company to erect and maintain a depot on the land conveyed does not create a condition subsequent. Such a clause is but an agreement or covenant by the grantee, and if there be a breach, the grantor cannot maintain ejectment.[6] So is a clause that the land is conveyed for the erection and maintenance of a freight house.[7] A deed conveying certain land and containing a clause that it granted also the exclusive use of a certain courtyard "upon condition that said yard shall only be used as a front-door yard," and that the grantee "shall put no building upon said yard except front door steps" is not a condition but a limitation upon the use.[8] No condition subsequent is created by a clause that the property conveyed shall be kept and maintained for the purpose of erecting and maintaining an institution of learning on the granted property.[9] A condition is not created by a clause in a deed conveying land to a railroad company and reciting that it was made in consideration of an agreement by the railroad com-

[5] Episcopal City Mission v. Appleton, 117 Mass. 326.

[6] Shreve v. Norfolk & W. R. Co. 109 Va. 706, 23 L.R.A.(N.S.) 771, 64 S. E. 972. See, also, King v. Norfolk & W. R. Co., 99 Va. 625, 39 S. E. 701; Lowman v. Crawford, 99 Va. 688, 40 S. E. 17; Alexandria & W. R. Co. v. Chew, 27 Gratt. 547.

In King v. Norfolk & W. R. Co., 99 Va. 625, 39 S. E. 701 it is said: "We are of opinion that the language employed in the deeds under consideration is apt language to create a fee simple and that the superadded words under the authorities amount to covenants rather then conditions. The deeds are not voluntary, as contended, but are based upon the benefits to accrue to the reserved property of the grantor by reason of the use of the granted premises as a railroad terminal. Hence they must be interpreted as any other deeds based upon a valuable consideration. The language is to be taken most strongly against the grantor, and most favorably to the grantee."

[7] Noyes v. St. Louis A. & P. H. R. Co., (Ill.) 21 N. E. 487.

[8] Eckhart v. Irons, 128 Ill. 568, 20 N. E. 687.

[9] Davis v. Jernigan, 71 Ark. 494, 76 S. W. 554.

pany to establish and maintain a station on the ground conveyed.[1]

§ 970c. **Same subject continued.**—Conditions subsequent are not favored and if the language of a deed will bear any other construction it will not be construed as creating a condition subsequent. Although a deed may contain a clause, that it was given by the grantor and accepted by the grantee upon the express agreement of the latter to build a house upon the property conveyed of a value and within a time stipulated and although it may further state that this agreement was a part of the consideration for the deed, still no condition subsequent is created. This clause creates only a personal covenant on the part of the grantee. If the grantee fails to comply with the agreement, he does not suffer a forfeiture, nor is it permissible to prove by parol evidence that it was intended to create a condition subsequent.[2] A clause that the property conveyed is to be held on condition and in trust that the grantee "shall erect and put up a suitable building or buildings for a high school" and further, that such building

[1] Louisville H. & H. L. Co., v. Baskett, (Ky.) 31 Ky. L. Rep. 1035, 104 S. W. 695.

[2] Hawley v. Kafetz, 148 Cal. 393, 3 L.R.A.(N.S.) 741, 83 Pac. 248. Said the court per Mr. Justice Lorigan: "Conditions subsequent are those which in terms operate upon an estate conveyed and render it liable to be defeated for breach of the conditions. Such conditions are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction. While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or by clear implication. Merely reciting in a deed that it is in consideration of a certain sum, and that the grantee shall do other things specified therein, does not create an estate upon condition. There must be language used which is so clear as to leave no doubt that the grantor intended that an estate upon condition should be created—language which *ex proprio vigore* imports such a condition. Cullen v. Sprigg, 83 Cal. 64, 23 Pac. 222; Behlow v. Southern Pac. R. R. Co., 130 Cal. 19, 62 Pac. 295."

"shall always be devoted to school purposes" creates a covenant merely.[3] A deed which conveyed land to a university corporation contained a recital that it was made "upon the express conditions and for the consideration hereinafter named." These conditions were that the land should be devoted exclusively for university purposes as a part of its campus, and that no buildings excepting those devoted to university purposes should be erected upon the land conveyed, and also that at least one building of a specified cost should be erected upon the property within a certain period fixed in the conveyance. The deed provided that in case the property was abandoned for university purposes or was used for other purposes before a time specified, the title should revert, but expressly provided that, after the time thus specified, there should be no reversion. The court decided that the provisions as to use before a certain time were conditions from which the land became released when such time expired, but that as to the clause that the land should be used exclusively as a part of the campus, such clause must be construed as creating a covenant running with the land. Upon the breach of the covenant, the grantor would be entitled to recover damages, or in a proper case, he might be entitled to enforce performance in a court of equity.[4] Whether the provisions of a deed are to be construed as covenants or as conditions must be determined by a construction of the entire instrument. In case of doubt they will be construed as covenants and not as conditions in order to prevent a forfeiture of the estate, and this construction is to be reached regardless of the technical language used by the parties. To employ the language of Judge Cross: "Terms which, taken by themselves, import a condition, are frequently construed as covenants, while terms which taken by themselves, import covenants, are fre-

[3] Carroll County Academy v. Gallatin Academy Co., 104 Ky. 621, 47 S. W. 617.

[4] Los Angeles University v. Swarth, 54 L.R.A. 262, 46 C. C. A. 647, 107 Fed. 798.

quently construed to be conditions; or, stated in a different way, the intent of the parties is gathered from the construction of the whole instrument, regardless of the technical meaning of the terms used." [5]

§ 970d. Condition subsequent when intent clear.—It is very difficult to say with any degree of precision when language importing a condition will be construed as a personal covenant. The general rule undoubtedly is that courts will incline to construe the language, wherever it is possible to do so into a covenant rather than a condition. Still if it is the clear intention of the parties to create an estate upon condition subsequent, the courts must give effect to the intention of the parties. Thus a deed contained this clause: "And this conveyance is made upon the express condition that the said Wilder and Hills, their heirs and assigns, shall never erect any building nearer the street than the store building thereon." The question presented was whether this was a common law condition. Mr. Justice Hammond in delivering the opinion of the court said: "The deed is in the ordinary form of a warranty deed, in general use in this commonwealth, and bears upon its face evidence that the draftsman understood the meaning of the legal terms used. It conveys in apt language the land now owned by the defendants, and creates also in express terms two easements, one of which is a right of way over a strip of land eight feet wide on the grantor's land southerly of and adjoining the land conveyed and the other is the right to maintain a drain from the store building as conveyed to the grantor by a prior deed; and it reserves a right of way over a strip of land upon the southerly side of the land conveyed, making in connection with the right of way above conveyed to the defendants, a passage-

[5] Minard v. Delaware L. & W. R. Co., 139 Fed. 60, affirmed in 153 Fed. 578.

way sixteen feet wide to be used in common; and also the right to maintain a certain drain from the cellar of the house where the grantor resides to the cellar under said store building. Up to this point the grantor has used language apt to create easements and reservations. He desires to do one thing more, and that is to prevent the erection of any building within a certain distance of the street. Everything else has been provided for. Here the language changes and as to this one thing the deed is upon the express condition that this provision be complied with. The language is "upon the express condition" an emphatic form of the expression "on condition." With reference to the use of this phrase the learned Justice proceeded: "The common law as to the creation of conditional estates has always been considered a part of our common law. If we are to have such estates, it is important that there should be the least possible uncertainty as to the form of the language to be used in creating them; and where we find in a deed an intensified form of the phrase, which from the earliest times has been regarded as "the most express and proper" phrase by which to create such an estate, it is to be assumed, in the absence of anything appearing in the deed to the contrary, that the phrase is used for its proper purpose, namely, to create such an estate, and that such an estate is thereby created." [6] A condition subsequent is created

[6] Clapp v. Wilder, 176 Mass. 332, 50 L.R.A. 120, 57 N. E. 692. In that case the court said: "No doubt there is a disposition among courts to look for something in the deed which shall modify the severity of the language; and sometimes considerable astuteness has been exercised in this direction (Post v. Weil, 115 N. Y. 361, 5 L.R.A. 422, 22 N. E. 145), and no doubt the language is sometimes used where from the whole deed it sufficiently appears that it could not have been intended in the full technical sense, and in such cases a restriction, and not a technical condition is the result." The court referred to the cases of Sohier v. Trinity Church, 109 Mass. 1, 19; Episcopal City Mission v. Appleton, 117 Mass. 326; Skinner v. Shephard, 130 Mass. 180; Ayling v. Kramer, 133 Mass. 12; Cassidy v. Mason, 171 Mass. 507, 50 N. E. 1027; Locke v. Hale, 165 Mass. 20, 42 N. E. 331. And distinguished them.

by a clause that the grantee shall erect and maintain a fence and that for his failure to comply, the deed shall become null and void.[7] If a deed contains a provision that the land conveyed is to be used by a city for the purpose of erecting upon it a city hall and that it is made upon the express condition that a cessation of such use would cause it to revert to the grantor, a condition subsequent is created. If the city should fail to erect a city hall within a reasonable time the grantor would have the right to a forfeiture and re-entry.[8] It is not essential that there should be a re-entry clause to authorize the grantor to terminate an estate, after there has been a breach of a condition.[9] Where property is conveyed upon the condition that it shall be used solely for maintaining an academic or collegiate school and for no other purpose, a conditional estate is created.[1] A conditional estate arises from a clause in a deed that it is made upon "condition" that no building shall be erected upon the property within a certain distance.[2] The words that the deed is made upon "condition" that certain things shall be done or not done is often decisive in determining that a conditional estate has been created.[3]

§ 971. **Some instances of construction.**—A deed conveying a fee-simple title to a tract of land contained the clause: "It being expressly understood by the parties that the said tract or parcel of land is not to be put to any other use than that of a depot square, and that no business or improvements

[7] Randall v. Wentworth, 100 Me. 177, 60 Atl. 871.

[8] Union College v. New York, 65 App. Div. 553, 73 N. Y. Supp. 51.

[9] Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10.

[1] Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10.

[2] Adams v. Valentine, 33 Fed. 1. See, also, Hoyt v. Ketcham, 54 Conn. 60, 5 Atl. 606.

[3] Brown v. Chicago & N. W. R. Co., (Iowa) 82 N. W. 1003. Blanchard v. Detroit L. & L. M. R. Co., 31 Mich. 43, 18 Am. Rep. 142; Marshalltown v. Forney, 61 Iowa, 578, 16 N. W. 740; Langley v. Chapin, 134 Mass. 82; Gray v. Blanchard, 8 Pick. 284; Rose v. Hawley, 118 N. Y. 502, 23 N. E. 904.

are to be put on the said tract, but that which is immediately connected with the Western and Atlantic Railroad." This clause was construed to be a covenant and not a condition, the remedy for a breach of which was an action for damages.[4] A distinction is also to be noticed between a condition and a remainder. By a condition an estate is defeated before its natural termination. A remainder, however, takes effect only on the termination of a preceding estate.[5] A deed of land to a church without designating any use or condition transfers a fee simple. The title does not become divested when the property conveyed is no longer used for religious purposes.[6] A condition subsequent arises from the use of the words "shall indemnify and save harmless."[7] Words used in a deed will

[4] Thornton v. Trammell, 39 Ga. 202. Brown, C. J., dissented, but Warner, J., in delivering the opinion of the court, said: "The conveyance itself is an *unqualified grant* of the land to the grantee. The *words* of the grantor in conveying the land to the grantee impose *no conditions* upon the latter which would be *compulsory* on him to do any act whatever. Independent of the *understanding* or *covenant of the parties,* as expressed in the deed, there is nothing in this conveyance to distinguish it from any other deed of bargain and sale, conveying an absolute fee simple estate in a tract of land. There being *no condition expressed in the grant* of the land to the grantee, by the grantor, of course there can be no *forfeiture* of the grantee's estate therein, for *condition broken.* If the *covenant* of the grantee has been broken, the plaintiffs have an adequate remedy by an action thereon to recover *damages.*" For cases in which clauses containing conditions have been construed, see Rainey v. Chambers, 56 Tex. 17; Owsley v. Owsley, 78 Ky. 257; Taylor v. Binford, 37 Ohio, 262; Neimeyer v. Knight, 98 Ill. 222; Barrie v. Smith, 47 Mich. 130; Poitevent v. Hancock County Supervisors, 58 Miss. 110; Risley v. McNiece, 71 Ind. 434; Drew v. Baldwin, 48 Wis. 529; Randall v. Marble, 69 Me. 310, 31 Am. Rep. 281; King v. Malone, 31 Gratt. 514; Swoll v. Oliver, 61 Ga. 248.

[5] Sterns v. Godfrey, 16 Me. 158.

[6] Cook v. Leggett, 88 Ind. 211. See generally Crane v. Hyde Park, 135 Mass. 147; Erwin v. Hurd, 13 Abb. N. C. 91; Methodist Episcopal Church v. Old Columbia Public Ground Co., 103 Pa. St. 608; Brown v. Caldwell, 23 W. Va. 187, 48 Am. Rep. 376; Mills v. Evansville Seminary, 58 Wis. 135; Jeffersonville etc. R. R. Co., v. Barbour, 89 Ind. 375.

[7] Michigan State Bank v. Hastings, 1 Doug. 225, 41 Am. Dec. 549. A clause providing that the grantee

not be construed into a condition subsequent when this is not the intention of the parties, nor when they can receive any other reasonable construction.[8] A condition subsequent is created by the use of the words, "provided, always, and this deed is upon the express condition," that the grantee shall maintain a specified system of drainage.[9] A restriction merely is created by a clause that a conveyance is made subject to the condition, that no building shall be erected on the property within a certain distance of the street.[1] A condition is not created by a clause that the property is conveyed for the purpose of erecting a church thereon.[2] But a covenant running with the land is created by a clause in the *habendum* that the deed is upon the express condition that the grantee, his heirs and assigns, shall refrain from erecting any building that would be a nuisance.[3] A clause stating that the deed is made upon the express stipulation that a dwelling house shall be erected on the land, within a specified time at a cost of not less than a specified sum does not create a condi-

shall erect and maintain a division fence is an implied covenant, and not a condition subsequent for a breach of which the land will be forfeited: Palmer's Executor v. Ryan, 63 Vt. 227. A condition subsequent is not created by a deed conveying and warranting land to a town for common school purposes: Higbee v. Rodeman, 129 Ind. 244. But it may impose a limitation upon the manner in which the property is to be leased: Curtis v. Board of Education, 43 Kan. 128.

[8] Wier v. Simmons, 55 Wis. 637. A condition subsequent is not created by implication by a statement in a deed that it is made for a special and particular purpose: Kilpatrick v. Mayor of Baltimore, 81 Md. 179, 48 Am. St. Rep. 509. See § 838 and notes, *ante*. A clause in a deed that a railroad company should erect a crossing under its track will, in the absence of a clause of forfeiture, or other indication that the parties intended to attach a condition to the grant, be construed as creating an easement and not a condition subsequent: Stillwell v. Railroad Co., 39 Mo. App. 221.

[9] Hammond v. Port Royal & Augusta Ry. Co., 15 S. C. 10.

[1] Skinner v. Shepard, 130 Mass. 180; Cassidy v. Mason, 171 Mass. 507, 50 N. E. 1027.

[2] Farnham v. Thompson, 34 Minn. 330, 57 Am. Rep. 59, 26 N. W. 9.

[3] Clement v. Burtis, 121 N. Y. 708, 24 N. E. 1013.

tional estate.[4] No conditional estate was held to be created in a deed to a city containing a clause that no buildings should be erected on the premises conveyed "for any other municipal purposes than that of a city hall."[5] Nor is such an estate created by a clause that a certain fence was to continue where it was at the time of the conveyance, and that the grantee should maintain the fence.[6] Nor does a clause that the grantee shall maintain at his own expense a division fence create a conditional estate.[7]

Other cases, as pointed out in a preceding paragraph, will be found where the courts have decided that under apparently similar clauses, estates upon condition were created. Thus, such an estate was held to have been created by a clause that the deed was made upon the express condition that if a building should be erected on the tract conveyed or any part thereof at a cost less than a certain sum "then the whole of said tract shall be at once forfeited and revert to the grantor, his heirs and assigns forever."[8] A clause that the grantee should maintain forever, at his own expense, a good and lawful fence, or the deed should be void was held to create a condition subsequent.[9] Where land was conveyed for the purpose of a private cartway, and the grantee in consideration of the conveyance agreed to maintain forever at his own expense on one line of the land conveyed, it was held that a condition subsequent was thereby created.[1]

§ 972. **Time for performance of condition.**—Where no limitation is prescribed within which a condition must be per-

[4] Stone v. Houghton, 139 Mass. 175, 31 N. E. 719.

[5] Ecroyd v. Coggeshall, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741.

[6] Hartung v. Witte, 59 Wis. 285, 18 N. W. 175.

[7] Palmer v. Ryan, 63 Vt. 227, 22 Atl. 574.

[8] Hoyt v. Ketcham, 54 Conn. 60, 5 Atl. 606.

[9] Emerson v. Simpson, 43 N. H. 475, 82 Am. Dec. 186. See, also, Randall v. Wentworth, 100 Me. 177, 60 Atl. 871.

[1] McCue v. Barrett, 99 Minn. 352, 109 N. W. 594.

formed, it is said that the grantee has his whole lifetime in which to perform it.[2] Other courts have held that performance of the condition must be within a reasonable time.[2a] But where a prompt performance of the condition is essential to give the grantor the entire benefit which it was expected he would obtain, or where the immediate performance of the condition was the consideration inducing the grantor to enter into the agreement, the grantee must perform the condition within a reasonable time, and has not his whole lifetime for its performance.[3] Thus, where a deed is made on condition that the grantee shall build a dwelling-house on the land conveyed, and allow the grantor and his wife to reside there during their joint lives, the condition must be performed within a reasonable time.[4]

§ 972a. Breach of condition by life tenant destroys remainder.—Where property is conveyed upon condition that the life tenant shall maintain it in repair, pay the taxes levied and also pay an annuity to the grantor, with a provision for the estate in remainder, and with a further provision that a breach of the condition shall give the grantor the right to declare a forfeiture, a breach of the condition by the life tenant will destroy the remainder as well as the life estate.[5]

The destruction of the life estate leaves the remainder without support. There must be a continuous ownership in succession of the two estates.[6] In the language of Mr. Justice Turley: "There is no principle of law better settled than

[2] See Hamilton v. Elliott, 5 Serg. & R. 383.

[2a] Trustees v. City of New York, 73 N. Y. Supp. 51, 65 App. Div. 553.

[3] Hamilton v. Elliott, 5 Serg. & R. 375, 383. See Hayden v. Stoughton, 5 Pick 528; Ross v. Tremain, 2 Met. 495; Reed v. Hatch, 55 N. H. 327; Fisk v. Chandler, 30 Me. 79; Allen v. Howe, 105 Mass. 241; Dickey v. McCullough, 2 W. & S. 88; Stuyvesant v. New York, 11 Paige, 414.

[4] Hamilton v. Elliott, 5 Serg. & R. 375.

[5] Lumsden v. Payne, 120 Tenn. 407, 114 S. W. 483, 21 L.R.A.(N.S.) 604.

[6] 2 Washb. Real Prop. § 1547.

that, if the particular estate which supports a contingent remainder is destroyed before the remainder vests, the remainder is defeated."[7] But a breach of the condition without forfeiture will not destroy the remainder.[8] In an action to set aside a deed for the breach of a condition of support of the grantor by the grantee, where a lien had been reserved upon the property conveyed as security for the performance of the condition, it was held that the title in remainder depended upon the performance of the contract and that upon the destruction of the life estate for a breach of condition the remainder fell with it.[9]

§ 973. **Clear proof of forfeiture.**—A condition cannot be extended beyond its terms, and a party who insists upon a forfeiture of an estate for a breach of a condition must bring himself clearly within the terms of the condition.[1] Where a

[7] Peck v. Carmichael, 9 Yerg. 326.

[8] Williams v. Angell, 7 R. I. 145.

[9] Lowe v. Stepp, 132 Ky. 75, 116 S. W. 293. See for a further discusssion of this subject Fearne, Contingent Remainders, 270; Tiffany, Real Property, § 123; Edwards, Property in Land, 128 note.

[1] Voris v. Renshaw, 49 Ill. 425. It is said: "When a grantor of land seeks to re-enter for breach of a condition subsequent, he should be required to establish something more than a technical encroachment through the action of strangers without the grantee's permission. It is not enough to show in this way that the letter of the condition is violated, but it must appear that its true spirit and purpose have been willfully disregarded by the grantee:" Rose v. Hawley, 141 N. Y. 366, 378. Said Mr. Chief Justice Cole: "It is elementary law that such conditions are most strongly construed against the grantor, and that a forfeiture will not be enforced unless clearly established:" Mills v. Evansville Seminary, 58 Wis. 135, 140, 15 N. W. Rep. 133. That a forfeiture must be clearly established, see, also, Hadley v. Hadley Mfg. Co., 4 Gray, 140; Merrifield v. Cobleigh, 4 Cush. 178; Bradstreet v. Clark, 21 Pick. 389; Crane v. Hyde Park, 135 Mass. 147; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Osgood v. Abbott, 58 Me. 73; Hooper v. Cummings, 45 Me. 359; Laberee v. Carleton, 53 Me. 211; Sharon Iron Co. v. Erie, 41 Pa. St. 341; Lehigh Coal etc. Co., v. Eearly, 162 Pa. St. 338, 34 W. N. C. 501, 29 Atl. Rep. 736; Hoyt v. Kimball, 49 N. H. 322; Newman v. Rutter, 8 Watts, 51; Chapin v. School District, 35 N. H. 445; Jenkins v. Mer-

deed contained a condition that the grantee should not convey the property except by lease for a term of years prior to a day named in the deed, and the grantee subsequently, and within the period limited in the deed, executed a lease of the land conveyed for ninety-nine years, and also at the same time made and delivered to the lessee a bond for an absolute deed, conveying the fee after the expiration of the limitation, and received from the purchaser the purchase price agreed upon, these acts of the grantee, it was held, were not prohibited by the condition, and consequently no forfeiture of the estate resulted.[2]

§ 974. Distinction between conditions and limitations. —A limitation determines an estate upon the happening

ritt, 17 Fla. 304; Hunt v. Beeson, 18 Ind. 380; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Wilson v. Galt, 18 Ill. 431; Lynde v. Hough, 27 Barb. 415; Woodworth v. Payne, 74 N. Y. 196, 30 Am. Rep. 298; Williams v. Dakin, 22 Wend. 201; Ludlow v. New York etc. R. R. Co., 12 Barb. 440; Craig v. Wells, 11 N. Y. 315; Barrie v. Smith, 47 Mich. 130, 10 N. W. Rep. 168; Waldron v. Toledo etc. Ry. Co., 55 Mich. 420, 21 N. W. Rep. 870; Glenn v. Davis, 35 Md. 208, 6 Am. Rep. 389; Southard v. Cent. R. R. Co., 26 N. J. L. 13; McKelway v. Seymour, 29 N. J. L. 321.

[2] Voris v. Renshaw, 49 Ill. 425. Mr. Justice Walker said, in delivering the opinion of the court: "When we apply, then, the strictest rules of law in the language of the books, neither the bond nor the lease was a conveyance of the property. In a legal sense, a bond does not convey any title. It is but an obligation to convey at a future time. It is in no sense a conveyance, and we have seen that where a party is insisting upon the forfeiture of an estate, under a condition of his own creation, he must bring himself clearly within the terms of the condition. We have no right to extend the condition beyond its terms. We cannot say that an act not embraced within the language is within the spirit of the condition, and will be substituted for the act prohibited by the terms of the condition. To do so would be to give a liberal instead of the strictest legal construction. To say that while the condition only imposed a forfeiture by an attempt to convey the property within the limited period, by an instrument capable of conveying it, yet it was forfeited by executing an instrument that does not convey, and all know does not have that effect, would be to givea liberal and not a strict construction."

of the event itself, without the necessity of doing any act to regain the estate.[3] "The distinction between an estate upon condition, and the limitation by which an estate is determined upon the happening of some event, is, that in the latter case the estate reverts to the grantor, or passes to the person to whom it is granted by limitation over, upon the mere happening of the event upon which it is limited, without any entry or other act, while in the former, the reservation can only be made to the grantor or his heirs, and an entry upon breach of the condition is requisite to revest the estate. The provision for re-entry is therefore the distinctive characteristic of an estate upon condition; and when it is found that by any form of expression the grantor has reserved the right upon the happening of any event, to re-enter, and thereby revest in himself his former estate, it may be construed as such."[4] Where a condition subsequent is followed by a limitation over in case of a breach of the condition, it becomes a conditional limitation.[5] No one but a grantor or his heirs can

[3] Guild v. Richards, 16 Gray, 309; Osgood v. Abbott, 58 Me. 73; Southard v. Central R. R. 26 N. J. L. 1. And see Miller v. Levi, 44 N. Y. 489; Henderson v. Hunter, 59 Pa. St. 340; People of Vermont v. Society, 2 Paine, 545; Wheeler v. Walker, 2 Conn. 196, 7 Am. Dec. 264; Burlington etc. R. Co. v. Colo. etc. R. Co. 38 Colo. 95, 88 P. 154.

[4] Attorney General v. Merrimack Mfg. Co., 14 Gray, 586, 612, per Hoar, J. In the case from which this quotation is taken, a deed of a church lot, with the church and the parsonage or minister's house standing thereon, was made "in consideration of one dollar, and for the purpose of supporting divine worship," *habendum* "so long as they shall use or permit the same to be used, and appropriated to divine worship, and for a residence of the minister of the gospel, and no longer, these being the whole object and intent of the parties in this conveyance;" and the deed reserved a right of re-entry to the grantors, upon failure to comply with the "object and intentions of the parties hereto, as above expressed." The court held that the estate created was not a conditional limitation, but an estate upon condition, which became absolute by a subsequent release from the grantors.

[5] Stearns v. Godfrey, 16 Me. 158. And see, also, relating to this subject Fifty Associates v. Howland, 11 Met. 99; Proprietors etc. v. Grant, 3 Gray, 142, 63 Am. Dec. 725.

take advantage of a breach of a condition. But a stranger may take advantage of a limitation.[6] Land was conveyed to a railroad company, to be occupied by them for the use of a depot for passengers and freight, and other necessary buildings for the accommodation of the company, and also for the erection of "a house for the temporary reception (other than a public house), for the accommodation, victualing, and lodging of passengers and others," and with the proviso that if the buildings should be used for other purposes, or if the grantees should use any other building within one mile of the premises for the purposes mentioned in the deed, or should use the premises for an inn or travern, the grantees should forfeit their estate. It was held that a transfer of the property by the grantees to another corporation under legislative sanction, and the selling of refreshments, and occasionally lodging persons in the depot buildings by a person in the employ of the company, did not constitute a breach of the condition.[7] If a piece of land is conveyed to a son by his parents, on the former's agreement that he shall not, without his father's consent, make any changes in the property, or contract any debt that might involve it, and that after his father's death he will divide it with the rest of the property among the father's other children, and the son, without consideration, causes the land to be conveyed to his wife, who has "knowledge of the agreement," the transaction is in fact a deed upon condition subsequent, and the son's estate, on account of the breach of the condition, becomes forfeited.[8] So, where a conveyance is made by parents to a son on the condition that he should support them, it may, upon proof of the breach of the condition, be rescinded by a court of equity.[9]

[6] People of Vermont v. Society etc. 2 Paine, 545; Southard v. Central R. R., 26 N. J. L. 1. And see Owen v. Field, 102 Mass. 90.

[7] Southard v. Central R. R. Co., 26 N. J. L. (2 Dutch.) 1.

[8] Wilson v. Wilson, 86 Ind. 472.

[9] Blake v. Blake, 56 Wis. 392; De Long v. De Long, 56 Wis. 514. In Burlington etc. R. Co. v. Colo. etc. R. Co., 38 Colo, 95, 88 P. 154, is was held that a provision in a

§ 974a. **Election of remedies between rescission and action for enforcement.**—In a case in Indiana it was held that where suit was commenced to recover damages for a breach of the condition, the grantor could not, after judgment re-enter for a breach subsequently occurring, as he was bound by the election of remedies.[1] But, in Wisconsin, the direct contrary was decided. An action for rescission of a deed made in consideration of support on account of a subsequent breach will not be prevented, it was held, by the fact that a prior action had been commenced and prosecuted to judgment to recover the benefits due under the conveyance.[2] The court, in the latter case, stated the doctrine of election of remedies prevents a person from assuming intentionally inconsistent positions to his adversary's disadvantage but the causes of action between which an election could be made must have existed when such election was exercised. This principle, however, does not apply when a separate cause of action accrues subsequently to the commencement of the former action and is consistent with the agreement forming the basis of the first agreement. This view seems to us founded on the better reason.

§ 975. **Appraisement of improvements.**—The fact that the grantor is compelled to pay for the improvements erected upon the land, does not affect the question of whether a clause in a deed is to be considered a condition or a conditional limitation. "No matter how many events the forfeiture depends

deed that, on the final abandonment of a right of way for a ditch, the right granted to maintain such ditch should cease, and revert to the grantors, should be construed as a limitation and not as a condition subsequent. Therefore, upon the happening of the event provided, the control and use of the land would pass to the owner of the fee without entry or claim.

[1] McWhorter v. Heltzell, 124 Ind. 129, 24 N. E. 743.

[2] Gall v. Gall, 126 Wis. 390, 5 L.R.A.(N.S.) 603, 105 N. W. 953.

upon, nor how many individuals must act in producing them, when all these events concur and coexist, the forfeiture is effected as completely as if it depended upon the occurrence of a single event, and the action or omission of a single individual."[3] A deed conveying a piece of land as a site for a schoolhouse contained the provision: "The conditions of this deed are such that whenever the within-named premises shall be converted to any other use than those named within, and the within grantees shall knowingly persist in the use thereof for any purpose whatever, except such as are described in said within deed, the said grantees forfeit the right, herein conveyed to the within-described premises," upon the grantor paying to them the appraised value of such buildings as may be erected on the land. The court held that this provision was not a limitation, but a condition subsequent, and that the grantee's estate would remain unaffected until an entry by the grantor or his heirs, after a breach of the condition, and that the provision for the payment of the appraised value of the buildings did not dispense with the necessity of entering for a breach.[4]

§ 975a. Where the estate conveyed is less than the fee. —Where an estate in fee is not conveyed, the rule that a limitation on the use of the property inconsistent with the title conveyed is void, does not apply.[5] The grantor cannot rescind a deed, in consideration of support for his life, by executing a subsequent conveyance without the consent of the grantee, for the reason that the support has been withheld. He must resort to his action either for the value of the support withheld, or to rescind on equitable grounds.[6]

[3] Warner v. Bennett, 31 Conn. 468, 476.

[4] Warner v. Bennett, 31 Conn. 468.

[5] Pellissier v. Corker, 103 Cal. 516.

[6] McCardle v. Kennedy, 92 Ga. 198, 44 Am. St. Rep. 85.

§ 976. **Parol condition.**—Aside from the question of the reformation of a deed in cases where clauses have been omitted by mistake, it is certain that in an action to recover property conveyed by deed on the ground that a condition on which it was made has not been performed, the deed must speak for itself, and a condition cannot be ingrafted upon a deed absolute in form by parol evidence.[7] The ingrafting of a contemporaneous condition on a deed will, in a proper action, be allowed only on clear evidence of fraud, accident, or mistake.[8]

§ 977. **Effect of restriction.**—The property conveyed may be restricted to certain uses. A deed conveyed land by metes and bounds, and at the close of the description contained a clause "conditioned" that no building or erection is ever to be made on the land conveyed, except a dwelling-house and outbuildings for the same, or such other buildings as would not affect the privileges of the grantor to a greater degree than would the erection of such dwelling-house and outbuildings, and conditioned also that no building more than a certain distance beyond the line of the grantor's house should ever be erected. The clause containing these restrictions was held to constitute neither a condition precedent or subsequent, nor a covenant that the grantee would abide by its terms, but that it was a part of the description of the estate

[7] Marshall County High School Co. v. Iowa Evangelical Synod, 28 Iowa, 360; Galveston, Harrisburg etc. Ry. Co. v. Pfeuffer, 56 Tex. 66; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Scantlin v. Garvin, 46 Ind. 262; Moser v. Miller, 7 Watts, 156; Schwalbach v. Chicago M. & St. P. Ry. Co., 73 Wis. 137, 40 N. W. Rep. 579; Gadberry v. Sheppard, 27 Miss. 203.

[8] East Line & Red River R. R. Co., v. Garrett, 52 Tex. 133; Marshall County High School v. Iowa Evangelical Synod, 28 Iowa, 360; Hammond v. Port Royal etc. Ry. Co., 15 S. C. 10; Rogers v. Sebastian Co., 21 Ark. 440; Long v. McConnell, 158 Pa. St. 573; 28 Atl. Rep. 233; Chapman v. Gordon, 29 Ga. 250.

conveyed, and showed what rights passed to the grantee, and what were retained by the grantor, and that subsequent purchasers from the grantee could not erect the prohibited buildings.[9]

§ 978. **Deed in consideration of certain agreements.**— The courts will not construe an estate to be upon condition, if the language of the deed will admit of any other reasonable interpretation. Thus, a deed made in consideration of a sum of money, and the performance of certain agreements contained in an indenture annexed to the deed, providing for the support of the grantor and his wife, is not a deed upon condition subsequent.[1] Nor does a deed to a town of land which has been used as a burying-place, "for a burying-place forever," in consideration of love and affection, and other valuable considerations, convey an estate upon a condition subsequent.[2] But where a parcel of land is dedicated by the original

[9] Fuller v. Arms, 45 Vt. 400. When a party recovers judgment for the permanent injuries sustained by him by the breach of restrictive covenants, a release from such covenants should be decreed: Amerman v. Deane, 132 N. Y. 355, 28 Am. St. Rep. 584.

[1] Ayer v. Emery, 14 Allen, 67. So in Van Horn v. Mercer, 29 Ind. App. 277, 64 N. E. 351, it was held that an agreement contemporaneously executed with a warranty deed under which the grantees undertook to support the grantors for life, etc. and providing "until said conditions are fully complied with this agreement shall be a lien on said described lands in the full sum of $800," does not create an estate on condition subsequent but merely provides a lien in case of the grantee's default.

[2] Rawson v. Inhabitants of School District etc., 7 Allen, 125, 83 Am. Dec. 670. And see Hunt v. Beeson, 18 Ind. 380. In the former case, Mr. Chief Justice Bigelow, in delivering the opinion of the court, said: "We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent, solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled. If it be asked whether the law will give any force to the words in a deed which de-

proprietors of a town for a public square, the municipal authorities cannot sell the land, or divert it to purposes inconsistent with those for which it was dedicated. The grantor

clares that the grant is made for a specific purpose, or to accomplish a particular object, the answer is, that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee. Thus, it is said in the Duke of Norfolk's case, Dyer, 138 *b*, that the words *ea intentione* do not make a condition but a confidence and trust. See, also, Parish v. Whitney, 3 Gray, 516, and Newell v. Hill, 2 Met. 180, and cases cited. But whether this be so or not, the absence of any right or remedy in favor of the grantor under such a grant to enforce the appropriation of land to the specific purpose for which it was conveyed, will not of itself make that a condition which is not so framed as to warrant in law that interpretation. An estate cannot be made defeasible on a condition subsequent, by construction founded on an argument *ab inconvenienti* only, or on considerations of supposed hardship or want of equity. In the light of these principles and authorities, we cannot interpret the words in the deed of the demandant's ancestor, which declare that the premises were conveyed 'for a burying-place forever,' to be words of strict condition. Nor can we gather from them that they were so intended by the grantor. The grant was not purely voluntary. It was only partially so. It was not made solely in consideration of the love and affection which the grantor bore toward the grantees, but also 'for divers other valuable considerations, me moving hereunto.' Previously to the time of the grant, the premises had been used for a burial-place. It is so described in the deed. Under what circumstances this had been done does not appear. It may have been for a compensation. We cannot now know, therefore, that the sole cause or consideration which induced the grantor to convey the estate to the town was, that it should be used for the specific purpose designated in the deed. There can be no doubt of the intent of the grantor that the estate should always be used and appropriated for such purpose. This intent is clearly manifested; but we search in vain for any words which indicate an intention that if the grantees omitted so to use them, and actually devoted them to another purpose, the whole estate should thereupon be forfeited, and revert to the heirs of the grantor. The words in the deed are quite as consistent with an intent by the grantor to repose a trust and confidence in the inhabitants of the town, for whom he declared his affection and love, that they would always fulfill the purpose for which the grant was made, so long as it was reasonable and practicable so to do, as they are with an intent to impose on them a condition which should compel them, on pain of forfeiture, to maintain the prem-

retains such an interest in the land as will enable him to enjoin the diversion.[3] If a county buys land for the purpose of erecting on it a courthouse and other buildings, and the deed contains a clause stating that the land is sold for that purpose, this clause does not operate to limit or restrain the power of alienation by the county authorities, where the condition that it should be so used was not imposed in the deed.[4] But a deed with the condition that the grantor is "to have a good living" out of the land conveyed during his life, and all other necessary expenses, and the residue is to remain in the hands of the grantee, "that is to say, if the conditions are fully complied with," otherwise the deed is to become "null and void and of no effect," is a deed on condition, and the estate of the grantee in case of default is subject to loss by a re-entry.[5] If the consideration for a deed be one dollar, and the execution of an agreement to give to the grantor, during his life, a certain portion of the crop produced on the land, the performance of this agreement is a condition subsequent.[6] But it is held that a condition is not created by a provision in a deed that the land shall be subject to the main-

ises as a burial-place for all time, however inconvenient or impracticable it might become to make such an appropriation of them. Language so equivocal cannot be construed as a condition subsequent, without disregarding that cardinal principle of real property already referred to, that conditions subsequent which defeat an estate are not to be favored or raised by inference or implication." See in this connection Thornton v. Natchez, 88 Miss. 1, 41 So. 498.

[3] Warren v. Mayor of Lyons City, 22 Iowa, 351. "Nothing can be clearer," said Wright, J., "than that if a grant is made for a specific, limited, and defined purpose, the subject of the grant cannot be used for another, and that the grantor retains still such an interest therein as entitles him, in a court of equity, to insist upon the execution of the trust as originally declared and accepted: Williams v. First Presbyterian Society, 1 Ohio St. 478; Barclay v. Howell's Lessee, 6 Pet. 498, 8 L. ed. 477; Webb v. Moler, 8 Ohio, 548; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255."

[4] Supervisors Warren Co. v. Patterson, 56 Ill. 111.

[5] Watters v. Bredin, 70 Pa. St. 235.

[6] Leach v. Leach, 4 Ind. 628, 58 Am. Dec. 642.

tenance of the grantor. The effect of such an agreement is merely to place a charge upon the land which may be enforced in equity.[7] A municipal corporation acquiring title to land on condition, is subject to the same rules as a private individual. If it acquires land on condition that upon it, within a specified time, it shall erect a building suitable for municipal purposes, it must, for a failure to comply with the condition, allow the land to return to the grantor.[8]

§ 979. **Reservations and exceptions.**—A reservation is of some new thing issuing out of what is granted; an exception is a withdrawal from the operation of the grant of some part of the thing itself. Says Chancellor Kent: "A reservation is a clause in a deed whereby the grantor reserves some new thing to himself issuing out of the thing granted, and not *in esse* before; but an exception is always a part of the thing granted, or out of the general words and description in the grant. It is repugnant to the deed and void, if the exception be as large as the grant itself. So it is if the excepted part was specifically granted, as if a person grants two acres, excepting one of them. The exception is good when the granting part of the deed is in general terms, as in the grant of a messuage and houses, excepting the barn or dovehouse; or in the grant of a piece of land, excepting the trees or woods; or in the grant of a manor, excepting a close, *ex verbo generali aliquid excipitur*. If the exception be valid, the thing excepted remains with the grantor, with the like force and effect as if no grant had been made." [9] It is scarcely necessary

[7] Pownal v. Taylor, 10 Leigh, 172, 34 Am. Dec. 725.

[8] Clarke v. Inhabitants of the Town of Brookfield, 81 Mo. 503, 51 Am. Rep. 243. And see St. Louis v. Wiggins' Ferry Co., 15 Mo. App. 227.

[9] 4 Kent's Com. 468, and cases cited. See, also, Whitaker v. Brown, 46 Pa. St. 197; Craig v. Wells, 11 N. Y. 315; Cutler v. Tuffts, 3 Pick. 272; Moulton v. Trafton, 64 Me. 218; Pynchon v. Stearns, 11 Met. 312, 45 Am. Dec. 210; Marshall v. Trumbull, 28 Conn. 183, 73 Am. Dec. 667; Ash-

to observe that, as in any case of the creation of an estate or interest in real property apt words must be used to create

croft v. Eastern R. R. Co., 126 Mass. 196, 30 Am. Rep. 672; State v. Wilson, 42 Me. 9; Stackbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Ives v. Van Auken, 34 Barb. 566; Munn v. Worrall, 53 N. Y. 44, 13 Am. Rep. 470; Brewer v. Hardy, 22 Pick. 376, 33 Am. Dec. 747; Doe v. Lock, 4 Nev. & M. 807; Winthrop v. Fairbanks, 41 Me. 311; Bridger v. Pierson, 1 Lans. 481; Pettee v. Hawes, 13 Pick. 323; Farnum v. Platt, 8 Pick. 339, 19 Am. Dec. 330; Leavitt v. Towle, 8 N. H. 96; Choate v. Burnham, 7 Pick. 274; Hornbeck v. Westbrook, 9 Johns. 73; McDaniel v. Johns, 45 Miss. 632; Richardson v. Palmer, 38 N. H. 212; Rich v. Zeilsdorff, 22 Wis. 544, 99 Am. Dec. 81; Barnes v. Burt, 38 Conn. 541; Burr v. Dana, 22 Cal. 11; Blanc v. Bowman, 22 Cal. 23; Dyer v. Sanford, 9 Met. 395, 43 Am. Dec. 399; Thompson v. Gregory, 4 Johns. 81, 4 Am. Dec. 255; Jackson v. McKenny, 3 Wend. 233, 20 Am. Dec. 690; Klaer v. Ridgway, 86 Pa. St. 529; Wiley v. Sidorus, 41 Iowa, 224; Sloan v. Lawrence Furniture Co., 29 Ohio St. 568; Lafayette & Wildcat Gravel Road Co., v. Vanclain, 92 Ind. 153; Wall v. Wall, 126 N. C. 405, 35 S. E. 811; Wellman v. Churchill, 92 Me. 193, 42 Atl. 352; Blackman v. Striker, 142 N. Y. 555, 37 N. E. 484; Sirmans v. Lumber Co., 130 Ga. 82, 60 S. E. 267; White v. Marion, 139 Ia. 479, 117 N. W. 254; Stone v. Stone, 141 Iowa, 438, 20 L.R.A.(N.S.) 221, 119 N. W. 712; Moore v. Griffin, 72 Kan. 164, 83 P. 395, 4 L.R.A.(N.S.) 477; Pitcairn v. Harkness, 10 Cal. App. 295, 101 P. 809; Barrett v. Coal Co., 70 Kan. 649, 79 P. 150; Edwards v. Brusha, 18 Okla. 234, 90 P. 727; Williams v. Jones, 131 Wis. 361, 111 N. W. 505; Elsea v. Adkins, 164 Ind. 580, 74 N. E. 242, 108 Am. St. Rep. 320; Spencer v. R. Co., 132 Ia. 129, 109 N. W. 453;

A reservation issues from or comes out of the thing granted. White v. City of Marion, 139 Ia. 479, 117 N. W. 254; Youngerman v. Polk Co., 110 Ia. 731, 81 N. W. 166. It cuts down and lessens the thing granted. Hough v. Porter, 51 Ore. 382, 98 P. 1083. A reservation is something taken back from the thing granted. An exception is some part of the estate not granted. Pritchard v. Lewis, 125 Wis. 604, 1 L.R.A.(N.S.) 565, 104 N. W. 989, 110 Am. St. Rep. 873. In Dyer v. Sanford, 9 Met. 395, 43 Am. Dec. 399, Mr. Chief Justice Shaw, in delivering the opinion of the court, on page 404, says: "As a proper reservation or exception, we think the principle stated is correct—that it must be something out of the estate granted. But we have no doubt that by apt words, even in a deed-poll, a grantor may acquire some right in the estate of the grantee. It is not, however, strictly by way of reservation, but by way of condition or implied covenant, even though the term 'reserving' or 'reservation' is used. If a grant is made to A, reserving the performance of a

an exception or a reservation.[1] Petroleum is included under a reservation of all minerals.[2] A reservation is to be construed most strongly against the grantor.[3] The duty of the

duty, to wit, the payment of a sum of money to a third person, for the benefit of the grantor, an acceptance of the grant binds A to the payment of the money: Goodwin v. Gilbert, 9 Mass. 510. So, where a demise is made to A, reserving a rent in money or in service, it is not strictly a reservation out of the demised premises; but the acceptance of it raises an implied obligation to pay the money. So we think a grant may be so made as to create a right in the grantee's land in favor of the grantor. For instance, suppose A has close No. 2, lying between two closes, Nos. 1 and 3, of B; and A grants to B the right to lay and maintain a drain from close No. 1 across his close, No. 2, thence to be continued through his own close, No. 3, to its outlet; and A, in his grant to B, should reserve the right to enter his drain, for the benefit of his intermediate close, with the right and privilege of having the waste water therefrom pass off freely through the grantee's close, No. 3, forever. In effect, this, if accepted, would secure to the grantor a right in the grantee's land; but we think it would inure by way of implied grant or covenant, and not strictly as a reservation. It results from the plain terms of the contract."

In Cutler v. Tuffts, 3 Pick. 277, it is said: "An exception," says Lord Coke, 1 inst. 47a, "is ever a part of the thing granted, and of a thing *in esse*, as an acre out of a manor; that is, out of a *general* a part may be excepted, but not part of a certainty, as out of twenty acres, one. Now, in the case before us, the thing granted is certain, that is a moiety of a certain tract of land; an execption, therefore, of one-half of this moiety would be like a grant of twenty acres excepting one. It is not a *reservation*, for that must be of some new right not *in esse* before the grant, as of rent, etc., or perhaps of some pre-existing easement." And see Corning v. Troy Iron Co., 40 N. Y. 209; Pettree v. Hawes, 13 Pick. 323; Richardson v. Palmer, 38 N. H. 212; Hurd v. Curtis, 7 Met. 110; Whitaker v. Brown, 46 Pa. St. 197; Bridger v. Pierson, 45 N. Y. 601; Emerson v. Mooney, 50 N. H. 316; Bowen v. Conner, 6 Cush. 132; Fancy v. Scott, 2 Man. & R. 335; Dennis v. Wilson, 107 Mass. 591; Greenleaf v. Birth, 5 Pet. 132, 8 L. ed. 72; Barber v. Barber, 33 Conn. 335; Sprague v. Snow, 4 Pick. 54; Crosby v. Montgomery, 38 Vt. 238.

[1] Brown v. Sudbury, 201 Mass. 149, 87 N. E. 483; Towns v. Brown (Ky.) 114 S. W. 773; Wendall v. Fisher, 187 Mass. 81, 72 N. E. 322.

[2] Dudham v. Kirkpatrick, 101 Pa. St. 36, 47 Am. Rep. 696. Under the facts, reservation of mines and minerals held not to include limestone. See Brady v. Smith, 181 N. Y. 178, 73 N. E. 963, 106 Am. St. Rep. 531.

[3] Klaer v. Ridgway, 86 Pa. St.

court, however, is to effectuate the intention of the grantor if it can be discovered, and a construction most strongly against the grantor will only be adopted in cases of doubt and as a last resort.[4] But reservations are to be construed as possessing the force which it is supposed the deed meant that they should possess.[5] A reservation of all minerals, or of the right of mining, must always respect the surface rights of support. The surface is not to be destroyed without some additional authority.[6] Where land is conveyed to trustees to be used as a graveyard, the grantor reserving

529; Wiley v. Sidorus, 41 Iowa, 224; Jackson v. Hudson, 3 Johns. 375, 3 Am. Dec. 500; Jackson v. Gardner, 8 Johns. 394. See, also, Bendikson v. R. Co., 80 Minn. 332, 83 N. W. 194; Jacobs v. Roach (Ala.) 49 So. 576; Littlejohn v. R. Co., 219 Ill. 584, 76 N. E. 840; Towns v. Brown (Ky.) 114 S. W. 73. In California, however, this rule has been changed by statute. See sec. 1069, Cal. Civil Code, Gardner v. Bank, 7 Cal. App. 106, 93 Pac. 900; Pavkovich v. R. Co., 150 Cal. 39, 87 P. 1097. Where a deed grants "all the right, title, and interest of the said party of the first part, the same being one-half undivided interest," the deed transfers all the title of the grantor, and the previons words of conveyance are not limited by the expression "being a one-half undivided interest:" McLennan v. McDonnell, 78 Cal. 273. Reservations are construed most strongly against the grantor: Grafton v. Moir, 130 N. Y. 465, 27 Am. St. Rep. 533. Where, under a deed, the grantee is to hold "during the term of her natural life, and after her death to revert to me and my heirs," the fee remains in the grantor, and if he should die before the grantor his interest may be sold subject to the life estate; Clark v. Hillis, 134 Ind. 421; 34 N. E. Rep. 13. Section 979 of the text was cited as authority in City of Fort Wayne v. Lake Shore and Michigan Southern Ry. Co., 132 Ind. 558, 18 L.R.A. 367, 32 Am. St. Rep. 277, where it was held that where land is conveyed to a railroad company by a city, under a deed reserving the right to cross the tracks with its streets when the city shall have made an addition of certain land thereto, the right cannot be enforced until it has been made the addition.

[4] Elsea v. Adkins, 164 Ind. 580, 74 N. E. 242, 108 Am. St. Rep. 320.

[5] Hall v. Ionia, 38 Mich. 493. That an exception is not void for repugnancy where the general words of a grant are limited by an exception, see Elsea v. Adkins, 164 Ind. 580, 74 N. E. 242, 108 Am. St. Rep. 320.

[6] Erickson v. Michigan Land and Iron Co., 50 Mich. 604.

"the right and privilege to and for the said grantor, and every member of his family or their offspring, to mark off within the boundaries of the above-described lot one square perch of ground in any locality thereof where they may think proper, for their own and separate use forever for the burial of the dead," the privilege reserved is personal to the grantor and his family. It cannot be assigned to a stranger.[7] A reservation must be made to the grantor. But it is considered as made when by it he secures valuable rights, though others may be also benefited.[8] A reservation of a life estate "with the absolute control of the said real estate, the same as if this conveyance had not been made, for and during the period of the natural life of the grantors and of each of them" is not inconsistent with the grant of a remainder in fee.[9] A clause in a deed following the description which reads "saving and preserving from the operation hereof the road running along the southerly line of said parcels" does not except the road itself from the grant but reserves an easement therein in the grantor and the fee passes to the grantee.[1] Where a sale is made of land with a reservation of the trees, the reservation has been construed as referring to trees then fit for the manufacture of timber.[2] A deed expressly reserving and excepting a "strip of land two rods in width off the north side thereof" plainly imports that the fee was intended to be reserved.[3] A

[7] Pearson v. Hartman, 100 Pa. St. 84. And see Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525. A life estate may be created by reservation. Sharpe v. Mathews, 123 Ga. 794, 51 S. E. 706; McDonald v. Jarvis, 64 W. Va. 62, 60 S. E. 990. Likewise other rights may be reserved to the grantor, his heirs or assigns. Engel v. Ladewig, 153 Mich. 8, 116 N. W. 550.

[8] Gay v. Walker, 36 Me. 54, 58 Am. Dec. 734.

[9] Haines v. Weirick, 155 Ind. 548, 58 N. E. 712, 80 Am. St. Rep. 251. See in this connection Horn v. Broyles (Tenn.) 62 S. W. 297; McDaniel v. Puckett (Tex.), 68 S. W. 1007.

[1] Bolio v. Marvin, 130 Mich. 82, 89 N. W. 563.

[2] Huron Land Co. v. Davison, 131 Mich. 86, 90 N. W. 1034.

[3] Pritchard v. Lewis, 125 Wis.

grant of a certain entire tract, excepting a portion, is not executory in any sense, and if the land sought to be excepted is so described as to be unascertainable, it is the exception that will fail, and not the grant, as the uncertainty affects the exception only.[4]

§ 980. **Construing a reservation as an exception.**—The terms "exception" and "reservation" are often used indiscriminately, and sometimes in a deed what purports to be a reservation has the force of an exception.[5] Mr. Justice Woodward, after reviewing some authorities, says: "Thus it appears, upon sufficient authority, that words of reservation may operate by way of exception, and, to have any effect must do so when the subject of the reservation is not something

604, 1 L.R.A.(N.S.) 565, 104 N. W. 989, 110 Am. St. Rep. 873.

[4] Loyd v. Oates, 143 Ala. 231, 38 So. 1022, 111 Am. St. Rep. 39; De Roach v. Clardy, (Tex.) 113 S. W. 22.

[5] State v. Wilson, 42 Me. 9; Whitaker v. Brown, 46 Pa. St. 197. See, also, Moore v. Griffin, 72 Kan. 164, 83 Pac. 395, 4 L.R.A.(N.S.) 477, in which the court says: "The modern tendency of the courts has been to brush aside these fine distinctions, and look to the character and effect of the provision itself. Gould v. Howe, 131 Ill. 490, 23 N. E. 602. While the distinction between an exception and a reservation in a deed is well established the words are frequently used interchangeably and synonymously." In Elsea v. Adkins, 164 Ind. 580, 74 N. E. 242, 108 Am. St. Rep. 320, the court says: "An exception is a part excepted from the general terms of that which is granted. The words, however, [exception and reservation] are often used interchangeably, and the mere fact that what is excepted is mentioned as being reserved will not defeat its operation as an exception." Accordingly in that case it was held that the words "the grantor reserves the ownership of the well on or near the east line of the lot hereby conveyed" constitutes an exception from the property conveyed. That parol evidence is admissible to identify the subject matter of an exception; see Elsea v. Adkins supra. In Pritchard v. Lewis, 125 Wis. 604, 1 L.R.A. (N.S.) 565, 104 N. W. 989, 110 Am. St. Rep. 873, the court lays down the rule that where the words are doubtful, the question as to whether they create an exception or a reservation is one of intention to be determined from the nature and effect of the provision itself, the subject matter and the situation of the parties.

newly created, as a rent or other interest strictly incorporeal, but is a thing corporate and *in esse* when the grant is made."[6] For instance, an owner of land across which a way had been laid out and used by the public for several years conveyed the land, "reserving to the public the use of the way across the same from the county road to the river." This clause was considered as creating an exception, and as applying to the way then in existence.[7] Where a grantor conveys land, "saving and reserving, nevertheless, for his own use, the coal contained in the said piece or parcel of land, together with free ingress and egress by wagonroad to haul the coal therefrom as wanted," the clause operates as an exception, and the grantor retains the entire and perpetual property in the coal.[8] A clause in a deed conveying one-half of a farm, "excepting, however, the reserve of the four rows of apple trees on the north side of the orchard, with a suitable passway to and from the same, and the land on which they stand, also so much of the second growth of ash timber as I shall want for my personal use," creates an exception.[9]

§ 980a. **Title founded on an exception.**—There is no material distinction between a title founded on an exception out of a grant and a title arising from a direct grant of the same subject.[1] A parol reservation of a crop, where land is conveyed by a deed of warranty containing no reference to the reservation, is void.[2] An exception is not void for uncertainty, because the boundaries of the land excepted must be shown by evidence.[3] It is competent to dissever the title to the surface of land and the minerals beneath it, so that the

[6] In Whitaker v. Brown, 46 Pa. St. 197.

[7] State v. Wilson, 42 Me. 9.

[8] Whitaker v. Brown, 46 Pa. St. 197.

[9] Randall v. Randall, 69 Me. 338.

[1] Lillibridge v. Lackawanna Coal Co., 143 Pa. St. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544.

[2] Carter v. Wingard, 47 Ill. App. 296; Damery v. Ferguson, 48 Ill. App. 224.

[3] Painter v. Pasadena L. & W. Co., 91 Cal. 74.

mineral may become a separate corporeal hereditament, and possession of title to it will be attended with all the attributes and incidents pertaining to the ownership of land. A grant of all the coal beneath a tract of land is an absolute conveyance in fee simple of all the coal, and an exception to the same effect in a grant of the surface can give no greater title.[4]

§ 980b. **Growing crops conveyed by deed.**—A deed will convey growing crops produced by annual planting and cultivation as a part of the real estate unless a reservation is made of them in the deed or in some other writing executed simultaneusly with it.[5] Chancellor Kent says: "If the land

[4] Lillibridge v. Lackawanna Coal Co., 143 Pa. St. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544. See, also, Armstrong v. Caldwell, 53 Pa. St. 284; Ryckman v. Gillis, 57 N. Y. 68, 15 Am. Rep. 464; Delaware etc. R. R. Co. v. Sanderson. 109 Pa. St. 583, 58 Am. Rep. 743; Hartwell v. Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448; City of Scranton v. Phillips, 94 Pa. St. 15; Knight v. Indiana etc. Co., 47 Ind. 105; Williams v. Gibson, 84 Ala. 228, 5 Am. St. Rep. 368; Arnold v. Stevens, 24 Pick. 106, 35 Am. Dec. 305; Caldwell v. Copeland, 37 Pa. St. 427, 78 Am. Dec. 436; Caldwell v. Fulton, 31 Pa. St. 475; 72 Am. Dec. 760; Riddle v. Brown, 20 Ala. 412, 56 Am. Dec. 402.

[5] Firebaugh v. Divan, 207 Ill. 287, 111 Ill. App. 137, 69 N. E. 924; Damery v. Ferguson, 48 Ill. App. 224; Tabbot v. Hill, 68 Ill. 106; Powell v. Rich, 41 Ill. 466; Garanflo v. Cooley, 33 Kan. 137, 5 Pac. 766; Chapman v. Veach, 32 Kan. 167, 4 Pac. 100; Smith v. Hague, 25 Kan. 246; Babcock v. Dieter, 30 Kan. 172, 2 Pac. 504; Carpenter v. Carpenter, 154 Mich. 100, 117 N. W. 598; Tripp v. Hasceig, 20 Mich. 254, 4 Am. Rep. 388; Baker v. Jordan, 3 Ohio St. 438. Chancellor v. Teel, 141 Ala. 634, 37 South 665; Gam v. Conrdrey, 4 Penne (Del.) 143, 53 Atl. 334; Gibbons v. Dillingham, 10 Ark. 9, 50 Am. Dec. 233; Pelts v. Hendrix, 6 Ga. 452; Chapman v. Long, 10 Ind. 465; Heavilon v Heavilon, 29 Ind. 509; Turner v. Cool, 23 Md. 56; Newburn v. Lucas, 126 Iowa, 85, 101 N. W. 730; Moffett v. Armstrong, 40 Iowa, 484; Strawhacker v. Ives, 114 Iowa, 661, 87 N. W. 669; Hecht v. Dittman, 56 Iowa, 679, 7 N. W. 495, 10 N. W. 241, 41 Am. Rep. 131; Stanbrough v. Cook, 83 Iowa, 705, 49 N. W. 1010; Downard v. Groff, 40 Iowa, 597; Wooton v. White, 90 Md. 64, 44 Atl. 1026, 78 Am. St. Rep. 425; Bludworth v. Lambeth, 9 Rob. (La.) 256; Baird v. Brown, 28 La. Ann. 842; Adams v. Moulton, 1 McGloin (La.) 210; Kammrath v. Kidd, 89 Minn. 380, 95 N. W. 213, 99 Am. St. Rep. 603;

be sold without any reservation of the crops in the ground, the law is strict between vendor and vendee; and I apprehend the weight of authority to be in favor of the existence of the rule that the conveyance of the fee carries with it whatever is attached to the soil, be it grain growing, or anything else, and that it leaves exceptions to the rule to rest upon reservations to be made by the vendor."[6] A deed was made in July by a person whose grantor was in possession of the property and entitled to continue possession until the following March, and entitled also to the crops. The grantee's agent, who prepared the deed, stated to the vendor that the custom was for the grantor to retain the growing crops when the deed was made after the first of July, but no agreement was made between the vendor and the grantee as to the disposition of the crops and the vendor did not rely on the statement. The deed contained covenants of warranty, but made no reservation of the crops. In an action for breach of the covenants the court held that while the agreement made by the grantee's agent within the scope of his authority might be binding, yet as there was no agreement, the grantee was entitled to maintain the action and recover damages.[7] In Minnesota, the court said that in that state the law is settled "that growing crops such as wheat and oats are attached to and become a part of the

Cummings v. Newell, 86 Minn. 130, 90 N. W. 311; Erickson v. Paterson 47 Minn. 525, 50 N. W. 699: In re Andersens Estate, 83 Neb. 8, 118 N. W. 1108, 131 Am. St. Rep. 613; Walton v. Jordan, 65 N. C. 170; Flynt v. Conrad, 61 N. C. 190, 93 Am. Dec. 588; Brittain v. McKay, 23 N. C. 265, 35 Am. Dec. 738; Planters' Bank v. Walker, 3 Smedes & M. 409; Foote v. Colvin, 3 Johns, 216, 3 Am. Dec. 478; Terhune v. Elberson, 3 N. J. L. 726; Marshall v. Homier, 13 Okl. 264, 74 Pac. 368; Engle v. Engle, 3 W. Va. 246; Jones v. Adams, 37 Or. 473, 50 L.R.A. 388, 59 Pac. 811, 62 Pac. 16, 82 Am. St. Rep. 766; Wilkins v. Vashbinder, 7 Wats. 378; Burnside v. Stahler's Admr's, 9 Watt. 46; Bittinger v. Baker, 29 Pa. 66, 70 Am. Dec. 154; Pickens v. Reed, 1 Swan, 80; Crews v. Pendleton, 1 Leigh 297, 19 Am. Dec. 750; Willis v. Moore, 59 Tex. 628, 46 Am. Rep. 284.

[6] 4 Kent. Com. p. 468.

[7] Newburn v. Lucas, 126 Iowa, 85, 101 N. W. 730.

real estate, and are transferred by a conveyance of the land, unless expressly reserved." [8] If an agreement is made between husband and wife for a separation and, in pursuance of, the agreement, a deed is executed conveying land to the wife without a reservation of the growing crops, the deed conveys the crops with the land to the wife.[9] When, upon an exchange of lands deeds are placed in escrow, they upon delivery after performance of the condition of the escrow, relate to the date of their execution. In determining the rights of the parties the delivery is considered to have been made on that date and, consequently, if, when the deeds are placed in escrow, possession of one of the tracts upon which a prune crop is growing is delivered to one of the parties to the exchange, who paid the expenses required to care for and gather the crop, he becomes the owner of the crop and is entitled to its proceeds as against the former owner.[1] A person who has acquired the legal title to land but not its possession is not entitled to the possession of a crop as against one who was in possession of the land at the time at which the crop was planted and remained in possession until it was matured and severed.[2]

§ 980c. **Reservation of growing crops by parol.**—On the ground that parol evidence is inadmissible to contradict or alter the terms of a written instrument, the rule announced in many cases is that it cannot be shown by parol that the grant-

[8] Kammrath v. Kidd, 89 Minn. 380, 95 N. W. 213, 99 Am. St. Rep. 603.

[9] Carpenter v. Carpenter, 154 Mich. 100, 117 N. W. 598.

[1] Marr v. Rhodes, 131 Cal. 267, 63 Pac. 364.

[2] Edwards v. Eveler, 84 Mo. App. 405. See, also, McAllister v. Lawler, 32 Mo. App. 91; Adams v. Leip, 71 Mo. 597; Jenkins v. McKay, 50 Mo. 348. In Damery v. Ferguson, 48 Ill. App. 224, the court said: "Matured crops, if severed from the soil, become personalty and do not pass by a deed, but crops not severed, whether ripe or unripe pass, we think, to the vendee by the deed as being annexed to and forming a part of the freehold."

or reserved the growing crops upon the land conveyed.[3] But in a number of cases a contrary rule is announced.[4] In the first class of cases it is said that to admit the reservation by parol of growing crops would be in direct conflict with the rule forbidding the introduction of parol evidence to vary the terms of a written instrument.[5] In the other class it is said that the allowance of a parol reservation of a growing crop is not to contradict the deed, but to show what, in some instances, would pass with the land as a part of the realty has, by the agreement of the parties, been transformed into personalty.[6] If a vendor executes a contract for a gross sum, containing no exception of the growing crops, he is bound to convey the land with the crops.[7] Where a contract of sale authorizes a real estate agent to sell land at a stipulated price per acre without crops or at a certain larger price per acre with the crops included, a contract of sale for a gross sum which is in excess of the highest sum per acre required by the

[3] Chapman v. Long, 10 Ind. 465; Turner v. Cool, 23 Ind. 56, 85 Am. Dec. 449. (But see the later cases in Indiana of Heavilon v. Heavilon, 29 Ind. 509; Harvey v. Million, 67 Ind. 90); Benner v. Bragg, 68 Ind. 338; Armstrong v. Lawson, 73 Ind. 498; Hays v. Peck, 107 Ind. 389, 8 N. E. 274; Gibbons v. Dillingham, 10 Ark. 9, 50 Am. Dec. 233; VanderKarr v. Thompson, 19 Mich. 82; Adams v. Watkins, 103 Mich. 431, 61 N. W. 774; McIlvaine v. Harris, 20 Mo. 457, 64 Am. Dec. 196; Smith v. Price, 39 Ill. 28, 89 Am. Dec. 284; Powell v. Rich, 41 Ill. 466; Damery v. Ferguson, 48 Ill. App. 225; Gam v. Cordrey, 4 Penn. Del. 143, 53 Atl. 334; Brown v. Thurston, 56 Me. 126, 96 Am. Dec. 438; Kammrath v. Kidd, 89 Minn. 380, 99 Am. St. Rep. 603, 95 N. W. 213.

[4] Baker v. Jordan, 3 Ohio St. 438; Walton v. Jordan, 65 N. C. 170; Kerr v. Hill, 27 W. Va. 576. Backenstoss v. Stahler, 33 Pa. 251, 75 Am. Dec. 592; Harbold v. Kuster, 44 Pa. 392; Kluse v. Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047; Heavilon v. Heavilon, 29 Ind. 509; Harvey v. Million, 67 Ind. 90; Hisey v. Troutman, 84 Ind. 115; Benner v. Bragg, 68 Ind. 338; Holt v. Holt, 57 Mo. App. 272.

[5] Gibbons v. Dillingham, 10 Ark. 9, 50 Am. Dec. 233.

[6] Baker v. Jordan, 3 Ohio St. 438; Backenstoss v. Stahler, 33 Pa. 251, 75 Am. Dec. 592; Harbold v. Kuster, 44 Pa. 392.

[7] Fisk v. Soule, 87 Cal. 313, 25 Pac. 430.

contract, is within the conferred authority, even though it fails to state whether the sale includes or excludes the crops.[8] Where the owners of a tract of land conveyed it by a warranty deed for a specified consideration, and it was agreed by parol that, as a part of the consideration, they might gather and remove a crop of corn growing upon the land, although the deed contained no reservation of this crop, it was held that parol evidence was admissible to show the reservation of the corn as a part of the consideration for the deed.[9]

§ 981. **Reservation by tenants in common.**—Where one of two tenants in common conveys his interest to a stranger, reserving to himself the right to pass and repass over the land to a woodhouse upon an adjoining lot owned by him, the reservation, irrespective of the question as to the propriety of such use, is void. It is an attempt to create a several limited interest in land held in cotenancy.[1] If a ten-

[8] Fisk v. Soule, 87 Cal. 313, 25 Pac. 430. See, also, as to parol reservation of growing crops. Huffman v. Hummer, 17 N. J. Eq. 269; Powell v. Rich, 41 Ill. 466, 47 Ill. App. 296.

[9] Grabow v. McCracken, 23 Okla. 613, 23 L.R.A.(N.S.) 1218, 102 Pac. 84. Said the court: "The weight of authority and reason supports the rule, at least that a matured crop of corn and wheat standing ungathered upon a tract of land may be specifically reserved by parol in the sale of the land, as a part of the contract price or consideration of the deed."

[1] Marshall v. Trumbull, 28 Conn. 183, 73 Am. Dec. 667. Said Hinman, J: "Now it is well settled that one tenant in common can neither sell nor encumber any part of the estate by metes and bounds, so as to prevent such a diversion or distribution as would give the other tenants in common an unencumbered title to the part thus sold or encumbered: Griswold v. Johnson, 5 Conn. 363; Porter v. Hill, 9 Mass. 34, 6 Am. Dec. 22; Merrill v. Berkshire, 11 Pick. 269. Deeds and other conveyances of such property are not merely inoperative against the rights of the other tenants when a partition is made, but they are, as remarked by Judge Hosmer, undoubtedly void, and the other cotenants may at all times so treat them. It follows, then, that unless this reservation or exception is in fact a reservation of a right in the whole passway, that is, a reservation of some aliquot portion of the plaintiff's interest in it, it must, according to this principle, be deemed to be void. But the right

ant in common convey all his estate in the land held in common, a reservation in such deed of his interest in the mines upon the land conveyed is void.[2] Mr. Chief Justice Shaw, after speaking of the rule forbidding one tenant to convey a tract by metes and bounds, said that if the conveyance in question could avail against the other cotenants, the owners of the remainder of the whole estate, "with all its incidents unimpaired, with all its ores and mines unopened and unsevered, would be compellable to divide the soil or general estate with one set of cotenants, and the mines and ores with another or many other sets of cotenants. Such a result would be attended with all the mischief and inconvenience arising from the act of a cotenant, in attempting to convey his undivided part in a particular parcel, instead of an aliquot part in the whole common estate. The same reasons upon which it is held that such a conveyance is void against cotenants, will also avoid the act of a part owner in attempting to parcel out rights in their nature indivisible, in definite portions of the inheritance, as the mines to one and the general estate to another." [3]

of a passway in or through a piece of land is, in its very nature, to be exercised upon a specific part of the land, and it is impossible to conceive in this case of a right in the plaintiff to pass to and from his woodhouse without interrupting and infringing upon the rights of the proprietor, who might have that portion of the gangway which adjoins the woodhouse aparted and set to him. Thus the effect of the attempted reservation of the passway, if valid, would be the same as the granting or deeding to another of that part of the gangway which does not adjoin the woodhouse by metes and bounds, and retaining the other portion, with the view of retaining a passway to it, which would be but an attempt to make partition without the co-operation of the other cotenants, and therefore cannot be done."

[2] Adams v. The Briggs Iron Co., 7 Cush. 361. The grantor retains title to timber excepted from the operation of a deed, and he has the implied power to enter, fell, and take it away. The exception has the same effect as if the whole estate had been conveyed, and the grantee had reconveyed the timber to the grantor: Wait v. Baldwin, 60 Mich. 622, 1 Am. St. Rep. 551.

[3] Adams v. Briggs Iron Co., 7 Cush. 361, 370.

§ 982. **Reservation to third person.**—A stranger to a deed cannot take title by reservation.[4] "But it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or 'reserved.'"[5] While a reservation strictly such is ineffectual to create a right in a stranger, it may still have effect. Thus in a deed with covenants for quiet enjoyment occurred the clause: "Reserving always a right of way, as now used, on the west side of the above-described premises, for cattle and carriages, from the public highway to the piece of land now owned by" a certain person. As there was in fact a right of way existing, this clause was construed as creating an exception from the property conveyed.[6] A reservation is always in the grantor's favor and unless it contains words of inheritance or the same is implied it exists only for the life of the grantor.[7] A reservation is not a part of the estate itself, but is something taken out of that already granted while an exception is some part of the estate not included in the grant.[8] It should be borne in mind that the general rule is that an estate cannot be created in a stranger to a deed by a reservation, purely such.[9]

[4] West Point Iron Co. v. Reymert, 45 N. Y. 703; Littlefield v. Mott, 14 R. I. 288.

[5] West Point Iron Co. v. Reymert, 45 N. Y. 703, per Allen, J.

[6] Bridger v. Pierson, 45 N. Y. 601. Text Gal. 316.

[7] Engel v. Meyer, 85 Me. 448, 27 Atl. 352.

[8] Youngerman v. Polk County, 110 Iowa, 731, 81 N. W. 166.

[9] Jackson v. Snodgrass, 140 Ala. 365, 37 South, 246; Haverhill Sav. Bank v. Griffin, 184 Mass. 419, 68 N. E. 839; Brace v. Van Eps, 21 S. D. 65, 109 N. W. 147; Karmuller v. Krotz, 18 Iowa, 352; White v. Marion, 139 Iowa, 479, 117 N. W. 254; Stone v. Stone, 141 Iowa, 438, 20 L.R.A.(N.S.) 221, 119 N. W. 712; Hill v. Lord, 48 Me. 83; Herbert v. Pue, 72 Md. 307, 20 Atl. 182; Murphy v. Lee, 114 Mass. 371, 11 N. E. 550; Borst v. Empie, 5 N. Y. 33; Craig v. Wells, 11 N. Y. 315; Hornbeck v. Sleight, 12 Johns. 199; Maynard v. Maynard, 4 Edw. Ch. 711; Stevens v. Adams, 1 Thomp. & C. 587; Parsons v. Miller, 15 Wend. 561; Ives v. Van Auken, 34 Barb. 566; Eysaman v. Eysaman, 24 Hun, 430; Logan v. Caldwell, 23 Mo. 372; Edwards v. Brusha, 18 Okla. 234, 90 Pac. 727; Loungs Petition, 11 R. I. 636; Re Palin, 28 R. I. 12,

§ 982a. **Reservation to stranger as estoppel.**—While the general rule is that a reservation cannot be made to a stranger to a deed, yet, there are cases in which, under certain circumstances, such a reservation or exception may have the effect of an estoppel or admission for the benefit of the stranger as against the grantor.[1] A clause in a deed of a whole tract of land, "reserving and saving from the effect and operation of this conveyance four square miles in two separate parts, to be selected and located by the parties of the first part" operates as an exception of the land reserved. But an action of ejectment cannot be based upon this title, unless it is shown that the land excepted has been selected and located.[2] While a reservation in a deed may not be effectual to vest, as such, a title in a stranger to the deed, it may operate as an exception to the grant, when such is the intention of the parties.[3] If the owner of real estate conveys to a person certain

65 Atl. 282; Strasson v. Montgomery, 32 Wis. 52.

[1] Butler v. Gosling, 130 Cal. 422, 60 Pac. 596.

[2] Butler v. Gosling, 130 Cal. 422, 60 Pac. 596.

[3] Burchard v. Walther, 58 Neb. 539, 78 N. W. 1061. In that case the clause in question read: "Said J. P. C. Walther, reserves the possession and life estate in the premises during the natural life, and to his son Charles F. Walther after him, and to Catherine, wife of Charles F. Walther, one third of said interest during her life, in case she survives both J. P. C. Walther and C. F. Walther." In a case in Michigan, the deed contained a clause, by which the grantor reserved to himself and his daughter, named in the deed, an estate for the lives of both. The court held that this clause operated as an exception to the grant and in the opinion said: "The language here used must, we think, be treated as excepting from the grant the use and enjoyment of the land conveyed, during the lives of both father and daughter, as effectually as though that reservation had been for a fixed term of years, extending beyond the life of the father, and at the death of the father the right to that use for the unexpired portion of the period must be held to have descended to the heirs of William H. Martin. This construction gives to the grantee the estate which both parties to the instrument evidently intended that he should take. It does not appear from the record that petitioner is the sole heir. The record will therefore be remanded, with directions to set aside the order heretofore entered, for the proper determin-

rights in a house situated on the land, and the deed is placed on record, a subsequent grantee of the land is bound by the conveyance of such rights, notwithstanding the deed conveying the property to him contains no reservation of the interest on the house.[4] When valuable rights in land are retained by the grantor the fact that others may be benefited by the reservation will not prevent the reservation from operating in fa-

ing of that question, and the entry of an order, after such hearing, in accordance with this opinion." Martin v. Cook, 102 Mich. 267, 60 N. W. 679.

[4] Bartlett v. Barrows, 22 R. I. 642, 49 Atl. 31. It was urged that the clause in question did not create an exception from the grant, and that it could not be supported as a reservation, because it was not made in terms to the grantor and reliance was placed upon the cases of Ex parte Young, 11 R. I. 636, and Littlefield v. Mott, 14 R. I. 288. Referring to these cases the court said: "These were cases where the court refused to uphold certain attempted reservations in deeds with full covenant of warranty as not made to the grantors, and as repugnant to the grant. The argument is that in the deed from Walling to the plaintiff this clause appears as a reservation, and, being to strangers, is void. But, as it reserves or retains rights which existed as against Walling before he conveyed to the plaintiff, it has the effect in his deed of an exception, and limits the preceding description of the property conveyed. Walling had previously granted these privileges to Mrs. Orrell if she did not already own them. He therefore could not convey to a third party except subject to them. If the clause had not been repeated in his deed, his grantee would have been equally bound by its provisions, as it was duly recorded in the deed to Mrs. Orrell before the deed to the plaintiff was recorded. Where B. had a right of way across A.'s land, and in conveying it A. reserved the right of way of B., it was held to be an exception of the right of way out of the granted premises, because as a reservation to a stranger it would be invalid. Bridger v. Pierson, 45 N. Y. 601, 603; Iron Co. v. Reymert, Id. 707, quoted in Washb. Real Prop. p. 462. Prof. Washburn says further on this subject (page 461) "Exceptions are often made in the form of a reservation where the thing intended not to pass by deed is then existing. Thus the grant of a farm 'reserving to the public the use of the road through said farm, also reserving for W. R. R. the roadway for said road, as made out,' etc., was held to except the easement of the public and of the railroad out of the granted premises, and that the soil and freehold of these passed by the deed; the effect being to create an exception, and not a reservation."

vor of the grantor.[5] Where a person had a right of way across the grantor's land, and the latter, in conveying his land to another, inserted in the deed, a reservation of the right of way existing, it was decided, that, although, in a strict sense a right of way could not be vested in a stranger to the deed by a reservation in it, still, as the right of way existed at the time at which the deed was made, it should be construed as an exception from the property conveyed by the deed.[6] A deed conveying land contained an exception of "a certain lot of timber growing and standing in the southwest corner of the aforedescribed quarter section" in favor of the grantor's son, a stranger to the deed. This exception was considered as an exception of the timber rather than of the land, and as terminating with the death of the person in whose favor it was made.[7]

§ 983. **Reservation of support in deed to trustees.**[8]— If a person conveys all his property to a trustee to be applied to his support and maintenance during life, and upon his death to be divided between his nephews and nieces, and the children of such as had died, the instrument is a deed and not a will. It vests in them an interest which the maker cannot recall.[9] Such an instrument is not prevented from taking ef-

[5] Wall v. Wall, 126 N. C. 405, 35 S. E. 811.

[6] Bridger v. Pierson, 45 N. Y. 601.

[7] Stone v. Stone, 141 Iowa, 438, 20 L.R.A.(N.S.) 221, 119 N. W. 712. "A reservation" said the court, "is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant. And an exception is a clause in a deed which withdraws from its operation some part of the thing granted, which would otherwise have passed to the grantee under the general description." See, also, Eisly v. Spooner, 23 Neb. 470, 36 N. W. 659, 8 Am. St. Rep. 128; Blackman v. Striker, 142 N. Y. 555, 37 N. E. 484; Herbert v. Pue, 72 Md. 307, 20 Atl. 182; Biles v. Tacoma O. & G. H. R. Co., 5 Wash. 509, 32 Pac. 211.

[8] This section was cited in Sharp v. Hall, 86 Ala. 110, 11 Am. St. Rep. 28.

[9] McGuire v. Bank of Mobile, 42 Ala. 589. See § 309, *ante*, and

fect until the maker's death, by reason of a reservation for his support, comfort, and maintenance during the term of his natural life. A reservation of this character is limited to a specified purpose, and does not give the instrument that ambulatory quality pertaining to wills.[1]

§ 984. Reservation of plants making them personal property.—As between a vendor and purchaser a reserva-

notes. See, also, § 854, *ante*. See, also, Karchner v. Hoy, 151 Pa. St. 383; Blank v. Kline, 155 Pa. St. 613. Mistreatment of the grantor by the grantee is sufficient ground for setting aside a deed made in consideration of support: Alford v. Alford, 1 Tex. Civ. App. 245.

[1] McGuire v. Bank of Mobile, 42 Ala. 589. This section was cited with approval in Sharp v. Hall, 86 Ala. 110, 11 Am. St. Rep. 28, where Mr. Chief Justice Stone, in delivering the opinion of the court, said: "A declaration of trust, by which the grantor stipulates to hold in trust for himself during life, with remainder to a donee or succession of donees, certainly secures no use, enjoyment, or usufruct to the remainderman during the grantor's life; yet it is a deed and not a will; 1 Bigelow's Jarman on Wills, 17, and notes; Gillham v. Mustin, 42 Ala. 365. Can a tangible distinction be drawn between such case and a direct conveyance, in form a deed, by which A conveys to B, to take effect at the death of A? The human mind is not content with a distinction that rests on no substantial difference. Conveyances reserving a life estate to the grantor have been upheld as deed: 2 Devlin on Deeds, § 983; Robinson v. Schley, 6 Ga. 515; Elmore v. Mustin, 28 Ala. 309; Hall v. Burkham, 59 Ala. 349. In Daniel v. Hill, 52 Ala. 430, 436, this court said: 'A deed may be so framed that the grantor reserves to himself the use and possession during his life, and on his death creates a remainder in fee in a stranger.' "Almost every conceivable form of conveyance, obligation, or writing by which men attempt to convey, bind, or declare the legal *status* of property, have, even in courts of the highest character, been adjudged to be wills. The form of the instrument stands for but little Whenever the paper contemplates posthumous operation, the inquiry is, What was intended? 1 Bigelow's Jarman on Wills, 20, 25; Habergham v. Vincent, 2 Ves. Jr. 204; Jordan v. Jordan, 65 Ala. 301; Daniel v. Hill, 52 Ala. 430; Shepherd v. Nabors, 6 Ala. 631; Kinnebrew v. Kinnebrew, 35 Ala. 638. The intention of the maker is the controlling inquiry, and that intention is to be gathered primarily from the language of the instrument itself: Dunn v. Bank, 2 Ala. 152." See § 309, *ante*.

tion may make plants personal property, as much so as if they had been taken from the ground. For instance, a person sold his interest in land, to which another held the legal title. By an agreement in writing between the vendor and purchaser, the former was allowed a specified time for the removal of some wine plants growing upon the ground. The vendor verbally authorized the holder of the legal title to convey to the purchaser on the payment of a sum of money, and this payment having been made, the holder of the legal title at the purchaser's request conveyed the land to the latter's wife. There was no clause in this deed reserving the wine plants, but the court held that the written reservation was valid, and conferred on the vendor the right to remove the plants within the time given. This right was not affected by the fact that the deed contained no reservation, as it was not executed by the vendor, nor did he give authority for its execution without the reservation.[2]

§ 985. **Right of way.**—Two parties obtained title to their respective pieces of land from the same grantor. In the deed by which the land to one was conveyed was the clause: "Said sixteen feet (east) of said house to be kept open as far back as the south end of said house." The other by reason of this reservation claimed a right of way, but it was decided that, as the clause was applicable to other matters, such as obstructing light, air, or the view, a right of way was not reserved.[3] Nor would evidence be admissible for the purpose of aiding in the construction of the deed by showing that for more than twenty years prior to the acquisition of the title by the grantor of these two parties, that the way had been used.[4]

[2] Ring v. Billings, 51 Ill. 475.
[3] Wilder v. Wheeldon, 56 Vt. 344.
[4] Wilder v. Wheeldon, 56 Vt. 344.

§ 985a. **Right to pass reserved merely.**—By a reservation of a right of way over an alleyway, merely the right to pass through it is reserved, and the owner of the land may use it in any manner he wishes, if he does not prevent the reasonable use of the way as a means of passage.[5] Where a right of way is reserved, but not specifically defined, it need only be such as reasonable necessity and convenience for the purpose for which it was created demand.[6] Unless expressly provided otherwise, the owner may build over a right of way if he leaves the ground unobstructed for a reasonable height above. The right to pass and repass does not carry with it the right to light and air above the passageway.[7] But where the deed provides for a passageway for light and air, always to be kept open for the purposes named, it conveys the right to the unobstructed passage of light and air from the ground upward.[8]

[5] Grafton v. Moir, 130 N. Y. 465, 27 Am. St. Rep. 533. See Kripp v. Curtis, 71 Cal. 63; Bodfish v. Bodfish, 105 Mass. 319; Stuyvesant v. Woodruff, 21 N. J. L. 133, 47 Am. Dec. 156. "'Right of way, in its strict meaning, is the right of passage over another man's ground;' and in its legal and generally accepted meaning in reference to a *railway*, it is a mere easement in the land of others, obtained by lawful condemnation to public use or by purchase: Mills on Eminent Domain, § 110. It would be using the term in an unusual sense by applying it to an absolute purchase of the fee simple of lands to be used for a railway or any other kind of way:" Williams v. Western Union Ry. Co., 50 Wis. 76.

[6] Grafton v. Moir, 130 N. Y. 465, 27 Am. St. Rep. 533; Bakeman v. Talbot, 31 N. Y. 366, 88 Am. Dec. 275; Rexford v. Marquis, 7 Lans. 249; Tyler v. Cooper, 47 Hun, 94, 124 N. Y. 626; Bliss v. Greeley, 45 N. Y. 671, 6 Am. Rep. 157; Atkins v. Boardman, 2 Met. 457; 37 Am. Dec. 100; Maxwell v. McAtee, 9 B. Mon. 20, 48 Am. Dec. 409; Matthews v. Delaware etc. Canal Co., 20 Hun, 427; Spencer v. Weaver, 20 Hun, 450; Johnson v. Kinnicutt, 2 Cush. 153.

[7] Gerrish v. Shattuck, 132 Mass. 235; Burnham v. Nevins, 144 Mass. 88, 59 Am. Rep. 61.

[8] Brooks v. Reynolds, 106 Mass. 31.

§ 986. **Maintenance of tollhouse.**—In the conveyance of a farm a strip of land was reserved until a gravel road having its only tollhouse and gate there, should remove its place of collecting toll from the land conveyed. Subsequently the company owning the tollroad erected a second tollhouse and gate at another place. It collected its principal tolls at this place, but still maintained a tollhouse at the old place, at which only a trifling amount was collected. The court held in a suit of ejectment by a subsequent purchaser, that he owned the strip of land and was entitled to its possession. "Looking to the substance and not to the mere form," said the court, "the event contemplated by this language of the deed had occurred. If the occupation of the land was still beneficial, as a sort of outpost, for the purpose of securing the collection of a greater amount of tolls at the new tollhouse than would probably be collected there if the old one were abandoned, this was not the purpose for which the reservation was made in said deed. The use of the old house for other beneficial purposes than that of gathering tolls at that place, and the collection of a merely nominal amount of tolls there, while the substantial revenue of the corporation was collected at another place, amounted, we think, to a change of the place of collecting toll, such as was contemplated by said deed."[9]

§ 987. **Unincorporated town.**—As the inhabitants of an unincorporated town are incapable in law of taking an estate in fee, a proviso in a deed reserving to the inhabitants of such a town the right to cut wood on the lands conveyed when not in fence, is void. Even if operative, the right would inure only to the inhabitants of the town living at the time of the grant, as no words of perpetuity are contained in the proviso.[1]

[9] Lafayette Wildcat Gravel R. R. Co. v. Vanclaim, 92 Ind. 153.

[1] Hornbeck v. Westbrook, 9 Johns. 73.

§ 988. **Passageway.**—Where a deed contained the clause, "reserving, however, a privilege to pass and repass through said lot of land to the outer cellarway, and through said way and cellar where it may do the least damage," it was held that the grantor by this reservation retained the right of passage through the cellar, even when there was no particular necessity for him to be there, and that it was proper to show that he had used the passage through the cellar in a certain manner, without objection from the grantee, in order to determine what the reservation intended.[2]

§ 989. **Construction in particular cases.**—A grantor conveyed land, "excepting and reserving" to himself, his heirs and assigns, "a passageway four feet wide, in, through, and over said premises," from a street by which the land was bounded to the grantor's house on an adjoining piece of land, and the way was subsequently located by the parties on the northerly side of the land conveyed. The grantee dug up the way, and began to build upon and over it. It was held that he had the right to build over the way, if he placed no part of the building upon it, and left it of a reasonable height, and that the grantor was entitled to have the soil of the way restored to its former condition.[3] Land conveyed by deed was described as "all that piece or parcel of land described as follows, to wit, being the northeast quarter of section 32, except forty acres in the southeast corner of said section 32." The court held that the forty acres excepted did not pass by the deed, and that any technical rule of the common law inconsistent with this decision, was not in force in Minnesota.[4] A deed which reserves a road of a certain width to be shut at each end by a bar or gate, reserves only a right of way,

[2] Choate v. Burnham, 7 Pick. 274.

[3] Gerrish v. Shattuck, 132 Mass. 235.

[4] Babcock v. Latterner, 30 Minn. 417. See Jackson v. Vickory, 1 Wend. 406, 19 Am. Dec. 522.

and not the fee of the land reserved for a road.[5] Where land is conveyed to a railroad corporation by a deed containing a clause, "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever, through a culvert six feet wide, and rising in height to the superstructure of the railroad, to be built and kept in repair by said company," the clause is construed as a reservation and not an exception. The grantor has by it an estate for life only.[6] The right of wharfing is included in a reservation of all privileges around a lot bounded by tide water.[7] A reservation in the form, "reserving all that part of said lot which is now used and occupied by the Iron Mining Company for railroad or railway purposes," is sufficiently definite and certain, where a portion of the lot was so occupied at the time the deed was executed.[8] Where A conveyed land to B, "reserving all the right that C may have to fasten a dam across said river and to said premises, and all rights said C has in the same," this clause was held to create an exception, and not a reservation; a covenant of seisin in A's deed to B was not broken by reason of C's interests.[9] A clause in a town lot, "saving and excepting the water privileges of a stream known as Trout

[5] Kister v. Reeser, 98 Pa. St. 1, 42 Am. Rep. 608. See, also, Hagan v. Campbell, 8 Port. 9, 33 Am. Dec. 267. And see Brown v. Meady, 10 Me. 391, 25 Am. Dec. 248.

[6] Ashcroft v. Eastern R. R. Co., 126 Mass. 196, 30 Am. Rep. 672.

[7] Parker v. Rogers, 8 Or. 183.

[8] Reidinger v. Cleveland Iron Mining Co., 39 Mich. 30. And see, also, Johnson v. Ashland Lumber Co., 47 Wis. 326. In Rockafeller v. Arlington, 91 Ill. 375, an owner of land had laid out a block and subdivided it into lots, placing stones at the corners of the block. He sold two lots, and, after the purchaser had taken possession, conveyed the whole tract, "excepting five lots in the first block, and second lot in second block, south of the railroad and plankroad, as the same shall be hereafter subdivided into village lots by the grantee or his assigns, said lots having been heretofore sold," by the grantor. The exception in the deed was considered not to be void for uncertainty, and the deed was held not to pass the title to the lots previously sold. For a case in which an excepting clause was held void for uncertainty, see Ditman v. Clybourn, 4 Ill. App. 542.

[9] Stockwell v. Couillard, 129 Mass. 231.

Brook, to be carried through the said described lot as aforesaid in a raceway," does not confer a right of carrying the waters of the brook across the lot through a flume erected upon trestlework of a height of several feet. The only right conveyed is that of carrying the water through an artificial canal in the earth; the erection of a flume may be restrained by injunction.[1] A stipulation that certain timber excepted from the operation of the deed should be removed within a specified time, does not render the exception conditional on the removal.[2] Where a grantor in a deed conveying five parcels of land inserts the clause, "possession to be given the said grantee of the house and garden above specified (the first parcel) immediately, and one undivided half of all the other tracts of land specified above, reserving the buildings now occupied by myself at my decease," he intends to reserve to himself only the buildings mentioned, and not a life estate in the undivided half of the four parcels of land.[3] If a deed reserves "all the standing wood upon a lot, together with the right to enter and remove the same at any time within three years," and there is nothing in any other part of the deed to indicate that the term "standing wood" is used in a limited

[1] Wilder v. De Cou, 26 Minn. 10. A clause, "reserving a passway from the road aforesaid, over or by said lot to the barn standing on the adjoining lot, being said Mary's (the grantor's) dwelling-house lot," creates a reservation of a right of way to the dwelling-house lot for such objects, as it would be proper to use a way to the barn appurtenant to the dwelling-house. The right of the grantee is not lost by the destruction of the barn, which existed on the lot at the time of the reservation: Bangs v. Parker, 71 Me. 458.

[2] Irons v. Webb, 41 N. J. L. 203, 32 Am. Rep. 193. See Perkins v. Stockwell, 131 Mass. 529.

[3] Shannon v. Pratt, 131 Mass. 434. Where the only valuable mineral found in the region at the time of the conveyance was iron ore, a reservation in the deed to the grantor of "all mines and ores of metal that are now or may be hereafter found on said land" will not include marble or serpentine deposits subsequently discovered: Deer Lake Co. v. Michigan Land etc. Co., 89 Mich. 180. Where a store is reserved, sufficient ground therefor is also reserved: Moulton v. Trafton, 64 Me. 218.

sense, trees suitable for timber, as well as trees suitable for fuel, will be included in the reservation.[4]

[4] Strout v. Harper, 72 Me. 270. For other cases in which reservations and exceptions have been construed, see Getchell v. Whittemore, 72 Me. 393; Roberts v. Robertson, 53 Vt. 690, 38 Am. Rep. 710; Knapp v. Woolverton, 47 Mich. 292; Alden's Appeal, 93 Pa. St. 182; Kaelle v. Knecht, 99 Ill. 396; Perkins v. Stockwell, 131 Mass. 529; Williamson v. Yingling, 80 Ind. 379; Kuhn v. Farnsworth, 69 Me. 404; Moses v. Eagle, etc. Mfg. Co., 62 Ga. 455; Hardwick v. Laderoot, 39 Mich. 419; Hartley v. Crawford, 81 *Pa. St. 478; Fisher v. Nelson, 8 Mo. App. 90; Lewis v. Loomis, 50 Wis. 497; Bridger v. Pierson, 1 Lans. 481; Hawes v. Louisville, 5 Bush, 667; Cheney v. Pease, 99 Mass. 448; Dean v. Colt, 99 Mass. 480; Sargent v. Hubbard, 102 Mass. 380; Sparhawk v. Bagg, 16 Gray, 583; Clark v. Cottrell, 42 N. Y. 527; Woodcock v. Estey, 43 Vt. 515; Farquharson v. McDonald, 2 Heisk. 404; McDaniel v. Johns, 45 Miss. 632; Cook v. Wesner, 1 Cin. 249; Bourgeois v. Thibodaux, 23 La. Ann. 19; Cottle v. Young, 59 Me. 105; Emerson v. Mooney, 50 N. H. 315; Reformed Church v. Schoolcraft, 5 Lans. 206; Haynes v. Jackson, 59 Me. 386; Arthur v. Case, 1 Paige, 447; Swick v. Sears, 1 Hill, 17; Ten Brock v. Livingston, 1 Johns. 357; Leavitt v. Towle, 8 N. H. 96; Rood v. Johnson, 26 Vt. 64; Mixer v. Reed, 25 Vt. 254; Cathcart v. Chandler, 5 Strob. 19; Hay v. Storrs, Wright, 711; Massey v. Warren, 7 Jones (N. C.) 143; Whitted v. Smith, 2 Jones (N. C.) 36; Champlain & St. Lawrence R. R. Co. v. Valentine, 19 Barb. 484; Allen v. Scott, 21 Pick. 25, 32 Am. Dec. 238; Loomis v. Pingree, 43 Me. 299; Louk v. Woods, 15 Ill. 256; Blossom v. Ferguson, 13 Wis. 75; Cooney v. Hayes, 40 Vt. 478, 94 Am. Dec. 425; Rich. v. Zeilsdorf, 22 Wis. 544, 99 Am. Dec. 81; Ballou v. Harris, 5 R. I. 419; Knotts v. Hudrick, 12 Rich. 314; Keeler v. Wood, 30 Vt. 242; Patterson v. Patterson, 1 Hayw. (N. C.) 163; Hays v. Askew, 5 Jones (N. C.), 63; City of Cincinnati v. Newell, 7 Ohio St. 37; Shoofstall v. Powell, 1 Grant Cas. 19; Cathcart v. Bowman, 5 Pa. St. 317; Sahl v. Wright, 6 Pa. St. 433; Johnson v. Zink, 52 Barb. 396; Rose v. Bunn, 21 N. Y. 274; Bartlett v. Judd, 21 N. Y. 200, 78 Am. Dec. 131; Esty v. Currier, 98 Mass. 500; Hodge v. Boothby, 48 Me. 68; Hill v. Lord, 48 Me. 83; Adams v. Morse, 51 Me. 497; Earle v. Dawes, 3 Md. Ch. 230; Veall v. Carpenter, 14 Gray, 126; Cronin v. Richardson, 8 Allen, 423; McDowell v. Brown, 21 Mo. 57; Carradine v. Carradine, 33 Miss. 698; Ward v. Ward, Mart. (N. C.) 28; Evans v. Labaddie, 10 Mo. 426; Stratton v. Gold, 40 Miss. 778; Logan v. Caldwell, 23 Mo. 373; Webster v. Webster, 33 N. H. 18, 66 Am. Dec. 705; Turner v. Cool, 23 Ind. 56, 85 Am. Dec. 449; Thurston v. Masterson, 9 Dana, 228; Howard v. Lincoln, 12 Me. 122; Tuttle v. Walker, 46 Me. 280; Brown v. Meady, 10 Me. (1 Fairf.)

§ 989a. **Removal of timber.**—Although there is some variance of opinion the general rule is that if a deed contains a reservation of standing timber to be removed within a time mentioned the right of the grantor will expire at the end of the period limited.[5] This rule is applicable where standing timber is granted under the condition that it shall be removed within a specified time. After the expiration of the time specified, it is maintained by the weight of authority, the right of the grantee ceases.[6] A reservation in a deed that the grant-

391, 25 Am. Dec. 248; Richardson v. York, 14 Me. 216; Ballard v. Butler, 30 Me. 94; Farley v. Bryant, 32 Me. 474; Moulton v. Faught, 41 Me. 298; Cromwell v. Selden, 3 N. Y. 253; Logan v. Caldwell, 23 Mo. 373; Thompson v. Gregory, 4 Johns. 81, 4 Am. Dec. 255; Jackson v. Lawrence, 11 Johns. 191; Colby v. Colby, 28 Vt. 10; Muller v. Boggs, 25 Cal. 175; Humphrey v. Humphrey, 1 Day, 271; Hart v. Conner, 25 Conn. 331; House v. Palmer, 9 Ga. 497; Marshall v. Trumbull, 28 Conn. 183, 73 Am. Dec. 667; Everett v. Dockery, 7 Jones (N. C.), 390; Altman v. McBride, 4 Strob. 208; Hornback v. Westbrook, 9 Johns. 73; Daniel v. Veal, 32 Ga. 589; French v. Carhart, 1 Comst. (1 N. Y.) 96; Bowen v. Conner, 6 Cush. 132; Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758; Hurd v. Hurd, 64 Iowa, 414; King v. iBshop, 62 Miss. 553; Perkins v. Aldrich, 77 Me. 96; Foster v. Foss, 77 Me. 279; Varner v. Rice, 44 Ark. 236; Dunn v. Sanford, 51 Conn. 443; Dennison v. Taylor, 15 Abb. N. C. 439.

[5] Rich v. Zeilsdorff, 22 Wis. 544, 99 Am. Dec. 81; Martin v. Gilson, 37 Wis. 360; Hodges v. Buell, 134 Mich. 162, 95 N. W. 1078; Richards v. Tozer, 27 Mich. 451; Monroe v. Bowen, 26 Mich. 523; Saltonstall v. Little, 90 Pa. 422, 35 Am. Rep. 683; Clark v. Guest, 54 Ohio St. 298, 43 N. E. 862; Perkins v. Stockwell, 131 Mass 529; Lockeshan v. Miller, 16 Ky. L. R. 55; Adkins v. Huff, 58 W. Va. 645, 3 L.R.A. (N.S.) 649, 52 S. E. 773.

[6] Strasson v. Montgomery, 32 Wis. 52; Golden v. Glock, 57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 703; Larson v. Cook, 85 Wis. 564, 55 N. W. 703; Haskell v. Ayres, 35 Mich. 89; Wasey v. Mahoney, 55 Mich. 194, 20 N. W. 901; Prentiss v. Ross, 96 Mich. 83, 55 N. W. 613; Utley v. Wilcox Lumber Co., 59 Mich. 263, 26 N. W. 488; Macomber v. Detroit L. & N. R. Co., 108 Mich. 91, 32 L.R.A. 102, 62 Am. St. 713, 66 N. W. 376; Reed v. Merrifield, 10 Met. 155; Fletcher v. Livingston, 153 Mass. 388, 26 N. E. 1001; Putney v. Day 6 N. H. 430; Pease v. Gibson, 6 Me. 81; Howard v. Lincoln, 13 Me. 122; Webber v. Proctor, 89 Me. 404, 36 Atl. 631; Judevine v. Goodrich, 35 Vt. 19; Strong v. Eddy, 40 Vt. 547; Kellam v. McKinstry, 69 N. Y. 264; Sanders v. Clark, 22 Iowa, 275; Bunch v.

or may remove the timber within a time limited carries with it an implied right to enter upon the land for that purpose.[7] The time is not extended by the fact that the grantor is prevented from removing the timber by an attachment of his interest, if the purchaser of the land was not concerned in securing the attachment.[8] The title of the grantor to the timber reserved is not absolute but is dependent upon its removal.[9] But this rule is not universally accepted as it is also held that such a reservation is unconditional and that the right of the grantor to remove the timber is not lost by his failure to exercise that right within the time specified.[1]

§ 990. **Restrictions and stipulations.**—A deed, like any other contract, may contain stipulations and restrictions of various kinds. Courts in construing them will endeavor to ascertain the intention of the parties, and will give effect to such intention when ascertained. Where a railroad company acquired, by a grant from the city, the right and privilege of using four distinct parts of certain streets, by virtue of four distinct paragraphs contained in the deed—in the last paragraph, immediately following the fourth grant, occurring the limitation, "said right and privilege to be enjoyed until" a specified time, the restriction was considered as not applying

Elizabeth City Lumber Co., 134 N. C. 116, 46 S. E. 24; Null v. Elliott, 52 W. Va. 229, 43 S. E. 173; Morgan v. Perkins, 94 Ga. 353, 21 S. E. 574; Broussard v. Verret, 43 La Ann. 929, 9 So. 905. But, see Halstead v. Jessup, 150 Ind. 85, 49 N. E. 821; Peterson v. Barry, 50 Wash. 359.

[7] Perkins v. Stockwell, 131 Mass. 529.

[8] Monroe v. Brown, 26 Mich. 523.

[9] Adkins v. Huff, 58 W. Va. 645, 3 L.R.A.(N.S.) 649, 52 S. E. 73.

[1] Irons v. Webb, 41 N. J. L. 203, 32 Am. Rep. 193. See Dyer v. Hartshorn, 73 N. H. 509, 63 Atl. 231, holding that the title to the trees reserved is absolute and that their continuance on the land after the time specified is unlawful, but does not affect the title. That grantor has a reasonable time only in which to remove the timber if no time is specified, see Decker v. Hunt, 98 N. Y. Supp. 174, 11 App. Div. 821. See, also, Huron Land Co. v. Davison, 131 Mich. 86, 90 N. W. 1034.

to the three grants first contained in the deed.[2] Restrictions inserted in a deed as a part of a scheme for a plan of improvement, are not to be deemed conditions in the technical sense, although spoken of as conditions. A forfeiture does not arise from their breach.[3] If a deed contains a restriction that no building shall be placed upon the land within a specified distance of a street, the street, as it existed at the time of the imposition of the restriction, and not as subsequently altered by public authority, is the one to which reference is considered to be made.[4] Where a deed conveyed land bounded on one side by a street, and on another by a railroad, and contained the clause, "subject to the condition that no building shall ever be placed on that part of the same lying within twenty-five feet of said street, and, also, that the present occupant of a part of the premises near said railroad for a lumberyard shall be allowed the time until October 1st, next, to remove his lumber and evacuate the premises, but no longer without the

[2] Quincy v. Chicago, Burlington etc. R. R. Co., 94 Ill. 537. The courts endeavor to ascertain the intention of the parties. Hobson v. Cartwright, 93 Ky. 368, 20 S. W. 281; Summers v. Beeler, 90 Md. 475, 48 L.R.A. 54, 45 Atl. 19; Bagnall v. Young, 151 Mich. 69, 114 N. W. 674; Hyman v. Lash (N. J. Ch.), 71 Atl. 742; Wesley v. Sulzer, 224 Pa. 311, 73 Atl. 338; Temple v. Sanborn, 41 Tex. Civ. App. 65, 91 S. W. 1095; see, also, Unitarian Ass'n v. Minot, 185 Mass. 589, 71 N. E. 551.

[3] Ayling v. Kramer, 133 Mass. 12. They must be created by apt words. McCusker v. Goode, 185 Mass. 607, 71 N. E. 76.

[4] Tobey v. Moore, 130 Mass. 448. If a deed contains the restriction that the front wall of any building erected on the lot should be set back a distance of twenty-two feet from the street, with the proviso that "steps, windows, porticos, and other usual projections appurtenant thereto are to be allowed in said reserved space of twenty-two feet," the restriction is violated by the projection of the whole front wall, except less than two feet at each end, into the reserved space, into the form of a bay extending up the whole height of the house, with a foundation, roof, and windows. This is true, notwithstanding such projections had been usual in the city for several years, and that the grantor subsequently conveyed lots in the same locality permitting such projections: Linzee v. Mixer, 101 Mass. 512.

consent of said grantee," both clauses take effect only by way of restriction. In the absence of evidence that the restriction was imposed for the benefit of other land, it is construed as a personal covenant merely with the grantor.[5] If a deed, in describing the lot of land conveyed, refers to a plan, this reference does not import a stipulation by the grantor against subsequently changing the plan in any respect, in parts not adjacent to the land conveyed.[6] A restriction forbidding the use of a building for the trade of a butcher, or for any "nauseous or offensive trade whatsoever," or for a purpose "which shall tend to disturb the quiet or comfort of the neighborhood," does not prevent the use of the building for the sale of groceries and provisions.[7] But where a deed contains a restriction that no building, with the exception of a dwelling-house, shall be erected on the lot, and that such building when erected shall not be used for the purpose of carrying on any offensive trade or calling, the erection of a building and the occupation of the lower story as a retail grocery constitute a violation of the restriction. The use of the building in this manner may be restrained by injunction.[8]

[5] Skinner v. Shepard, 130 Mass. 180. Where a deed contained a restriction that no building should be placed upon the land within ten feet of the street, the erection of a brick wall six feet high, with a coping one foot in height, to be used as a fence or wall on the line of the street, does not violate this restriction: Nowell v. Academy of Notre Dame, 130 Mass. 209. For a case in which certain erections were held to be a violation of a restriction, that the front line of the building should be fifteen feet from the street, and "that no dwelling-house or other building shall be erected on the rear of said lot," see Sanborn v. Rice, 129 Mass. 387. As to the right of purchaser of property under general plan to enforce common building restrictions against another purchaser see Judd v. Robinson, 41 Colo. 222, and monographic note thereto in Vol. 14 A. & E. Ann. Cas. 1021.

[6] Collidge v. Dexter, 129 Mass. 167.

[7] Tobey v. Moore, 130 Mass. 448.

[8] Dorr v. Harrahan, 101 Mass. 531, 3 Am. Rep. 398. This case differs from Tobey v. Moore, 130 Mass. 448, in that the grantee was restricted from erecting anything but a dwelling-house. See, also, Linzee v. Mixer, 101 Mass. 512. For other cases in which restrictions and stipulations have been

§ 990a. **Offensive occupations.**—A restriction may be inserted in a deed, prohibiting the use of the premises for classes of business deemed offensive by the grantor.[9] The restriction may prohibit the carrying on of any trade or business.[1] A clause preventing the carrying on of certain kinds of business may also exclude, in general terms, other kinds of business as being offensive, which are not, strictly speaking, nuisances. Thus, the owner of several adjoining lots inserted a stipulation in the deeds when selling them to the purchasers, "for themselves, and their representatives, heirs, and assigns, owners of any of the said lots above described, that no buildings other than dwelling-houses, at least two stories high, of brick or stone, or churches, chapels, or private stables, of the same material, shall be erected on any of said lots; that no livery or other stable shall be erected on lots fronting on Madison Avenue, and that there shall not be allowed, or erected on any part of said lots of land, any tenement house, brewery, or lager beer saloon, tavern, slaughterhouse, forge, furnace, steam engine foundry, carpenter's or carriage or car shop, manufactory of metals, gunpowder, glue, varnish, vitriol, turpentine, ink or matches, or any distillery, or any establishment for dressing hides, skins or leather or any museum, theater, circus, or menagerie, nor shall any other buildings be

construed, see Higman v. Stewart, 38 Mich. 513; Chapman v. Gordon, 29 Ga. 250; Hicks v. McGarry, 38 Mich. 667; Scott v. Ward, 13 Cal. 458; Beals v. Case, 138 Mass. 138; Thompson's Appeal, 101 Pa. St. 225; Barker v. Barrows, 138 Mass. 578.

[9] Barrow v. Richard, 8 Paige, 351, 35 Am. Dec. 713; Whitney v. Union Ry. Co., 11 Gray, 359, 71 Am. Dec. 715; Cross v. Frost, 64 Vt. 179; Rowland v. Miller, 139 N. Y. 93, 22 L.R.A. 182; Dorr v. Harrahan, 101 Mass. 531; Hall. v. Ervin, 37 Ch. D. 74; Brouwer v. Jones, 23 Barb. 153; Bramwell v. Lacey, 10 Ch. D. 691; Gannett v. Albree, 103 Mass. 372; Morris v. Tuskaloosa Mfg. Co., 83 Ala. 565; Winnipesaukee Camp Meeting Assn. v. Gordon, 63 N. W. 505. See, also, Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936; Fink v. Hughes, 133 Mich. 63, 94 N. W. 601; United States v. Certain Lands in Jamestown, 112 F. 622.

[1] Trustees v. Thacher, 87 N. Y. 311; 41 Am. Rep. 365.

erected, or trade or business carried on upon said lots which shall be injurious or offensive to the neighboring inhabitants; it being expressly agreed that this covenant runs with the land, and is binding on all future owners thereof." A corporation, whose business was that of undertakers, had leased a building upon one of the lots formerly occupied as a dwelling-house, and had fitted it up and was using it for the reception of dead human bodies, their preparation for burial, the holding of autopsies, and for such other purposes as were incident to their business as undertakers. The owner of one of the lots sold brought an action to restrain the violation of the agreement, and the court held that the business was an offensive one within the meaning of the agreement, and that the court could take judicial notice of its nature, and hence granted an injunction.[2] But where a deed prohibits the carrying on of

[2] Rowland v. Miller, 139 N. Y. 93, 22 L.R.A. 182, 34 N. E. Rep. 765. Mr. Justice Earl, in delivering the opinion of the court, said that it would be too narrow a construction to hold that the agreement prohibited only trades or kinds of business which are nuisances *per se*, and continued: "This clause in the agreement must have a reasonable construction. We cannot suppose that the parties had in mind any business which might be offensive to a person of a supersensitive organization, or to one of a peculiar and abnormal temperament, or to the small class of persons who are generally annoyed by sights, sounds, and objects not offensive to other people. They undoubtedly had in mind ordinary, normal people, and meant to prohibit trades and business which would be offensive to people generally, and would thus render the neighborhood to such people undesirable as a place of residence. It cannot be doubted that the business of the Taylor Company was, within this definition, offensive to the neighboring residents. People of ordinary sensibilities would not willingly live next to a lot upon which such a business is carried on. Any ordinary person desiring to rent such a house as plaintiff's, would not take her house if he could get one just like it, at the same rent, at some other suitable and convenient place. Indeed, her house would be shunned by people generally, who could afford to live in such an expensive house. The courts can take judicial notice of the offensive character of such a business. Judges must be supposed to be acquainted with the ordinary sentiments, feelings, and sensibilities of the people among whom they live, and hence, in this case, the learned judge, after the

"any nauseous or offensive business whatever," it is mainly a question of fact whether the erection of a stable comes within the language of the restriction.[3] A deed contained a covenant against using the premises for certain specified businesses, and concluded with the general clause, "or any other manufactory, trade, or business whatsoever which should or might be offensive to the neighboring inhabitants." It was considered that carrying on the business of a coal yard was prohibited by this restriction.[4] So, also, the contemplated erection of an automobile garage has been held to be in violation of a restriction that no building shall be used or occupied offensive to the neighborhood for dwelling houses.[4a] But it is said that an apartment house is not a building offensive to the neighborhood.[5]

§ 990b. **Building lines.**—It is a common practice to insert in deeds a restriction that buildings that may be erected shall be distant a specified space from the front line of the lot, and such restrictions are valid. The grantee under such a deed does not acquire an absolute and unqualified title, but it is a part of the title which he accepts, that the use of the land shall be limited and restricted as provided by the deed.[6]

character of the business carried on by the Taylor Company had been proved, could have found, as a matter of law, that it was a violation of the restriction agreement without any further proof."

[3] Whitney v. Union Railway Co., 11 Gray, 359, 71 Am. Dec. 715.

[4] Barrow v. Richard, 8 Paige, 351, 35 Am. Dec. 713. Where the conditions have changed so that the enforcement of the restriction would no longer be of benefit to the person in whose favor it was made, the courts may refuse to enforce it: Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365.

[4a] Evans v. Foss, 194 Mass. 513, 9 L.R.A.(N.S.) 1039, 11 A. & E. Ann. Cas. 171.

[5] Kitching v. Brown, 180 N. Y. 414, 70 L.R.A. 742, 73 N. E. 241.

[6] Reardon v. Murphy, 163 Mass. 501; Payson v. Burnham, 141 Mass. 547; Linzee v. Mixer, 101 Mass. 512; Hamlen v. Werner, 144 Mass. 396; Bagnall v. Davies, 140 Mass. 76; Peck v. Conway, 119 Mass. 546; Attorney General v. Algonquin Club, 155 Mass. 128; Sanborn v. Rice, 129 Mass. 387; Attorney Gen-

"It often happens," says Mr. Justice Soule, "that owners of land, which they design to put into market lots for dwelling-houses, insert in the deeds of the several lots a uniform set of restrictions as to the purposes for which the land may be used, and as to the portions of it which may be covered by buildings. So far as these restrictions are reasonable in their character, they are upheld and enforced by courts of equity in favor of the original owner, so long as he continues to own any part of the tract for the benefit of which the restrictions were created, as well as in favor of the owner of any one of the lots into which the tract was divided, and against the owner of any of the lots who attempts to set the restriction at naught." [7] Where the owners of a tract of land lay it out into house lots, and agree among themselves orally that the lots shall be occupied exclusively for dwelling-houses, and in the deed executed by them insert a clause that no buildings shall be erected on the lots except for dwelling-houses only, the grantee is bound by the condition, and he may be prevented by the purchasers of others of the lots from converting a dwelling-house upon his lot into a public eating-house.[8] Re-

eral v. Williams, 140 Mass. 329; 54 Am. Rep. 568; Attorney General v. Gardiner, 117 Mass. 492. The character, use and location of buildings may be restricted by conditions, restrictions and covenants. See Quatman v. McCray, 128 Cal. 285, 60 Pac. 855; Frink v. Hughes, 133 Mich. 63, 94 N. W. 601; Ewersten v. Gerstenberg, 186 Ill. 344, 51 L.R.A. 310, 57 N. E. 1051. In re Welsh, 175 Mass. 68, 55 N. E. 1043; Best v. Nagle, 182 Mass. 495, 65 N. E. 842; Sutcliffe v. Eisele, 62 N. J. Eq. 222, 50 Atl. 69.

[7] Sanborn v. Rice, 129 Mass. 396.

[8] Parker v. Nightingale, 6 Allen, 341, 83 Am. Dec. 632. Said Mr. Chief Justice Bigelow: "A court of chancery will recognize and enforce agreements concerning the occupation and mode of use of real estate, although they are not expressed with technical accuracy, as exceptions or reservations out of a grant not binding as covenants real running with the land. Nor is it at all material that such stipulations should be binding at law, or that any privity of estate should subsist between parties, in order to render them obligatory, and to warrant equitable relief in case of their infraction. A covenant, though in gross at law, may, nevertheless be binding in equity, even to the extent of fastening a servitude or easement on real property, or of

strictions are also frequently inserted in deeds prohibiting the erection of buildings beyond a certain height, and such restrictions are valid.[9]

§ 990c. Extension of room, window, or piazza.—A restriction prohibiting the erection of a building within a speci-

securing to the owner of one parcel of land a privilege, or, as it is sometimes called, a right to an amenity, in the use of an adjoining parcel, by which his own estate may be enhanced in value, or rendered more agreeable as a place of residence. Restrictions and limitations which may be put on property by means of such stipulations, derive their validity from the right which every owner of the fee has to dispose of his estate, either absolutely or by a qualified grant, or to regulate the manner in which it shall be used and occupied. So long as he retains the title in himself, his covenants and agreements respecting the use and enjoyment of his estate will be binding on him personally, and can be specifically enforced in equity. When he disposes of it by grant or otherwise, those who take under him cannot equitably refuse to fulfill stipulations concerning the premises of which they had notice. It is upon this ground that courts of equity will afford relief to parties aggrieved by the neglect or omission to comply with agreements respecting real estate after it has passed by mesne conveyances out of the hands of those who were parties to the original contract. A purchaser of land, with notice of a right or interest in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate, of which he had notice when he became the purchaser. In such cases, it is true that the aggrieved party can often have no remedy at law. There may be neither privity of estate, nor privity of contract, between himself and those who attempt to appropriate property in contravention of the use or mode of enjoyment impressed upon it by the agreement of their grantor, and with notice of which they took the estate from him. But it is none the less contrary to equity that those to whom the estate comes, with notice of the rights of another respecting it, should wilfully disregard them, and, in the absence of any remedy at law, the stronger is the necessity for affording such cases equitable relief, if it can be given consistently with public policy, and without violating any absolute rule of law." See, also, Whittenton Mfg. Co. v. Staples, 164 Mass. 320, 29 L.R.A. 500; Whitney v. Union Railway Co., 11 Gray, 359, 71 Am. Dec. 715.

[9] Keening v. Ayling, 126 Mass. 404; Smith v. Bradley, 154 Mass. 227; Hobson v. Cartwright, 93 Ky. 368.

fied distance of a line, requires that no part of the building shall project beyond such line.[1] For instance, a restriction in a deed declared that no building should be erected within twenty feet of a certain street. The grantee built a house facing that street, the front wall of which was twenty feet distant from the street; but a part of the roof sloping toward the street was extended to a line about fourteen feet distant from the street covering a piazza, and supported by posts placed six feet from the front wall of the house, and in this part of the house there was also a dormer window by which a room in the second story was extended a distance of three feet from the line of the front wall of the house. It was decided that the portion of the roof and dormer window extending beyond the front line of the building was an extension of the building, and prohibited by the restriction in the deed.[2] So, in another case, where the restriction was: "No building erected on said premises shall be placed at a less distance than twenty feet from the said easterly line of Parsons street," and the front line of the main body of the house was twenty feet from the street but attached to the house, and extending along the entire front was a piazza, about eight feet wide and having a roof supported by posts, it was considered that the whole of the piazza was within the terms of the restriction.[3] But an awning in front of a building extending thirteen feet from the house line to the curb does not constitue a violation of a restriction providing "that the front of any messuages,

[1] Bagnall v. Davies, 140 Mass. 76; Attorney General v. Williams, 140 Mass. 329, 54 Am. Rep. 468; Payson v. Burnham, 141 Mass. 547; Manners v. Johnson, 1 Ch. Div. 673. See, also Ogontz v. Land etc. Co., 168 Pa. St. 178, 31 Atl. 1008.

[2] Bagnall v. Davies, 140 Mass. 76.

[3] Reardon v. Murphy, 163 Mass. 501. The court said it could see no ground for a distinction between a piazza covered by the main extension of a house and one covered by its own roof and attached to the house. See, also, Smith v. Bradley, 154 Mass. 227; Ogontz Land and Improvement Co. v. Johnson, 168 Pa. St. 178.

dwelling houses, and other buildings" shall recede eight feet from the street line.[4]

§ 990d. **Bay windows.**—Bay windows are also considered as parts of a building.[5] A deed contained this clause: "It is further agreed that the building or buildings that shall be erected on the said lot shall be of brick and set the same distance back from Third street, as the house now erected on the southwest corner of Third and Oak streets, and shall be suitable dwellings for the neighborhood." The court construed this clause as requiring that the front wall only of each building erected on the land should be equally distant from the street, with the front wall of the house then standing on the other lot, and as not intending to forbid the erection or to prescribe the shape or dimension of any porch, stoop, or platform which the respective owners might please to build.[6] It was stipulated in a deed that the front wall of any building erected on the land conveyed should be set back twenty feet from the avenue, with a proviso that "porticos and other usual projections" appurtenant to the wall might project into the reserved space, subject to these limitations: "No projection of any kind other than doorsteps and balustrades connected therewith, and also cornices at the roof of the building, will be allowed to extend more than five feet from said wall into said front space. No projection in the nature of a bay window, circular front, or octagon front, with the foundation wall sustaining the same (such foundation wall being a projection of the front wall) will be allowed, unless any horizontal section of such projection would fall within the external lines of a trapezoid, whose base upon the rear line of the aforesaid space does not exceed seven-tenths of the whole

[4] Oclott v. Knapp & Co., 89 N. Y. Supp. 201.

[5] Sanborn v. Rice, 129 Mass. 387; Attorney General v. Williams, 140 Mass. 329, 54 Am. Rep. 468; Payson v. Burnham, 141 Mass. 547; Kirkpatrick v. Peshine, 24 N. J. Eq. 206.

[6] Graham v. Hite, 93 Ky. 474.

front of the building, nor exceed eighteen feet in any case, and whose side lines make an angle of forty-five degrees with the base; and each house in a block shall be considered a separate building within the meaning of this limitation." The court decided that the basement story of such a building surmounted by a balcony such as had never been used in this country was not a "usual projection" within the meaning of the deed, and also that each of several bay windows of the building must fall within the external lines of a trapezoid, the base of which, while it might overlap upon a portico or balcony, was clear of that of the adjoining bay window, and did not extend beyond the exterior lines of the building, and the combined bases of all the trapezoids must not exceed seven-tenths of the whole front of the building. A mandatory injunction was issued for the removal of such projections as were insisted upon, unless so slight as to come within the rule *de minimis*.[7]

§ 990e. **Restrictions as to purposes of building lots.**— Frequently an owner of a tract of land who desires to cut it up into lots for building purposes, inserts in the deeds of sale building restrictions as a part of a general plan for the improvement of the whole tract. When uniform restrictions as to the purposes for which the lots may be used are inserted in the deeds, these provisions inure to the benefit of the several grantees. Each grantee, may, in equity, enforce these provisions against the other grantees.[8] It is, however, essential to ascertain the purpose of the grantor in the imposition of

[7] Attorney General v. Algonquin Club, 153 Mass. 447, 11 L.R.A. 500. See, also, as to the construction of the decree, the later case of Attorney General v. Algonquin Club, 155 Mass. 128. See, also, Attorney General v. Ayer, 148 Mass. 584; Linzee v. Mixer, 101 Mass. 512.

[8] Payson v. Burnham, 141 Mass. 547, 6 N. E. 708; Jeffries v. Jeffries, 117 Mass. 184; Parker v. Nightingale, 6 Allen 341; Sanborn v. Rice, 129 Mass. 387; Whitney v. Railway Co., 11 Gray 359; Beals v. Case, 138 Mass. 138; Peck v. Conway, 119 Mass. 548.

these restrictions. They may be made for his own personal benefit, or they may have been imposed for the benefit generally of the purchasers of the lots; and the grantor's intention may be ascertained from his acts and the circumstances.[9] In a case where the owner of a tract of land platted it into thirteen city lots and sold twelve of them by deeds executed contemporaneously, in each of which buildings to be erected on the lots were restricted to "first class dwelling houses only," except that in the case of an irregular corner lot, and not suitable for a dwelling, the erection of a store was allowed. The grantor conveyed without restriction the remaining lot which was also irregular in shape and unfit for dwelling purposes. As the grantor owned no other land in the neighborhood, it was held that this restriction as to building was placed on each lot for the benefit of all the others and consequently that each owner had the right to enforce it against all the others.[1] So, where a grantor having platted a tract of land, disposed of them by deeds each containing the condition that "no building except a dwelling house, to be exclusively used as a residence for a private family shall ever be erected thereon." As these restrictions are for the benefit of the purchasers, they can be enforced in equity both by and against the grantees.[2] But if the owner of the land executes a number of conveyances subject to restrictions, and also a number of other conveyances free from all restrictions, a court is not justified in concluding that a general building scheme founded on these restrictions was adopted for the whole tract.[3] Nor can such a general scheme of restriction be said to be shown by a deed reciting that it was made subject to the restrictions, "if any now exist," mentioned in a former deed from the grantor to a third person as such a recital will be considered not as

[9] Hano v. Bigelow, 155 Mass. 341, 29 N. E. 628.

[1] Hano v. Bigelow, 155 Mass. 341, 29 N. E. 628.

[2] Hopkins v. Smith, 162 Mass. 444, 38 N. E. 1122.

[3] Donahoe v. Turner, 204 Mass. 274, 90 N. E. 549; See, also, Haines v. Einwachter (N. J.) 55 Atl. 38.

showing a scheme of restriction but merely as precautionary.[4] If a deed contains a covenant against incumbrances the measure of damages caused by the existence in the chain of title of the grantor of a covenant against the erection of certain kinds of buildings on the lot for a specified number of years, and which requires that any building placed on the lot shall be a certain distance from the street is the difference between the value of the lot with and without this covenant.[5] Although the restriction, forbidding the erection of a building more than nine feet "on the rear end of the lot" is vague and indefinite, because it cannot be said with any degree of certainty what constitutes the rear end of a lot, yet if the grantee admits that his intention is to erect a five story building on the entire lot he may be enjoined.[6]

§ 991. **Removal of restriction.**—Where a restriction is imposed for a certain purpose, and the object for which the restriction was made is afterward abandoned, the land may become free from the restriction. Thus, land lying between two streets in a city was divided up by the corporation owning it into lots, and sold at auction. Among the terms of the sale was the provision that "between the lots there shall be a railway fourteen feet wide, to be for the common benefit of all the lots bounding on it, to be used for no other purpose than a railway, and no building is ever to be built over it." By the deeds, afterward executed, the fee to the middle of this strip of land was conveyed, with the easements, and subject to the restrictions named in the terms of the sale. On this strip of land railway tracks were afterward laid, but subsequently its use for a railway ceased. An owner of one of the lots commenced a suit in equity, more than twenty years after the abandonment of the land for railway purposes, to

[4] Donahoe v. Turner, 204 Mass. 274, 90 N. E. 549.

[5] Williams v. Hewitt, 57 Wash. 62, 106 Pac. 496.

[6] Wesley v. Sulzer, 224 Pa. 311, 73 Atl. 338.

compel the removal of a structure on the land of the defendant. The court held, however, that, as to the strip of land reserved for a railway, the defendant might use his land in any way he desired. It was no longer subject to the restriction that no building should be erected on it.[7] Where there is a covenant against the erection of tenement houses, it will not be enforced if flats and tenement houses have already been erected upon the larger portion of the adjacent lots. Such a change in the neighborhood defeats the object of the covenant, and it would be contrary to the principles of equity to deprive the owner of making a profitable use of his property. Compensation, however, will be given in damages.[8] The right to enforce a restriction may be barred by acquiescence in violation of the same or other similar restrictions. "The recognized doctrine is that where a vendor sells off an estate in lots, with restrictions upon the use of the lots sold, he will lose his right in equity to enforce the restrictions against one grantee, if he has knowingly permitted other grantees to violate the same restrictions, the effect of which violation is to abrogate the purpose of the restriction and alter the general

[7] Bangs v. Potter, 135 Mass. 245. Said Coburn, J., in delivering the opinion of the court: "These servitudes and easements were expressly limited to a railway; and, though it would be a benefit to each lot to receive light and air through the space which was to be kept open for the railway, the benefits of light and air are incidents which result from the provisions for a railway, and are not provided for independently of the railway, and no servitude is imposed or easement granted for any purpose but the railway; and, when the railway was abandoned, all servitudes and easements terminated, and each owner had the right to use the whole of his lot for any purpose he pleased, without restraint by the 'terms of sale' or provisions in the deeds: Central Wharf v. India Wharf, 123. Mass. 567. What provision the corporation would have made for the use of this strip of land, if the possibility that the railway might be abandoned had been considered, it is useless to conjecture; it did not provide for such contingency, and the provisions of the deeds cannot be modified or extended, so as to make them in accordance with what it may be supposed the corporation would have done if it had anticipated the existing state of things."

[8] Amerman v. Deane, 132 N. Y. 355, 28 Am. St. Rep. 584.

scheme intended to be conserved by it. The rule is applicable whether the suit is brought by the covenantee or by one of several grantees of land sold in accordance with the general scheme by the original covenantee.

"It rests upon the equitable ground that if any one who has a right to enforce the covenant and so preserve the conditions which the covenant was designed to keep unaltered, shall acquiesce in material alterations of those conditions, he cannot thereafter ask a court of equity to assist him in preserving them." [9] But an abandonment will not be presumed because, in a few instances, a mere strict observance of the covenants has not been required.[1] And it is said that the violation acquiesced in must be of such character as to be offensive to the complainant in order that equity will refuse to grant relief on the theory that the right of enforcement has been lost by acquiescence.[2] The violations acquiesced in must be material in order that equity will withhold relief.[3]

[9] Ocean City Ass'n v. Chalfant, 65 N. J. Eq. 156, 1 A. & E. Ann. Cas. 601, 55 Atl. 801, citing Roper v. Williams, T. & R. 18; Peek v. Matthew, L. R. 3 Eq. 515. See, also, Chelsea Land etc. Co. v. Adams, 71 N. J. Eq. 771, 14 A. & E. Ann. Cas. 758, 66 Atl. 180; Brown v. Wrightman, 5 Cal. App. 391, 90 Pac. 467; Sharer v. Pantler, 127 Mo. App. 433, 105 S. W. 668; Lignot v. Jaekle (N. J.), 65 Atl. 221; and see Bowen v. Smith, (N. J. Eq.), 74 Atl. 675; Righter v. Winters, 68 N. J. Eq. 252, 59 Atl. 770. See, also, in this connection Sec. 991 (c) post.

[1] Morrow v. Hasselman, 69 N. J. Eq. 612, 61 Atl. 364; Lignot v. Jaekle (N. J.), 65 Atl. 221; Waters v. Collins (N. J.), 70 Atl. 984; Newbery v. Barkalow, (N. J.), 71 Atl. 752; De Lima v. Mitchell, 98 N. Y. Supp. 811, 49 Misc. 171; Levy v. Halcyon etc. Co., 92 N. Y. Supp. 231, 45 Misc. 289. Must be acquiesence by complainant to bar relief; Bingham v. Murlok Co. (N. J.), 70 Atl. 185. See, also, in this connection, Woodbine etc. Co. v. Reiner (N. J.), 65 Atl. 1004.

[2] Osborne v. Bradley, 2 Ch. 446; Barten v. Slifer, 72 N. J. Eq. 812, 66 Atl. 899; Rowland v. Miller, 139 N. Y. 93, 22 L.R.A. 182, 34 N. E. 765; Levy v. Halycon etc. Co., 92 N. Y. Supp. 231, 45 Misc. 289; McDonald v. Spang, 105 N. Y. Supp. 617, 55 Misc. 332; Brigham v. Murlock Co., 74 N. J. Eq. 287, 70 Atl. 185; Bowen v. Smith (N. J. Eq.), 74 Atl. 675; McGuire v. Caskey, 62 Ohio St. 419, 57 N. E. 53.

[3] See Hyman v. Lash (N. J. Eq.), 71 Atl. 742; Bowen v. Smith (N.

§ 991a. **Reasonable construction.**—A restriction that a building shall be used only for particular purposes, or that it may be used for any purpose except those specified, must, like every other contract, receive a reasonable construction. It was contended in a case that we have already cited, where the use of a lower story of a dwelling-house as a grocery was prohibited, that such restrictions are viewed with disfavor, and are not to be extended by implication beyond their literal interpretation, and that the grantee had the right to convert his dwelling, when built, into a place of business, and might carry on such business if he did so in an inoffensive manner. Mr. Justice Ames answered this contention by observing: "But this mode of dealing with the condition deprives it of all force whatever, and seems to us to be a mere evasion. There is nothing in the condition that appears to be unreasonable, or contrary to the policy of the law; and there is no reason for doing violence to the language in which it is expressed, or perverting its true meaning. Some kinds of industry might be carried on in a dwelling-house without any inconvenience whatever to the neighborhood. The house might be occupied by a physician or a lawyer, perhaps by a chemist or photographer, and a portion of it set apart as an office or place of business, without any offense or objection. All this would be allowable under the deed. But to change a dwelling-house into a grocery, a workshop, or a market, would be a very different matter. The condition cannot be construed as having any other meaning than to prescribe the kind of a building that shall be erected, and the manner in which it shall be used and occupied."[4] Where a deed provides that the grantor should

J. Eq.), 74 Atl. 675; Adams v. Howell, 108 N. Y. Supp. 945, 58 Misc. 435; Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936; Stewart v. Finklestone (Mass.), 92 N. E. 37; note, also, Righter v. Winters, 68 N. J. Eq. 252, 59 Atl. 770; Brigham v. Mulock Co., 74 N. J. Eq. 287, 70 Atl. 185; Morrow v. Hasselman, 69 N. J. Eq. 612, 61 Atl. 369; Waters v. Collins (N. J. Eq.), 70 Atl. 984; McGuire v. Caskey, 62 Ohio St. 419, 57 N. E. 53.

[4] Dorr v. Harrahan, 101 Mass.

not put upon the premises "any buildings, timbers, trees, or other nuisances," the term "other nuisances" will not include excavations unless such an intention is apparent from the deed as a whole.[5] But a condition that no dwelling house shall contain more than two tenements or be erected for more than two families is violated where a building is erected with a capacity for three families.[6] And the carrying on of a photograph gallery is a violation of a restriction forbidding the erection of buildings other than dwelling houses and necessary out buildings.[7]

§ 991b. **Public policy.** A restriction in a deed that the land conveyed shall be used for residence purposes only, and not for the purpose of carrying on any trading or mercantile business is not opposed to public policy.[8] An agree-

534, 3 Am. Rep. 398. In case of doubt, the clause creating the restriction should be construed against the grantor and in favor of the grantee's right not to have the land restricted. American etc. Ass'n v. Minot, 185 Mass. 589, 71 N. E. 551. The restriction will not be extended by construction. Quatman v. McCray, 128 Cal. 285, 60 Pac. 855; Peck v. Hartshorn, 189 Mass. 110, 75 N. E. 133; Waters v. Collins (N. J. Ch.), 70 Atl. 984.

[5] Cross v. Frost, 64 Vt. 179. Said Mr. Justice Munson: "It is a general rule that when words of particular designation are followed by an expression of general import, the latter can be held to include only things similar in character to those specially named: Brainerd v. Peck, 34 Vt. 496; Parks Administrator v. American Home etc. Soc., 62 Vt. 19; Re Barre Water Co., 62 Vt. 27, 9 L.R.A. 195. If this rule governs the construction of the clause quoted, the phrase 'other nuisances' cannot be made to include a lowering of the surface, for the things named are only such as are placed upon and raised above the surface. We think the scope of the phrase must be restricted in accordance with this rule, unless its use in a more comprehensive sense is apparent from the instrument as a whole."

[6] Ivarson v. Mulvey, 179 Mass. 141, 60 N. E. 477. Apartment house not tenement, see Marx v. Brogan, 98 N. Y. Supp. 88, 111 App. Div. 480. See, also, Kitching v. Brown, 180 N. Y. 414, 70 L.R.A. 742, 73 N. E. 241. Flat construed, see Lignot v. Jaekle, 72 N. J. Eq. 233, 65 Atl. 221.

[7] Frink v. Hughes (Mich.), 94 N. W. 601.

[8] Morris v. Tuskaloosa Mfg. Co., 83 Ala. 565, 3 So. Rep. 689.

ment in a lease that the premises shall be used "strictly as a private dwelling, and not for any public or objectionable purpose" is broken if the premises are allowed to be used as a boarding-house.[9] Where a statute authorizes the sale to a city of a square, and provides that "no part of said ground lying in the southward of the State-house within the wall as it is now built, be made use of for erecting any sort of buildings thereon, but that the same shall be and remain a public green and walk forever," the restriction is not violated by the erection of a monument consisting of a statue upon a pedestal.[1] A restriction in a deed that the lots conveyed shall not "be used for purposes other than a dwelling-house, office, privy, coach-house or stable, the restriction to cease only when the lot should be built on according to the spirit of the agreement," will prohibit the erection of a church.[2] While it is contrary to

[9] Gannett v. Albree, 103 Mass. 372.

[1] Society of Cincinnati's Appeal, 154 Pa. St. 621, 20 L.R.A. 323, 26 Atl. Rep. 647.

[2] St. Andrew's Church Appeal, 67 Pa. St. 512. It was said by Mr. Justice Sharswood in delivering the opinion of the court: "It is not disputed that the covenant upon which the injunction was prayed ran with the land, and was binding upon the defendants; nor has it been pretended that a court of equity is not bound according to well-established principles and precedents to enforce the specific performance of of such a covenant, by restraining its breach, unless some good ground can be shown to the contrary. It has been argued, but not much pressed, that the edifice proposed to be erected by the defendants, if against the letter, is not against the spirit of the covenant. It is urged that it was aimed at preventing what might be a nuisance or annoyance to the owners of other dwelling-houses on the square, and that a church in no sense would be such. It is enough to say, in answer to this suggestion, that by confining the erection of buildings to private dwelling-houses, offices, privies, or necessary houses, coach-houses, or stables, it was evidently intended to prohibit any buildings of public resort, such as a hotel, circus, menagerie, theater, or other similar establishment; and if the plaintiff cannot prevent a church from being built in the first instance, he certainly could not afterward prevent it from being used for any other purpose. The covenant is directed against the building alone, not the subsequent use, and when a building is lawfully erected on either of the lots, so far as that building is concerned, the covenant is at

good business policy to allow restrictions and prohibitions to be inserted in conveyances which tie up the use of property, nevertheless, if the condition restricting the use of the property is made in good faith, and stipulates for nothing that is *malum in se* or *malum prohibitum,* before the court should determine the condition to be void as contravening public policy, it should be satisfied that the advantage to accrue to the public from so holding is certain and substantial and not theoretical and problematical.[3] Accordingly, a condition in a deed providing that no grain elevator should ever be erected on the village lots conveyed, and that grain should never be handled thereon, was held valid and enforceable, although the building erected was a public warehouse, there being no such warehouse on the premises when conveyed, and the condition not affecting all the available lands in the community.[4] The court in that case says: "So long as the beneficial enjoyment of

an end. There would be nowhere any power to restrain its application to any purpose not a nuisance in itself. To protect himself, therefore, from such a consequence, it was the clear right of the plaintiff to stand upon the covenant, even though the erection of a church might not prove of any actual inconvenience or annoyance to him so long as it was only used as a church. It is plain, too, that in such a case the amount of damage which the plaintiff may be likely to suffer from the threatened breach, ought not to enter as an element in the determination. In this respect there is a manifest distinction between cases depending on nuisance and on contract: Attorney General v. The Railway Companies, Law Rep. 3 Ch. App. 99; Hills v. Miller, 3 Paige, 254; 24 Am. Dec. 218. Indeed, the fact that a jury would not give probably any more than nominal damages, is a circumstance which appeals most strongly to the conscience of the chancellor to stretch forth the strong arm of the court for the plaintiff's relief. It is his only adequate remedy for the violation of a clear and indubitable right." See, also, where the use of a building for charitable purposes has been held to be a violation of a restriction, German v. Chapman, 7 Ch. D. 271; Rolls v. Miller, 25 Ch. D. 206, 27 Ch. D. 71; Bramwell v. Lacy, 10 Ch. D. 691; Winnipesaukee Camp Meeting Assn. v. Gordon, 63 N. H. 505.

[3] Wakefield v. Van Tassell, 202 Ill. 41, 65 L.R.A. 511, 66 N. E. 830, 95 Am. St. Rep. 207.

[4] Wakefield v. Van Tassell, 202 Ill. 41, 65 L.R.A. 511, 66 N. E. 830, 95 Am. St. Rep. 207.

an estate conveyed in fee simple is not materially impaired by restrictions and conditions contained in a deed, such restrictions and conditions, as to the mode of its use, are held valid. The enforcement of these conditions by the courts arises from the principle of law that every owner of the fee has the legal right to dispose of his estate either absolutely or conditionally, or to regulate the manner in which the estate shall be used and occupied, as the grantor may deem best and proper. Just so long as the conditions and restrictions are not violative of the public good or subversive of the public interests they will be enforced." A condition against alienation is void because repugnant to the estate granted.[5] But conditions in partial restraint of alienation have been held good.[6]

§ 991c. **Changed conditions of city.**—Where a restriction is intended to make the locality suitable for a certain purpose, as for instance, for residences, and the growth of the city or other conditions not resulting from a breach of the covenant show that the purpose can no longer be accomplished, it would be inequitable to enforce it, and hence its violation cannot be enjoined in equity.[7] Thus, where a covenant was made that only dwelling-houses should be erected on the land, and that no kind of manufactory, trade, or business should be conducted or suffered on the premises, but subsequently, the advance of business, and the operation of an elevated railroad through the street, caused the value of the property for any purpose except commercial to become great-

[5] Teaney v. Mains, 113 Ia. 53, 84 N. W. 953.

[6] Fouts v. Miliken, 30 Ind. App. 298, 65 N. E. 1050.

[7] Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; Jackson v. Stevenson, 156 Mass. 496, 32 Am. St. Rep. 476; Starkie v. Richmond, 155 Mass. 188; Duke of Belford v. British Museum, 2 Mylne & K. 552; Sayers v. Collyer, 24 Ch. Div. 180; German v. Chapman, 7 Ch. Div. 271. See also, Boston etc. Union v. Trustees, 183 Mass. 202, 66 N. E. 714. See, also, in connection with subject matter of this section, § 991 (ante).

ly lessened, it was decided that owing to the changed conditions, the restriction would not be enforced against a subsequent purchaser.[8] In a similar case Mr. Justice Barker observed: "If all the restrictions imposed in the deed should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions; and since the changed condition of the locality has resulted from other causes than their breach, to enforce them in this instance could have no other effect than to harass and injure the defendant, without effecting the purpose for which the restrictions were originally made."[9] But the party may be entitled to some damages, and is entitled to have the bill retained for the purpose of assessing them.[1] A court of equity will refuse to enjoin the erection of an apartment house, although such erection is in violation of a covenant running with the land, where the greater part of the life of the covenant has elapsed, and, on

[8] Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365. Said Danforth, J., delivering the opinion of the court: "It is true, the covenant is without exception or limitation, but I think this contingency which has happened was not within the contemplation of the parties. The road was authorized by the legislature, and by reason of it there has been imposed upon the property a condition of things which frustrates the scheme devised by the parties, and deprives the property of the benefit which might otherwise accrue from its observance. This new condition has already affected in various ways and degrees the uses of property in its neighborhood, and property values. It has made the defendant's property unsuitable for the use to which, by the covenant of his grantor, it was appropriated, and, if in face of its enactment and the contingencies flowing from it, the covenant can stand anywhere, it surely cannot in a court of equity. The land in question furnishes an ill site for dwelling-houses, and it cannot be supposed that the parties to the covenant would now select it for a residence, or expect others to prefer it for that purpose."

[9] In Jackson v. Stevenson, 156 Mass. 496, 32 Am. St. Rep. 476.

[1] Jackson v. Stevenson, 156 Mass. 496, 32 Am. St. Rep. 476. That consideration of the change in circumstances cannot be indulged in on petition at law. See Welch v. Austin, 187 Mass. 256, 68 L.R.A. 189.

account of the changed circumstances of the neighborhood, due to third persons, the enforcement of the covenant would be of no value to the complainant but would cause great damage to the defendant.[2] On this subject, the New York Court of Appeals says: "Nineteen of the twenty-five years which bounded the life of the covenant in question have passed, and the object of the parties in making it has been defeated by the unexpected action of persons not under the control of the defendant. Under the circumstances now existing the covenant is no longer effective for the purpose in view by the parties when they made it, and the enforcement thereof cannot restore the neighborhood to its former condition by making it desirable for private residence. If the building restriction were of substantial value to the dominant estate, a court of equity might enforce it even if the result would be a serious injury to the servient estate, but it will not extend its strong arm to harm one party without helping the other, for that would be unjust."[3] The rule governing the class of cases under consideration has been well stated by the Supreme Court of Illinois as follows: "Equity will not, as a rule, enforce a restriction, where, by the acts of the grantor who imposed it or of those who derived title under him, the property, and that in the vicinage, has so changed in its character and environment and in the uses to which it may be put as to make it unfit or unprofitable for use if the restriction be enforced, or where to grant the relief would be a great hardship on the owner and of no benefit to the complainant, or where the complainant has waived or abandoned the restriction."[4] In the absence of any material change in conditions directly affecting the character and use of the property in

[2] McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961, 5 A. & E. Ann. Cas. 45. See, also, Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; Stokes v. Stokes, 155 N. Y. 581, 50 N. E. 342.

[3] McClure v. Leaycraft (supra), per Vann, J.

[4] Ewersten v. Gerstenberg, 186 Ill. 344, 51 L.R.A. 310, 57 N. E. 1051. See, also, in this connection, Jenks v. Pawlowski, 98 Mich. 110, 56

question, it is said that equity will not refuse to enforce a restriction on the ground that it has ceased to be binding.[5] And when the restriction, notwithstanding the change of use of the land and buildings, still is of substantial value to the dominant lot, equity will restrain its violation, if relief is promptly sought.[6]

N. W. 1105, 22 L.R.A. 863, 39 Am. St. Rep. 522; Roth v. Jung, 79 N. Y. Supp. 822, 79 App. Div. 1; Deeves v. Constable, 84 N. Y. Supp. 592, 87 App. Div. 352; Loud v. Pendergast, 206 Mass. 122, 92 N. E. 40; Brown v. Wrightman, 5 Cal. App. 391, 90 Pac. 467; Curtis v. Rubin, 244 Ill. 88, 91 N. E. 84; Sharer v. Pantler, 127 Mo. App. 433, 105 S. W. 668; Ocean City Ass'n v. Chalfant, 65 N. J. Eq. 156, 55 Atl. 801, 1 A. & E. Ann. Cas. 601; Bowen v. Smith (N. J. Eq.), 74 Atl. 675; Righter v. Winters, 68 N. J. Eq. 252, 59 Atl. 770; Hemsley v. Hotel Co., 62 N. J. Eq. 164, 50 Atl. 14; Chelsea Land & Improv. Co. v. Adams, 71 N. J. Eq. 771, 66 Atl. 180, 14 A. & E. Ann. Cas. 758; Los Angeles etc. Co. v. Muir, 136 Cal. 36, 68 Pac. 308; Shaefer v. Ball, 104 N. Y. Supp. 1028, 53 Misc. 448; Schwartz v. Duhne, 103 N. Y. Supp. 14, 118 App. Div. 105.

[5] Evans v. Foss, 194 Mass. 513, 9 L.R.A.(N.S.) 1039, 80 N. E. 587, 11 A. & E. Ann. Cas. 171.

[6] Brown v. Huber, 80 Ohio St. 183, 28 L.R.A.(N.S.) 705, 88 N. E. 322. See, also, in this connection Landell v. Hamilton, 175 Pa. St. 327, 34 L.R.A. 227, 34 Atl. 663; Zipp v. Barker, 40 N. Y. Supp. 325, 6 App. Div. 609, affirmed in 166 N. Y. 621, 59 N. E. 1133; Batchelor v. Hinkle, 117 N. Y. Supp. 542, 132 App. Div. 620; Holt v. Fleischman, 78 N. Y. Supp. 647, 75 App. Div. 593. Other cases in which relief is held not to be barred, see section 991 (ante).

CHAPTER XXVIII.

RECITALS.

§ 992. Kinds of recitals.
993. Recital that grantee is a beneficiary.
994. Recital as surplusage.
995. History of title.
996. Stranger to title.
997. Parties bound by recitals.
998. Recognition of title in another.
999. General recitals.
1000. Notice from recitals.
1001. Illustrations.
1002. Failure to read recitals.
1003. Recitals in patents.
1004. Presumption of satisfaction of vendor's lien.
1005. Indefinite description.
1006. Collateral circumstances.
1007. Notice of trust in favor of grantee.
1008 Bond for deed.
1009 Recital of nominal consideration as evidence of fraud of trustee.

§ 992. **Kinds of recitals.**—Recitals are introduced for the purpose of explaining why the deed is executed, or of showing circumstances which preserve the connection in the chain of title, and are considered as being of two kinds, particular and general. Particular recitals are conclusive evidence of the facts recited in actions in which the purpose of the deed is directly involved.[1] But if the deed is merely collateral to the purposes of the action, the recitals are but *prima facie* evidence of the facts recited.[2] Where a married woman and her husband execute a deed of trust of her separate estate, a recital in such deed that it is made to secure her in-

[1] Mix v. People, 86 Ill. 329; George v. Bischoff, 68 Ill. 236; Usina v. Wilder, 58 Ga. 178; Pinckard v. Milmine, 76 Ill. 453. See also in this connection Harman v. Stearns, 95 Va. 58, 27 S. E. 601.

[2] Carpenter v. Duller, 8 Mees. & W. 209; Rucker v. Hyde, 118 Tenn. 358, 100 S. W. 739; Rankin v. Moore, 46 Tex. Civ. App. 44, 101 S. W. 1049. And see Williamson v. Mayer, 117 Ala. 253, 23 So. 3.

debtedness, evidenced by her and his notes, does not preclude her in an action on the notes with a prayer for judgment against her separate estate, from showing that such notes were given for supplies furnished for a plantation, cultivated in her husband's name and for his benefit.[3] But parties are not estopped from contradicting general recitals lacking the element of certainty.[4] A restriction upon the absolute title is not imposed by a recital in a grant from the State, that it is made for commercial purposes only.[5] The recitals in a deed either specifically by mentioning them or by stating facts

[3] Bank of America v. Banks, 101 U. S. 240, 25 L. ed. 850. See, also, Young v. Raincock, 7 Com. B. 310; Southeastern Ry. Co. v. Wharton, 6 Hurl. & N. 520; Stroughill v. Buck, 14 Q. B. 781; Fraser v. Pendlebury, 31 Law J. Com. P. 1; Carter v. Carter, 3 Kay. & J. 617. In Bank of America v. Banks, 101 U. S. 247, 25 L. ed. 853. Mr. Justice Clifford, in delivering the opinion of the court, said: "Facts recited in an instrument may be controverted by the other party in an action not founded on the same instrument, but wholly collateral to it. Recitals of the kind may be evidence for the party instituting the suit, but they are not conclusive: Carpenter v. Buller, 8 Mees. & W. 209, 213; Herman on Estoppel, § 238; Lowell v. Daniels, 2 Gray, 161, 169, 61 Am. Dec. 448; Chaplain v. Valentine, 19 Barb. 485, 488. In order to work an estoppel, the parties to a deed must be *sui juris* competent to make it effectual as a contract. Hence a married woman is not estopped by her covenants. Plainly the wife was not competent to purchase supplies for the plantation of her husband, and therefore cannot be estopped by these recitals: Bigelow on Estoppel, 276; Jackson v. Vanderheyden, 17 Johns. 167, 8 Am. Dec. 378."

[4] Jackson v. Allen, 120 Mass. 64; Right v. Bucknell, 2 Barn. & Adol. 278; Lainson v. Tremere, 1 Ad. & E. 792; Kepp. v. Wiggett, 10 Com. B. 35; Salter v. Kidley, 1 Show. 59. Where the consideration is a sum in cash, "and the balance, by the assuming on the part of the said grantee's part to pay the mortgage," existing upon the property as security for the grantor's note, this recital, in the absence of evidence of a contrary intention, shows an agreement on the grantee's part to pay the mortgage debt, and not simply to secure a discharge of the mortgage lien upon the land: Lewis v. Covillaud, 21 Cal. 178.

[5] Abbott v. Curran, 98 N. Y. 665. While a party claiming under a deed is estopped from denying any of the material recitals in it, this rule does not apply to those claiming adversely, or by title acquired prior to the execution of the deed: Cobb v. Oldfield, 151 Ill. 540, 42 Am. St. Rep. 263.

sufficient to put a purchaser upon inquiry may charge him with knowledge that the property is subject to a charge, lien or incumbrance.[6]

§ 993. Recital that grantee is a beneficiary.—Where a trustee executes a deed reciting that the grantee is one of the beneficiaries to whom the trustee was required to convey under the terms of the trust, such recital, in a suit in ejectment by the grantee against one who does not himself claim to be a beneficiary, is sufficient evidence of the facts recited. Thus, where the title to lands within the limits of a city is held by the city as a trustee for the parties in possession, to be conveyed to them upon compliance with certain conditions, a party who has no claim to the land cannot raise the question whether the grantee in a deed executed by the city authorities was a beneficiary, and as such entitled to a deed.[7] A grantee relies at his peril upon recitals in his deed that the grantor is the sole heir and legatee of the former owner, and cannot invoke such recitals as an estoppel against persons entitled under

[6] Jennings v. Bloomfield, 199 Pa. 638, 49 Atl. 135; Atlanta Land & Loan Co. v. Haile, 106 Ga. 498, 32 S. E. 606; Walls v. State, 140 Ind. 16, 38 N. E. 177; Taylor v. Mitchell, 58 Kan. 194, 48 Pac. 589; O'Mahoney v. Flanagan, 34 Tex. Civ. App. 244, 78 S. W. 245; Costello v. Graham, 9 Ariz. 257, 80 Pac. 336; Waggoner v. Dodson, 96 Tex. 415, 73 S. W. 517; International Dev. Co. v. Howard, 113 Ky. 450, 68 S. W. 459; Equitable Loan & Security Co. v. Lewman, 124 Ga. 190, 3 L.R.A.(N.S.) 879, 52 S. E. 599; Carter v. Leonard, 65 Neb. 670, 91 N. W. 574; Flanary v. Kane, 102 Va. 547, 46 S. E. 312; Eyring v. Hercules Land Co., 41 N. Y. Supp. 191, 9 App. Div. 306, 75 N. Y. St. Rep. 639; Robinson v. Owens, 103 Tenn. 91, 52 S. W. 870; Shuttleworth v. Kentucky Coal, Iron & Dev. Co., 22 Ky. L. Rep. 1806, 61 S. W. 1013; Summerville v. King, 98 Tex. 332, 83 S. W. 680; De Bajligethy v. Johnson, 23 Tex. Civ. App. 272, 56 S. W. 95; McDaniel v. Harley, 42 S. W. 323.

[7] McGreery v. Sawyer, 52 Cal. 257; McCreery v. Duane, 52 Cal. 293. As to the effect of the recital in a will of deeds executed by the grantor in his lifetime, see In re Heydenfeldt, 106 Cal. 434. See, also, § 284a, *ante*. See, also, Soukup v. Union Ins. Co., 84 Iowa, 448, 35 Am. St. Rep. 317, 51 N. W. 167.

the will of the former owner to remainder interests in the land.[8] The fact that a deed recites that the parties are the heirs of a preceding owner renders it evidence as to the truth of the recital only against the parties and their privies.[9] A recital in a deed relative to prior conveyances is evidence of the fact as stated and establshes it *prima facie*.[1]

§ 994. **Recital as surplusage.**—Recitals are to be construed as are other parts of the deed. In endeavoring to ascertain and effectuate the intention of the parties, courts may transpose clauses or strike them out altogether. In applying this familiar principle to recitals, we may select a case which we have had occasion to cite before as establishing the principle that a void deed is incapable of confirmation.[2] In this case a deed being void, a recital in a second deed that it was executed to confirm the former deed, the court declared, might be treated as surplusage. Consequently the second deed, with this rejection, if valid in other respects, would be sufficient to pass the title.[3]

§ 995. **History of title.**—A grantor who recites a history of his title in his deed is estopped from denying it against

[8] Weigel v. Green, 218 Ill. 227, 75 N. E. 913.

[9] Dixon v. Monroe, 112 Ga. 58, 37 S. E. 180. While the parties to a deed are bound by the recitals, strangers are not; Hughes v. Rose, 163 Ala. 368, 50 So. 899. A recital in a deed of the payment of the consideration is presumptive evidence of that fact. Voorhies v. Voorhies, 120 N. Y. Supp. 677, 66 Misc. Rep. 78. See Maxwell v. McCall, (Iowa), 124 N. W. 760. Recitals as to consideration are not evidence against strangers, Doty v. Bitner, 82 Kan. 551, 108 Pac. 858; Kruse v. Conklin, 82 Kan. 358, 108 Pac. 856.

[1] Merriman v. Blalack, (Tex. Civ. App.) 121 S. W. 552. A recital in a deed as to the consideration price is evidence: Robertson v. Hefley (Tex. Civ. App.), 118 S. W. 1159.

[2] See vol. 1, § 18.

[3] Barr v. Schroeder, 32 Cal. 609. Said Rhodes, J. (p. 618): "Strike out of the deed the matters in respect to the mistake, and the confirmation and the deed still remains sufficient in law to pass the title. Those matters must be disregarded because they were impossible of accomplishment in that mode. The deed is not vitiated by their presence."

persons who have acted upon the faith of such representations. A grantor who recites in a deed of warranty that a certain tract of land had been conveyed to him, is not permitted to deny this fact in a suit brought against him by his grantee, or a purchaser from the grantee.[4] But as between the original parties a recital unnecessary to the conveyance will not operate as an estoppel.[5] A person executing a deed in behalf of a manufacturing company, and reciting that he has authority by a vote of the company to execute such deed, is estopped to deny that he had such authority.[6]

§ 996. **Stranger to title.**—But a stranger cannot claim the benefit of recitals as estoppels against a party to the deed. An owner of land sold it in twenty-fourth parts, and some of the grantees subsequently joined with him in the execution of a mortgage to a stranger which contained a recital that the former owner was the owner of eleven twenty-fourths. After the execution of the mortgage, and before its registration, a creditor of such owner attached the land, and on execution bought the land. He then brought an action of ejectment against the persons in possession, the original owner's former tenants, and they alleged, in defense, that such original owner had no title when the attachment was served. The purchaser at the execution sale relied on the recital in the mortgage as an estoppel; but the court held that the recital could not operate

[4] Green v. Clark, 13 Vt. 158. See McCreery v. Duane, 52 Cal. 293.

[5] Osborn v. Endicott, 6 Cal. 149, 65 Am. Dec. 498.

[6] Stow v. Wise, 7 Conn. 214, 18 Am. Dec. 99. And see Douglass v. Scott, 5 Ohio, 195; Clark v. Baker, 14 Cal. 612, 629, 76 Am. Dec. 449; Van Rensselaer v. Kearney, 11 How. 322, 13 L. ed. 713; Carver v. Jackson, 4 Peters, 1, 85, 7 L. ed. 761, 791; Penrose v. Griffin, 4 Binn. 231; Goodtitle v. Bailey, Cowp. 597; Bensley v. Burdon, 2 Sim. & St. 524; Marchant v. Errington, 8 Scott, 210; Adams v. Lansing, 17 Cal. 629. Recitals in a deed of an administrator of the steps required by law to make a sale are *prima facie* evidence of the facts recited: Worthy v. Johnson, 8 Ga. 236, 52 Am. Dec. 399; Doe v. Henderson, 4 Ga. 148, 48 Am. Dec. 216.

as an estoppel in favor of the purchaser at execution sale and against the defendants.[7] Likewise the taking of a deed containing a recital that the premises are "subject to a mortgage," cannot be construed to import a promise on the part of the purchaser to pay such mortgage debt.[8] Nor, if such evidence be wanting, can the title be established by showing that the heirs at law of the person deceased received the consideration money.[9] Where a deed contains a recital that "the undersigned are owners and part owners of the within-described land," it is held that in the absence of words of limitation, the title of those who sign, although all do not sign, is conveyed.[1] In an action of ejectment, when a deed executed by one of the parties to the action, but to which the other party is an entire stranger, is introduced in evidence in the action, any recitals contained in it can be used only as simple admissions made by the party who executed the deed.[2] Where a deed executed by one tenant in common to a stranger refers to certain incidents of the joint estate, the other tenant is not es-

[7] Sunderlin v. Struthers, 47 Pa. St. 411. The court said that it was "an unprecedented extension of the doctrine of equitable estoppel, to hold that a man is bound to the world to make good what he has said to anyone, if others choose to rely upon it. If every man may be held liable, not only to parties and privies to his deed, but to all mankind, to make good every introductory recital which the deed contains, it behooves him to avoid all recitals, and be careful what scrivener he employs. Such is not the law, and there are no authorities which assert it." See, also, Allen v. Allen, 45 Pa. St. 468, 473; Robbins v. McMillan, 26 Miss. 434; Whitaker v. Garnett, 3 Bush, 402, Weigel v. Green, 218 Ill. 227, 75 N. E. 913; McCorkell v. Herron, 128 Ia. 324, 103 N. W. 988 (citing text); Uvalde County v. Oppenheimer (Tex. Civ. App.), 115 S. W. 904; Hagan v. Holderby, 62 W. Va. 106, 57 S. E. 289, and see Lanier v. Hebard, 123 Ga. 626, 51 S. E. 632.

[8] Capitol Nat. Bank v. Holmes, 43 Colo. 154, 16 L.R.A.(N.S.) 470, 95 Pac. 314, 127 Am. St. Rep. 108.

[9] Miller v. Miller, 63 Iowa, 387.

[1] St. Louis v. Wiggins' Ferry Co., 15 Mo. App. 227. As to recitals in a deed made by a mortgagee under a power of sale, see Tartt v. Clayton, 109 Ill. 579.

[2] Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111. See as to recital of heirship, Potter v. Washburn, 13 Vt. 558, 37 Am. Dec. 615.

topped by the recital.[3] A recital in a deed that the grantors are the widow and heirs of a person who has a record title, is not competent evidence of the truth of the matters recited against a stranger.[4] If it be sought to establish title to real estate derived from one deceased, the executor's deed alone is not sufficient. The probate of the will and lawful proceedings ending in the execution of the deed must also be shown. The recitals in the executor's deed are not competent to establish their truth as against persons not in privity with the grantor.[5] So a recital in a deed that the party making it is an heir at law of a former owner, is no evidence of the fact recited except as against parties to the deed and their privies.[6]

§ 997. **Parties bound by recitals.**—Where it appears from the deed that all the parties intend to admit certain facts as true, a recital in the deed of such facts is an estoppel upon all. If the recital is intended, however, to be the statement of but one party, such party only is estopped, and what the intention is, is to be gathered from the deed.[7] If the language of the recitals indicates that the scrivener did not have the deed recited before him, and such recitals refer to what the grantors have done, or intend to do among themselves, in which acts the grantees have no part or interest, and there is nothing to show that the grantees had any knowledge of the recited deed except as recited, the recitals will be considered

[3] Thomason v. Dayton, 40 Ohio St. 63. A deed reciting that the grantors are the heirs of a previous owner of the land, is not sufficient evidence as against a stranger of the death of the named ancestor, or that the grantors are in fact his heirs: Kelley v. McBlain, 42 Kan. 764.

[4] Costello v. Burke, 63 Iowa, 361.

[5] Miller v. Miller, 63 Iowa, 387.

[6] Dixon v. Monroe, 112 Ga. 158, 37 S. E. 180; Mining Co. v. Irby, 40 Ga. 479; Hanks v. Phillips, 39 Ga. 550.

[7] Bower v. McCormick, 23 Gratt. 310. See Stronghill v. Buck, 14 Q. B. 781; Joeckel v. Easton, 11 Mo. 118, 47 Am. Dec. 142; Blackhall v. Gibson, 2 Law Rec. 49; Thompson v. Thompson, 19 Me. 235, 36 Am. Dec. 751; Young v. Raincock, 7 Conn. B. 310; Simson v. Eckstein, 22 Cal. 580.

the statement of the grantors only.[8] An instrument which purported to be a will, recited that the testator had already distributed to his sons different tracts of land, and "which lands I have already divided amongst my sons as a donation *inter vivos,* to their entire satisfaction, and which donation by these presents I do hereby ratify." The court held that the heirs of the person executing such instrument, and all persons claiming under them, were estopped by these recitals from asserting that a title did not pass, and that the intention of the instrument was to vest a title immediately, and not to make a testamentary disposition, and that by these recitals the sons took title by way of ratification of the previous gift.[9] Likewise a recital in a deed conveying land devised to "Mary E. Newlin," that the grantor "Mary E. Kurtz" was formerly "Mary E. Newlin" is, in the absence of controverting evidence, conclusive on the issue of the identity of the grantor.[1] But where the defendant, in trespass to try title is charged by recitals in his deed with notice of the plaintiff's title the court may exclude testimony that he was an innocent purchaser.[2] Where a quitclaim deed is given by the grantee in a deed on the foreclosure of a trust deed in which a building and loan association was the beneficiary the person claiming under the quitclaim deed is charged with notice of the terms of the

[8] Bower v. McCormick, 23 Gratt. 310, and cases cited; Borst v. Corey, 16 Barb. 136. See Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498. An estoppel binds the grantor and his privies: Rangely v. Spring, 28 Me. 127; Doe v. Howell, 1 Houst. 178; Simson v. Eckstein, 22 Cal. 580; Doe v. Porter, 3 Ark. 18, 36 Am. Dec. 448; Carver v. Jackson, 4 Pet. 1, 7 L. ed. 761; Kinsman v. Loomis, 11 Ohio, 475; Byrne v. Morehouse, 22 Ill. 603; Pinckard v. Milmine, 76 Ill. 453; West v. Pine, 4 Wash. 691; Chautauqua County Bank v. Risley, 4 Den. 480; Jackson v. Parkhurst, 9 Wend. 209; Stoutimore v. Clark, 70 Mo. 471; Hasenritter v. Kirchhoffer, 79 Mo. 239; Usina v. Wilder, 58 Ga. 178.

[9] Adams v. Lansing, 17 Cal. 629.

[1] Haney v. Gartin, 51 Tex. Civ. App. 577, 113 S. W. 166.

[2] Texas Tram & Lumber Co. v. Givin, 29 Tex. Civ. App. 1, 67 S. W. 892, 68 S. W. 721.

trust deed and of the constitution and by laws of the building and loan association referred to in the trust deed.[3] Where a deed recites that "The above piece of land is covered by the north branch canal and embankment," this recital, while some evidence that the land belonged to the State, is not conclusive.[4] If a creek flows through the grantor's land, and a deed recites that the grantee is about to divert and appropriate its waters, and grants a right of way to conduct the water over the grantor's land, the grantor is not estopped from denying the right of the grantee to divert the water.[5] An estoppel must be certain, and in the case just cited there was no direct grant of any water or of the right of diversion. As the court said: "There is nothing in the recital that is inconsistent with the theory that the defendant had acquired a right which it now sets up; nor is there anything in it that is inconsistent with the theory that it had not acquired, but confidently expected to acquire it." In other words, an admission that a person has a right to divert water cannot be found on a recital that he is about to divert it.[6] Likewise, although recitals are of aid in construing the deed, they cannot be allowed to control or diminish the estate expressly and clearly granted;[7] that

[3] Cobe v. Lovan, 193 Mo. 235, 4 L.R.A.(N.S.) 439, 112 Am. St. Rep. 480, 92 S. W. 93.

[4] Pennsylvania & New York Canal Co. v. Billings, 94 Pa. St. 40.

[5] Zimmler v. San Luis Water Co., 57 Cal. 221.

[6] See Zimmler v. San Luis Water Co., 57 Cal. 221. That recitals as between the parties are to be taken as evidence of their truth, see Williamson v. Mayler, 117 Ala. 253, 23 So. 3; Rucker v. Hyde, 118 Tenn. 358, 100 S. W. 739; Hardin County v. Mills (Tex. Civ. App.), 112 S. W. 822. A recital in a conveyance of a municipal corporation of facts without the existence of which it would be unauthorized, is evidence of the facts recited, and no additional evidence is required in support of the deed: Gordon v. City of San Diego, 101 Cal. 522, 40 Am. St. Rep. 73.

[7] Tate v. Clement, 176 Pa. St. 550, 35 Atl. 214.

is to say a grant cannot be diminished by a mere recital in the description or elsewhere.[8]

§ 998. **Recognition of title in another.**—A person may be estopped from asserting title in himself by acts recognizing title in another. If a person procures an order of court for the sale of land on the assumption that the land is claimed by the county, and in the order of sale the land is described as land "formerly owned" by the person who procures the order, he is estopped from denying or revoking this recognition of title when a third person has acted upon it by a purchase of the land from the county, paid the purchase money, and erected improvements.[9] But a grantor executing a deed confirming a former one to which he was not a party, does not adopt the recitals of the former deed so as to be estopped by them, unless language showing this intention is used.[1] If a deed recites the making of a previous agreement the recital is equivalent to renewing the agreement and the recital will sustain an action.[2] The recitals contained in a deed resulting from a sale under a power of sale in a mortgage of the regularity of the sale are to be deemed *prima facie* true.[3] A recital in a deed that certain persons have requested its execution will not pass their title.[4]

§ 999. **General recitals.**—In order that a recital may have the effect of an estoppel, it is essential that it be certain. Hence, as the element of certainty is lacking in general recitals, they do not, as a general proposition, estop the parties

[8] Tate v. Clement, *supra*.

[9] Stevenson v. Saline County, 65 Mo. 425.

[1] Doe ex dem. Shelton v. Shelton, 3 Ad. & E. 265. The parties may be estopped by recitals showing that the land conveyed was the grantor's homestead: Williams v. Swetland, 10 Iowa, 51.

[2] Ball v. Hancock's Admr's, 82 Ky. 107.

[3] Williamson v. Mayer, 117 Ala. 253, 23 So. 3.

[4] Chapman v. Crooks, 41 Mich. 595, 2 N. W. 924.

from denying the truth of the matters recited.[5] An estoppel does not result from statements which are immaterial to the objects of the deed. Thus, where a lot is excepted out of the land described in the deed, and the clause containing the exception states that such lot "remains vested" in the grantor, the grantee is not estopped from asserting title subsequently acquired to the excepted piece through a source hostile to the grantor's title.[6] A recital that one of the grantors is a *feme covert* does not estop either party from showing that she was a *feme sole* at the time of the execution of the deed.[7]

§ 1000. **Notice from recitals.**—It is a familiar principle that every person taking a deed is charged with notice of all recitals contained in the instruments making his chain of title. "The principle of equity is well established that a purchaser of land is chargeable with notice, by implication, of every fact affecting the title which would be discovered by an examination of the deeds, or other muniments of title of his vendor, and of every fact as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted. If there is sufficient contained in any deed or record, which a prudent purchaser ought to examine, to induce an inquiry in the mind of an intelligent person, he is chargeable with knowledge or notice of the facts so contained." [8] Thus, where the

[5] Doe ex dem. Butcher v. Musgrave, 1 Man. & G. 615; Right v. Buckner, 2 Barn. & Adol. 278; Naglee v. Ingersoll, 7 Pa. St. 185; Right v. Bucknell, 2 Barn. & Adol. 278. And see Farrar v. Cooper, 34 Me. 394.

[6] Champlain & St. Lawrence R. R. v. Valentine, 19 Barb. 484.

[7] Brinegar v. Chaffin, 3 Dev. 108, 22 Am. Dec. 711.

[8] Cambridge Valley Bank v. Delano, 48 N. Y. 329, 336; Sergeant v. Ingersoll, 15 Pa. St. 343; Willis v. Gray, 48 Tex. 463, 26 Am. Rep. 328; Sitdham v. Matthews, 29 Ark. 650; Wood v. Krebbs, 30 Gratt. 708; Baker v. Mather, 25 Mich. 51; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Sigourney v. Munn, 7 Conn. 324; Major v. Buckley, 51 Mo. 227; Rafferty v. Mallory, 3 Biss. 362, 369; Burrus v. Roulahac's Administrator, 2 Bush, 39; Corbitt v. Clenny, 52 Ala. 480; Phillips v. Porter, 3 Ark. 18, 36 Am. Dec. 448;

deed under which a mortgagor holds refers to a prior unrecorded mortgage, a second mortgagee will take subject to the first.[9] The same principle applies where a person sells a tract of land, and does not take a mortgage for the purchase money, but recites in his deed the terms of the sale, and describes the notes which he has taken for the unpaid purchase money. A purchaser before the maturity of the notes has notice of the

Payne v. Abercrombie, 10 Heisk. 161; Deason v. Taylor, 53 Miss. 697; Blaisdell v. Stevens, 16 Vt. 179; White v. Foster, 102 Mass. 375, 380; Burwell's Executors v. Fauber, 21 Gratt. 446; Johnson v. Thweatt, 18 Ala. 741; French v. Loyal Company, 5 Leigh, 627; United States Mortgage Co. v. Gross, 93 Ill. 483; Foster v. Strong, 5 Bradw. (Ill.) 223; Wallace Gress v. Evans, 1 Dak. Ty. 387; Wiseman v. Hutchinson, 20 Ind. 40; Parke v. Neeley, 90 Pa. St. 52. See, also, Boggs v. Varner, 6 Watts & S. 469; Honore's Executor v. Blackwell, 6 Mon. B. 67, 43 Am. Dec. 147; Reeves v. Vinacke, 1 McCrary, 213; Moore v. Bennett, 2 Ch. Cas. Ch. 246; Greenfield v. Edwards, 5 De Gex, J. & S. 582; Robson v. Flight, 4 De Gex, J. & S. 608; Bacon v. Bacon, Toth. 133; Moore v. Bennett, 2 Ch. Cas. Ch. 246; Ætna Life Ins. Co. v. Ford, 89 Ill. 252; McConnell v. Reed, 4 Scam. 202; Frye v. Partridge, 82 Ill. 267, 270; Rupert v. Mark, 15 Ill. 540; Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169; Chicago etc. R. R. v. Kennedy, 70 Ill. 350, 362; Merrick v. Wallace, 19 Ill. 486; Morris v. Hogle, 37 Ill. 150, 87 Am. Dec. 243; Croskey v. Chapman, 26 Ind. 333; Allen v. Poole, 54 Miss. 323; Johnston v. Gwathmey, 4 Litt. 317, 14 Am. Dec. 135; Dudley v. Witter, 46 Ala. 664; Green v. Early, 39 Md. 223; Ridgeway v. Holliday, 59 Mo. 444; Frost v. Beewman, 1 Johns. Ch. 288; Campbell v. Roach, 45 Ala. 667; Burch v. Carter, 44 Ala. 115; Case v. Erwin, 18 Mich. 434; Baker v. Mather, 25 Mich. 51; Brush v. Ware, 15 Peters, 93; Clements v. Wells, Law R. 1 Eq. 200; Pilcher v. Rawlins, Law R. 11 Eq. 53; Davies v. Thomas, 2 Younge & C. 234; Murrell v. Watson, 1 Tenn. Ch. 342; Acer v. Westcott, 1 Lans. 193; Christmas v. Mitchell, 3 Ired. Eq. 535; Malpas v. Ackland, 3 Russ. 273; Casey v. Inloes, 1 Gill. 430, 39 Am. Dec. 658; Kerr v. Kitchen, 17 Pa. St. 433; Long v. Weller's Executors, 29 Gratt. 347, 353; Pruden v. Alden, 23 Pick. 184, 34 Am. Dec. 51; Fitzhugh v. Barnard, 12 Mich. 105; Dean v. Long, 122 Ill. 447, 14 N. E. Rep. 34; Smith v. Lowry, 113 Ind. 37, 15 N. E. Rep. 17; Wait v. Baldwin, 60 Mich. 622, 1 Am. St. Rep. 551, 27 N. W. Rep. 697; Whitlock v. Johnson, 87 Va. 323, 12 S. E. Rep. 614; Weigel v. Green, 218 Ill. 227, 75 N. E. 913.

[9] Buchanan v. Balkum, 60 N. H. 406; Fifield v. Elmer, 25 Mich. 51.

vendor's lien, by reason of the recitals in the deed.[1] An owner of land executed a mortgage, and three years after its execution the mortgage was foreclosed, and the premises conveyed to the mortgagee. The deed to the mortgagee was not, however, recorded in the proper county. Some time afterward, the original mortgagee to whom the deed was made, as stated, transferred the land by deed, which was properly recorded. Twenty-four years after the execution of the mortgage, the mortgagor made a deed of the same property subject to the mortgage, and described it as given in "1830 or 1831." It was held, very properly, that the grantee had notice of the mortgage, and of the fact that it was unpaid, and he had every reason to believe after the lapse of the long period of twenty-four years, that it had been foreclosed. Consequently the grantee took subject to the mortgage, and to all the rights which had accrued under it.[2] So where there are two joint owners of land, a purchaser from one is chargeable with notice of the interest of the other, when it appears by the deed to which he must look for his vendor's title.[3] A purchaser is not bound by recitals in a satisfied mortgage made by an owner whose title was a link in the chain of title.[4] A person will be charged with notice of equities which appear in his chain of title,[5] or to which anything appearing in such

[1] Croskey v. Chapman, 26 Ind. 333. So the recital of a consideration may show that a land company has sold land in violation of its charter: Franco Land Co., v. McCormick, 85 Tex. 416, 34 Am. St. Rep. 815. See § 710, *ante*.

[2] Fitzhugh v. Barnard, 12 Mich. 104.

[3] Campbell v. Roach, 45 Ala. 667. A recital, to convey notice, must be in the chain of title: Hazlett v. Sinclair, 76 Ind. 488, 40 Am. Rep. 254; Mason v. Black, 87 Mo. 329; Knox Co., v. Brown, 103 Mo. 223, 15 S. W. Rep. 382; Boggs v. Varner, 6 W. & S. 469; Coleman v. Barklew, 27 N. J. L. 357; Polk v. Cosgrove, 4 Biss. 437; Mueller v. Engeln, 12 Bush, 441; Burke v. Beveridge, 15 Minn. 205; Digman v. McCollum, 47 Mo. 372; Tydings v. Pitcher, 82 Mo. 379; Corbin v. Sullivan, 47 Ind. 356, 40 Am. Rep. 254; Bellas v. Lloyd, 2 Watts, 401.

[4] Pyles v. Brown, 189 Pa. St. 164, 42 Atl. 11, 69 Am. St. Rep. 794.

[5] O'Connor v. Vineyard (Tex. Civ. App.) 43 S. W. 55; Moore v.

chain would lead him.[6] A recital in a deed that the grantor is the sole heir and legatee of a certain person of a certain place charges the grantee with notice of the terms of the will, even if the recorded copy of the will fails, on account of insufficient authentication to operate as constructive notice.[7] If a deed is executed in consideration of an agreement contemporaneous with it, which is described and referred to in the deed, a purchaser from the grantee will be bound by the conditions of the agreement even if it is not then recorded.[8]

§ 1001. **Illustrations.**—A person conveyed a piece of land to a trustee in trust to secure the payment of, *first,* a debt due to one creditor, and *secondly,* a debt due to another creditor. The latter required the trustee to sell the land, and the owner began a suit to enjoin the sale, making the trustee and such second creditor parties, and with his bill filed the deed as an exhibit. In the decree, the trustee was appointed a special commissioner to sell the land, and when the land was sold such second creditor became the purchaser. The sale was confirmed and approved, and the court directed the trustee to convey the land to such second purchaser, and to take a deed of trust upon it to secure the purchase money. In accordance with this direction the trustee conveyed the land to such second creditor, and in his conveyance referred to it as the land mentioned in the bill. When the trustee came to take the deed of trust, as directed, instead of taking it upon this land, he took it upon another tract of such second creditor which was encumbered with other liens. Some eight years afterward such second creditor conveyed the land by deed, the deed referring to it as the land purchased under the decree. Subsequently the assignee of the first creditor filed a bill against

Scott (Tex. Civ. App.) 38 S. W. 394; Fitzhugh v. Barnard, 12 Mich. 104.

[6] Robinson v. Crenshaw, 84 Va. 348, 5 S. E. 222.

[7] Weigel v. Green, 218 Ill. 227, 75 N. E. 913.

[8] Town v. Gensch, 101 Wis. 445, 77 N. W. 893.

the last purchaser to enforce the lien of the original deed of trust. The purchaser claimed that he was a *bona fide* purchaser without notice. At the time when he purchased, war was being carried on in the State, and he alleged that as he lived some distance from the courthouse, which, by reason of the war, was difficult of access, he refused to purchase unless his grantor, the second creditor, would bring a certificate of the clerk of the court that the land was free from all liens and encumbrances; and that the clerk, after an examination of the records of his office, gave a certificate, that, so far as shown by the records of his office, no lien or encumbrance existed on this land; and that on this assurance he purchased the land, paid the purchase money, and received his deed. On this somewhat complicated state of facts, the court held that the purchaser was bound to know all the matters disclosed by the suit, and that his claim to the defense of a *bona fide* purchaser could not be supported by the certificate of the clerk.[9] A sold land to B, executing a bond for a title, and the latter, before the full payment of the purchase money, sold the land to C, also executing a bond for title, and directing that upon the payment of the balance still due to A that the latter should make a deed to C retaining a lien for the amount to be paid to B by C, which bond was registered. C paid to A the balance due to him, and A and C thereupon executed

[9] Wood v. Krebbs, 30 Gratt. 708. In Burwell's Executors v. Fauber, 21 Gratt. 446, the court say: "Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat emptor* is one of the best-settled maxims of the law, and applies exclusively to a purchaser. He must take care and make due inquiries, or he may not be a *bona fide* purchaser. He is bound not only by *actual*, but also by constructive notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice."

a deed to D. The deed to D referred to the registered bond for title, but failed to retain a lien. Subsequently E, who had no actual notice of any vendor's lien, but who had knowledge of the bond referred to in the deed, bought the land for full value from one who derived title under D. It was held that E was put upon inquiry by reference in the deed to the bond for title, and hence was charged with constructive notice of its contents.[1] A city conveyed to trustees, by an unrecorded deed, land for a cemetery. Afterward, when the use of the cemetery had been discontinued, and some of the bodies had been removed, and others were not disturbed, the city, for a valuable consideration, executed a quitclaim deed to a person, referring to the premises as a tract formerly dedicated for a public cemetery, and such deed and the ordinance under which it was made were subsequently confirmed by legislature. An action was brought to recover the land from the trustees, and the court held that the quitclaim deed by its recitals imparted notice of the dedication of the land by the unrecorded deed, and that by the latter deed the legal title passed to the trustees and the trust was still in force, and hence a recovery of the land could not be decreed.[2] Though the instrument is not recorded, and a party may have no actual notice of it, yet if he must trace his title through it, he is bound by whatever is contained in it.[3] A mortgage was executed in Iowa by an owner of a tract of land to secure the payment of several promissory notes, which were described in the mortgage. When the mortgage was spread upon the records, the description of one note was omitted. Subsequently the mortgagor sold the premises and conveyed the same by a deed, in which reference was made to the mortgage, and in the mortgage the aggregate amount of the several notes was correctly stated. The grantee, it was held, took the land by force of such re-

[1] Payne v. Abercrombie, 10 Heisk. 161.

[2] Weisenberg v. Truman, 58 Cal. 63.

[3] Stees v. Kranz, 32 Minn. 313.

cital in his deed, with notice of the mortgage as security for all the notes.[4] If a grantee is placed on inquiry, which if prosecuted would lead to knowledge by the fact that one who had no title of record joined in the deed to him, a subsequent purchaser whose deed appears in such chain of title will be charged with the same notice.[5] A recital in a deed that the grantors are husband and wife, whose names are the same as those of the grantor and grantee in a guardian's deed to the same land is sufficient to convey notice to a purchaser that at the date of the former deed, his grantors were husband and wife.[6] In ejectment, the plaintiff is charged with constructive notice which recorded deeds contain or recite, constituting the chain of title under which defendant claimed.[7]

§ 1002. **Failure to read recitals.**—Every person is presumed to read the deed under which he holds, and a failure to read certain recitals contained in the deed cannot avail him as a defense when it is sought to charge him with notice. A person claimed title under a deed which stated that it was made subject to "two mortgages for two thousand dollars," and contained also a warranty against all claims "except said mortgages." On the land embraced in the deed there were two prior mortgages. One of these, amounting to fifteen hundred dollars, was recorded, and the grantee had actual knowledge of it. Of the other he had no notice except such as was given by his deed. As a matter of fact, the grantee did not read his deed, and did not actually know of the clauses referring to the mortgages. It was held that he must be presumed to know the contents of his deed, and that it was sufficient to put him upon inquiry, and to affect him with notice of the mortgage which was not recorded.[8] "Men of ordi-

[4] Dargin v. Beeker, 10 Iowa, 571.

[5] Creel v. Keith, 148 Ala. 233, 41 So. 780.

[6] Frazier v. Jeakins, 64 Kan. 615, 57 L.R.A. 575, 68 Pac. 24.

[7] Freeman v. Moffitt, 119 Mo. 280, 25 S. W. 87.

[8] Hamilton v. Nutt, 34 Conn. 501.

nary prudence," said Carpenter, J., "will use all reasonable means to ascertain the state and condition of their own titles. Hence, we may lay it down as a rule, founded upon the experience of mankind, that one who has knowledge of the existence of a deed, to which he has access, and which affects the title to property in which he is interested, will, in equity, be presumed to have knowledge of the contents of the deed. And, generally, when a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact. Under our recording system a deed duly recorded is constructive notice to all the world; and the law conclusively presumes that every person interested has knowledge not only of the deed, but of its precise language, where that is material. These principles apply in full force to this case. If a man will, under certain circumstances, be presumed to have knowledge of the contents of the deed of another, how much more reasonable is it to presume that he has knowledge of the contents of his own deed. Occasional hardships may result from the application of this rule; but it is believed to be founded in sound policy, and that in a large majority of cases it will tend to prevent fraud and promote the cause of justice." [9] "It is in consonance with reason, that if the title deeds under which a purchaser derives title recite an encumbrance, he will be bound by that recital, and presumed to have had notice of it, whether he has read it or not. For the law will not permit him to deny notice by insisting that he has not read the deed." [1]

§ 1003. **Recitals in patents.**—The same rule as to recitals in deeds applies also to recitals in patent from the government. A person who traces his title to a patent is charged with notice of the facts contained in its recitals.[2] If a patent

[9] Hamilton v. Nutt, 34 Conn. 501.

[1] Wailes v. Cooper, 24 Miss. 208, 228, per Mr. Justice Yerger.

[2] Bonner v. Ware, 10 Ohio, 465. See, also, Brush v. Ware, 15 Peters, 93, 10 L. ed. 672; Bell v. Duncan,

issues to one as assignee of another, as executor of a third person, deceased, a purchaser from the patentee must determine at his peril whether the executor had the requisite power to make an assignment of the warrant.[3]

§ 1004. **Presumption of satisfaction of vendor's lien.**— A deed recited that it was made "in consideration of the sum of nine hundred and thirty-seven and a half dollars, to me in hand paid, or secured to be paid, the receipt whereof is hereby acknowledged." This recital was held to be sufficient notice to subsequent purchasers that a vendor's lien existed, and it was incumbent upon such subsequent purchasers to show that the vendor's lien for any unpaid balance had been removed, waived, or abandoned.[4] And when it is recited in a deed that the sale is made on credit, it is the duty of the grantee to inquire whether the purchase money has been paid. He is not authorized to presume its payment from the fact that the time for the payment of the purchase money, as mentioned in the deed, has elapsed.[5] The grantee, if he had made the inquiry, must have learned the truth, and, by failing to make it, he is guilty of such negligence as precludes him from claiming to occupy the position of an innocent purchaser without notice.[6] But when sufficient time has elapsed to bar an action on the notes taken for the purchase money, a purchaser or judgment creditor, although the notes may have been renewed, may rely, it is held, upon the presumption that they

11 Ohio, 192; Ware v. Brush, 1 McLean, 533; Reeder v. Barr, 4 Ohio, 446, 22 Am. Dec. 762; Polk's Lessee v. Wendall, 5 Wheat. 293, 5 L. ed. 92; Miller v. Kerr, 7 Wheat. 1, 5 L. ed. 381; Hoofnagle v. Anderson, 7 Wheat. 212, 5 L. ed. 437; Hardin County v. Nona Mills Co., (Tex. Civ. App.) 112 S. W. 822.

[3] Bonner v. Ware, 10 Ohio, 455. As to recitals in Mexican grants, see Ferris v. Coover, 10 Cal. 589; Nieto v. Carpenter, 7 Cal. 527; Scott v. Ward, 13 Cal. 458.

[4] Thornton v. Knox, 6 Mon. B. 74. See, also, Johnston v. Gwathmey, 4 Litt. 317, 14 Am. Dec. 135.

[5] Deason v. Taylor, 53 Miss. 697.

[6] Honore's Executor v. Bakewell, 6 Mon. B. 67, 43 Am. Dec. 147.

have been paid.[7] "When the purchaser appears upon the face of his deed on the public records of the county as the absolute owner, without reservation or encumbrance, in favor of the vendor, how long will a court of conscience recognize his lien as against creditors who have recovered judgments against the vendee? Can the vendor, by protracted indulgence, keep alive his secret privilege after a presumption may fairly arise that the debt has been paid? Credit, in a very large measure, depends upon the amount and value of property which a man ostensibly owns. If one is in the possession of land under a deed made ten or twelve years ago, would the community be justified in inferring that the purchase money had been paid, and might not prudent men give credit on the faith of the fact? If the vendor lie by all that time, taking no measures to enforce his claim, should he not be considered as holding his purchaser out to the community as an unencumbered owner; and when creditors under subsequent judgments proceed against the land, ought he not to be postponed to them? The vendor's privilege results by law from the sale, and is an incident of the debt. When the debt is barred the lien is extinguished. If a court of equity would keep up this lien (as against intervening claimants) long enough to afford the vendor a full, reasonable time to get in his money, as long as a right of action at law is preserved to him to recover the debt, it would seem that ample protection is given to his equity. It would be unreasonable and fruitful of evil to leave it in the discretion of the vendor to indulge and postpone, whether by renewals or not, so that others may be entrapped to deal with the vendee as a man of substance, and then turn upon them and say that they did so at their risk, and sweep from them that upon which they trusted." [8] If a deed contains a reser-

[7] Avent v. McCorkle, 45 Miss. 221.

[8] Simrall, J., in Avent v. McCorkle, 45 Miss. 221. In Judson v. Dada, 79 N. Y. 373, the facts were these: An owner of land subject to a mortgage which was recorded conveyed a portion thereof to two persons. The deed stated the property was "supposed to be eighty

vation of a lien to the grantor for the unpaid portion of the price, this deed is notice to a subsequent purchaser of the grantor's rights, even if not recorded, because it is in the chain of title of such purchaser.[9]

§ 1005. Indefinite description.—It is not essential in all cases that the recital should be so certain in its terms as to

acres." The grantor covenanted that in case of a deficiency she would pay therefor at the rate of thirty dollars per acre. The grantees assumed and agreed to pay the whole mortgage in consideration for the deed. It having been ascertained subsequently that there was a deficiency in the land conveyed, the grantor executed to the grantees a writing, agreeing that she would save them harmless to the amount of $273.32 from any claim under the mortgage. This latter sum was what the deficiency would be. The grantor afterward conveyed the remaining portion of the property to other persons, and covenanted that the same was free and clear from all encumbrances. An action was brought to foreclose the mortgage, and the court held that the grantees of the residue were entitled to no greater equities than those which the grantor had at the time she conveyed, and intimated, though it did not so decide, that sufficient was contained in the first deed to put the subsequent grantees upon inquiry, and charge them with constructive notice of the release by the grantor to the first grantees to the extent of the value of the deficit, in case a notice was required. See, also, Howard Ins. Co. v. Halsey, 8 N. Y. (4 Seld.) 271, 59 Am. Dec. 478; Green v. Slayter, 4 Johns. Ch. 38; Hope v. Liddell, 21 Beav. 183; Cambridge Bank v. Delano, 48 N. Y. 326; Howard v. Chase, 104 Mass. 249; Hudson v. Warner, 2 Har. & G. 415; Garrett v. Puckett, 15 Ind. 485; Ross v. Worthington, 11 Minn. 438, 88 Am. Dec. 95; Taylor v. Stibbert, 2 Ves. 437; Martin v. Cotter, 3 Jones & L. 496, 506; Clements v. Welles, Law R. 1 Eq. 200; Hall v. Smith, 14 Ves. 426; Cosser v. Collinge, 3 Mylne & K. 282; Lewis v. Bond, 18 Beav. 85; Cox v. Coventon, 31 Beav. 378; Wilbraham v. Levesey, 18 Beav. 206; Tanner v. Florence, 1 Ch. Cas. Ch. 259; Walter v. Maunde, 1 Jacob & W. 181; Drysdale v. Mace, 2 Smale & G. 225; Pope v. Garland, 4 Younge & C. 394; Smith v. Capron, 7 Hare, 185; Babcock v. Lisk, 57 Ill. 325; Martin v. Nash, 31 Miss. 324; Sanborn v. Robinson, 54 N. H. 239; Brown v. Simons, 44 N. H. 475; Briggs v. Palmer, 20 Barb. 392, 20 N. Y. 15.

[9] Runge v. Gilbough, 99 Tex. 539, 91 S. W. 566, 122 Am. St. Rep. 659. As to recitals giving notice of unrecorded instruments see Bailey v. Southern Ry. Co., 112 Ky. 424, 60 S. W. 631; Paul v. Kerswell, 60 N. J. L. 273, 37 Atl. 1102; Pierson v. McClintock, 34 Tex. Civ.

apprise the purchaser of all the rights of another. It will charge him with notice if it is sufficient to put him upon inquiry. A testator devised to his son Robert, "fifty acres on the west end of the place previously given to his son Michael, for ten years, and at the end of that time to hold the same by paying to Michael five dollars per acre in installments, to be given him on either side of the road, as Michael may think proper." A certain portion of the premises was set off at the west end of the tract devised, though a clearing had first been commenced at the east end by an agreement between the two sons, and had been paid for, but no deed had been executed, nor was there any continued possession on the part of Robert. An heir of Robert brought an action of ejectment against a purchaser at a sheriff's sale under Michael, who claimed to hold as a purchaser without notice. But the court held that the will was notice to him of a devise of fifty acres off the northwest corner of the tract, which part, unless it had been selected elsewhere, was the part best answering the description in the will. A person who read the will would be under obligation to inquire if the devisee had obtained his fifty acres, and at what time.[1]

§ 1006. **Collateral circumstances.**—While a grantee is bound to take notice of everything that appears on the face of the deeds in his chain of title, he is not compelled to prosecute an inquiry into collateral circumstances. And where a deed refers to another, he is not required to take notice of a fact exhibited in the latter deed which is completely foreign to the subject of the reference.[2] He is not obliged, for instance, to take notice that the deed to which reference is thus made has incorporated into it a bill of sale of personal prop-

App. 360, 78 S. W. 706; Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574.

[1] McAteer v. McMullen, 2 Pa. St. 32.

[2] Mueller v. Engeln, 12 Bush, 441; Burch v. Carter, 44 Ala. 115.

erty on which the grantor attempts to retain a lien.[3] A purchaser is affected with notice by a recital so far as it concerns the title to the land purchased. He is not affected with notice with respect to the title of any other land than that which is transferred by such deed.[4]

§ 1007. Notice of trust in favor of grantee.—Where a deed is made for a nominal consideration, and contains a recital that it is made in pursuance and fulfillment of a trust reposed in the grantor by the grantee, the recital is not notice of a trust in favor of any other person than the grantee himself. This is said to be especially true when the deed is made to the grantee and his heirs in fee simple, for the only proper use and behoof of the said grantee and his heirs and assigns forever.[5]

§ 1008. Bond for deed.—A purchaser, being presumed to know every fact to which he is led by a deed forming a link in the chain of his title, cannot in equity, escape from the

[3] Mueller v. Engeln, 12 Bush, 441.

[4] Boggs v. Varner, 6 Watts & S. 469. In this case (at page 474), it is said on the question of whether notice should be proven by vague and uncertain evidence, by Rogers, J: "A court of equity acts on the conscience, and as it is impossible to make any demand on the conscience of a man who has purchased for a valuable consideration, *bona fide* and without notice of any claim on the estate, such a man is entitled to the peculiar favor of a court of equity. As every presumption is in favor of the subsequent purchaser, when the former owner is guilty of neglect, his title cannot be postponed except by evidence which taints his conduct with fraud. And this, it is obvious, ought not to be done by testimony in its nature vague and indefinite, and leading to no certain results, such as that he ought to have known of the prior title because he lived near the owner, in the same town, perhaps, or on the next lot, that he was well acquainted with him, or because the title was well known to others. This may all be true, and yet at the time he pays his money, he may be ignorant of any other title than his own. It is not just that inferences should be strained in favor of the person by whose default the mischief has been done."

[5] Kaine v. Denniston, 22 Pa. St. 202.

effect of such presumption, because an equitable right, and not a legal one, is the fact to which he is referred. A took a mortgage from B, on premises to which B had title under a deed from C, which contained this recital: "This conveyance is made in pursuance of a contract of sale of said premises, made and entered into by the party of the first part for a conveyance thereof to one D, of whom the said party of the second part has become the assignee or purchaser, and as such entitled to a fulfillment thereof, by virtue of this conveyance," the contract being identified by its date. The court held that A took his mortgage with notice of the equitable right of D to a conveyance from C, and of the terms of the agreement between D and B, upon which the right of B to a deed from C was founded.[6] And a bond for title, held by the vendee, is sufficient to charge a purchaser from him with notice of the lien of the vendor for the unpaid purchase money.[7]

§ 1009. Recital of nominal consideration as evidence of fraud of trustee.—As a general proposition, when the trust is defined as to its object, but it is provided that the property may be sold, and the proceeds reinvested upon trusts that require a certain time to be made, and call for the exercise of discretion on the part of the trustee, the purchaser is not bound to see to the application of the purchase money. By a deed properly recorded land was conveyed to a person in trust. The deed of trust gave the trustee power to sell the property, and to reinvest the proceeds, if the sale were for the

[6] Acer v. Westcott, 1 Lans. 193.

[7] Newsome v. Collins, 43 Ala. 663; Bradford v. Harper, 25 Ala. 337. And see Sergeant v. Reynolds, 15 Pa. St. 343; Witter v. Dudley, 42 Ala. 616; Campbell v. Roach, 45 Ala. 667; Johnson v. Thweatt, 18 Ala. 741; Coy v. Coy, 15 Minn. 119. "The question of the sufficiency of notice is often embarrassing, and sometimes difficult of solution. But, as a general rule, to charge a purchaser, the notice must be such as explains itself by its own terms, or refers to some deed or circumstance which explains it, or leads to its explanation": White v. Carpenter, 2 Paige, 217, 249.

benefit of the *cestui que trust*. The trustee executed a deed conveying the land, in consideration of one dollar and other valuable considerations. The grantee under this deed mortgaged the land and reconveyed it to the trustee, subject to the mortgage. After the registration of these deeds, the mortgagee assigned the mortgage. The recital in the deed from the trustee was held not to be sufficient notice to the assignee that the acts of the trustee were not in accordance with the power conferred upon him. There was no obligation upon the assignee to see whether the trustee had reinvested the money obtained from the sale.[8] "The assignee of the mortgage," said Colt, J., "was not bound to ascertain at her peril, whether it was in fact a sale upon which the trustee actually received the money; and her title cannot be defeated, unless she had actual or constructive notice of the alleged fraud. It is contended that the recital in the deed, that it was given in consideration of one dollar and of other valuable considerations, is either actual or constructive notice that the trustee received no money for the deed, and that it was given in violation of the trust. But this recital cannot be regarded as actual or positive notice of the fact charged, because, assuming that a subsequent purchaser is to be affected by it under our registry law, still, the language does not necessarily import misconduct in the trustee, or that there was an absence of consideration. It is entirely consistent with the fact that the consideration was received in securities taken by the trustee as a valid change of investment, and in fulfillment of the trust. And although the fact that the actual consideration is not stated in the usual form may be competent, in connection with other evidence, to show that the purchaser was, by all the circumstances, put upon inquiry, and therefore is chargeable with constructive notice, yet the recital alone is plainly not enough to raise in law a conclusive presumption of notice."[9]

[8] Norman v. Towne, 130 Mass. 52.

[9] Norman v. Towne, 130 Mass. 52.

Somewhat similar in principle is the case where A borrowed three hundred dollars of B, and transferred and delivered to him a note and mortgage for fifteen hundred dollars as collateral security for the loan, the assignment of the mortgage being absolute in form and reciting a consideration of three hundred dollars, the amount borrowed. Before the maturity of the note, B transferred it and assigned the mortgage to C, as collateral security for a loan of twelve hundred dollars. A brought a suit in equity against B and C to redeem the note and mortgage. The court held that the recital of the consideration in the assignment of the mortgage to B was not of itself sufficient to put C on inquiry, or to show that he acted fraudulently, and A could exercise the right of redemption only by paying the amount for which C held the note and mortgage as collateral security.[1] The notice, in other words,

[1] Briggs v. Rice, 130 Mass. 50. The court, per Colt, J., said: "It is not easy to state by rule what constitutes in equity implied or constructive notice, because it depends in most cases upon a great variety of circumstances, having a tendency to excite suspicion, or showing fraudulent purpose. The general rule is, that whatever puts a party upon inquiry amounts to notice, provided the inquiry, as in the case of a purchaser, is a duty, and would lead to a knowledge of the fact. It is left to be decided in each case what is sufficient to put a party on inquiry. In the present case, the fact relied on is clearly not sufficient. The defendant became holder of this note for a valuable consideration before its maturity. He had no actual notice of any equities which would defeat his right to recover an amount sufficient to secure the payment of the debt for which it was pledged. As owner of the mortgage note, he was, in fact, entitled in equity, without any assignment, to claim the benefit of the mortgage security. The mortgage in this case, however, was assigned to him by one who had a perfect record title. It is well settled that the consideration expressed in a deed is not conclusive, and it is always open to show what the real consideration was, and that it was more or less than the amount named: Bullard v. Briggs, 7 Pick. 533, 19 Am. Dec. 292. The recital of an inadequate consideration in the assignment under which Rice, the assignor of Gooding, claimed, if brought to the knowledge of the later, might be competent as one circumstance in connection with other evidence to charge him with gross negligence or a fraudulent purpose, but is not alone sufficient to put him on inquiry, or prove

derived from matters of record, is never construed as being more extensive than the facts stated by the record.[2]

fraud on his part. It is not easy to see in it anything calculated even to arouse suspicion. It is consistent with the fact that the amount of three hundred dollars was agreed on by the parties as the fair value of the mortgaged property, or that it was fairly bought for that sum by Rice. It does not necessarily imply any defect or qualification of the apparent title in him. It certainly cannot be treated as actual notice that the note was subject to some unknown equity, the nature of which it was the duty of the defendant to ascertain at his peril. As a prudent man, taking a note not yet due, it was sufficient for him to know that the assignment transferred to him a good title to the mortgage security. It is not enough that an overprudent and cautious person, if his attention had been called to the circumstances in question, would have been likely to seek an explanation of it. There must be some clear neglect to inquire, after actual notice that the title is in some way defective, or some fraudulent and willful blindness, as distinguished from mere want of caution: Jones v. Smith, 1 Hare, 43, 55, and 1 Phillips, 244; Ware v. Lord Egmont, 4 De Gex, M. & G. 460; Dexter v. Harris, 2 Mason, 531; Buttrick v. Holden, 13 Met. 355; Jackson v. Valkenburgh, 8 Cowen, 260."

[2] Gale's Executor v. Morris, 29 N. J. Eq. 222.

CHAPTER XXIX.

DESCRIPTION.

§ 1010. Certainty of description.
1011. Illustrations of uncertainty.
1011a. Further illustrations of uncertainty.
1012. What is a sufficient description.
1013. Illustrations.
1013a. Further illustrations—Certainty.
1013b. Additional illustrations—Certainty.
1013c. Exception void for uncertainty.
1013d. Description to be liberally construed.
1014. Land of reputed owner as boundary.
1015. General description and unrecorded deed.
1015a. Situation and condition shown by parol evidence.
1015b. Center line of railroad route.
1016. Surplusage.
1017. Illustrations.
1018. Subject continued.
1019. Parcel of larger tract.
1020. Reference to maps or other deeds.
1020a. Conflict between map and survey.
1021. Loss of plat.
1022. Parol evidence as to plat.
1023. Right to way.
§ 1024. Land bounded by non-navigable stream or highway.
1025. Where contrary intention appears.
1025a. Private way or alley.
1025b. Intention of owner.
1025c. Road as an abuttal and not a monument.
1025d. Common use of passageway.
1025e. Presumption as to center of alley rebutted.
1026. Land bounded by lake or pond.
1026a. Effect of meander lines.
1027. Estoppel from description of land as bounded by a street.
1028. Navigable streams and tide waters.
1028a. Reason for these rules.
1028b. Presumption overcome only by actual reservation.
1029. Courses and distances controlled by monuments.
1029a. Erroneous description in incident of title.
1030. When courses and distances prevail.
1031. Latent ambiguity as to monument intended.
1031a. Supplying omissions.
1032. Subsequert survey.
1032a. Reliance on survey.

§ 1033. Conflict between starting point and other calls.
1034. Running to line of another tract.
1035. "Northerly," "due north," etc.
1036. Division lines by consent.
1037. Line located by mistake.
1037a. Further consideration of subject.
1038. Two descriptions in deed.
1038a. Middle point of physical object intended.
§ 1039. Repugnance between general and particular description.
1040. Some illustrations.
1041. Particular description uncertain.
1042. Parol evidence.
1043. Description applying to several tracts.
1044. Quantity of land enumerated.
1045. Intention that quantity shall control.
1046. Words "more or less."

§ 1010. Certainty of description.—The description of the premises conveyed must be sufficiently definite and certain to enable the land to be identified; otherwise it will be void for uncertainty.[1] A suit in ejectment was commenced

[1] People v. Klumpke, 41 Cal. 263; Wofford v. McKinna, 23 Tex. 36, 44, 76 Am. Dec. 53; Williams v. Western Union R. R. Co., 50 Wis. 71; Campbell v. Johnson, 44 Mo. 247; Boardman v. Read, 6 Pet. 328, 8 L. ed. 415; Bailey v. White, 41 N. H. 337. See Gatewood v. House, 65 Mo. 663; United States v. King, 3 How. 773, 11 L. ed. 824; Sneed v. Woodward, 30 Cal. 430; Montag v. Linn, 23 Ill. 551; Kea v. Robeson, 5 Ired. Eq. 375; Lumbard v. Aldrich, 8 N. H. 31, 28 Am. Dec. 381. See, also, Cummings v. Browne, 61 Iowa, 385; Shoemaker v. McMonigle, 86 Ind. 421; Brown v. Chambers, 63 Tex. 131; Freed v. Brown, 41 Ark. 495; Howard v. North, 5 Tex. 290, 51 Am. Dec. 769; Cunningham v. Thornton, 28 Ill. App. 58. See, also, Huntress v. Portwood, 116 Ga. 351, 42 S. E. 513; Hamilton v. Ogee, 10 Kan. App. 241, 62 P. 708; Hoodless v. Jernigan, 46 Fla. 213, 35 So. 656; Crawford v. Verner, 122 Ga. 814, 50 S. E. 958; Dowdell v. Home Soc. 114 La. 49, 38 So. 16; McRoberts v. McArthur, 62 Minn. 310, 64 N. W. 903; Early v. Long, 89 Miss. 285, 42 So. 348; Wetzler v. Nichols (Wash.) 101 P. 867; Hoard v. R. Co., 59 W. Va. 91, 53 S. E. 278; Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484; Holley v. Curry, 58 W. Va. 70, 51 S. E. 135, 112 Am. St. Rep. 944. In Holley's Ex'r. v. Curry (*supra*) the court says: "The writing in question describes the real estate sought to be charged as follows: Seventy-two acres of land situate near Hamlin, the same bought of the land company. Also, twelve and one-half acres of land also situate near Hamlin and the same conveyed to said B. F. Curry by James T. Car-

to recover, "the northwest fourth of the southwest quarter of section eleven, township fifty-three, range sixteen," embracing forty acres. The deed conveyed several tracts, but the only designation in the deed which would include the

roll, Jr., Also three acres situate near Hamlin, and known as the old church lot. Also my store-house and lot and livery stable, and lot in Hamlin. There are many decisions by this court on the subject of descriptions of real estate, and other writings (citing authorities). "The decisions of other states on the question of description are almost innumerable, and not always consistent. It may be laid down generally, that great liberality is allowed in the matter of description. In description that is certain which can be made certain. A deed will not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain from the description aided by extrinsic evidence, what property it is intended to convey. The office of description in a deed or other writing, is not to identify the land, but to furnish means of identification (citing, among other authorities text sec. 1012). In the case of Blake v. Doherty, 5 Wheat. (U. S.) 1359, 5 L. ed. 109, the opinion being delivered by Chief Justice Marshall, it is held: 'It is essential to the validity of a grant that the thing granted should be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description as without the aid of extrinsic testimony, to ascertain precisely what is conveyed.' Usually general descriptions such as 'all my land,' in a certain town, county or state; 'all my land wherever situated;' 'all my right, title and interest in and to my father's estate at law,' and the like are held good (citing authorities). Descriptions omitting town, county or state, where the property is situated, have been held sufficient, where the deed or writing provides other means of identification (citing authorities and quoting a portion of text sec, 1011). Under the authorities, the writing in question is not on its face void for want of certainty in description of the real estate sought to be charged thereby. This writing does not state in what county or state the real estate is situated. It was acknowledged and recorded in Lincoln county, in this state. The number of acres in some of the tracts is given. Three of the tracts are described as near Hamlin. The first tract is described as the same bought of the land company. The second, as conveyed to Curry by James T. Carroll, Jr. Hamlin is the county seat of Lincoln county, in this state, and of this fact the court will take judicial knowledge. People v. Faust, 113 Cal. 172, 45 Pac. 261. These facts afford some, and we think sufficient means of identification."

forty-acre tract for which suit was brought was, "the southwest quarter of section eleven, containing forty acres." As a quarter section contains four forty-acre tracts, it was impossible to decide to which forty-acre tract the description applied. This ambiguity in the description was held to be patent and hence, incapable of removal by extrinsic evidence. A suit in ejectment founded on such a deed must fail. The title should be first perfected by an action brought for the reformation of the deed.[2] But to render the deed void for uncertainty in the description, the ambiguity must be patent and appear on the face of the instrument.[3] A deed is void for uncertainty which describes the land conveyed as tract of land lying and being in the country aforesaid, adjoining the lands of John J. Phelps and Norfleet Pender, containing twenty acres more or less."[4] A deed is void for uncertainty, if from its face it is apparent that there are two lots to which the description is equally applicable.[5] Such an ambiguity cannot be explained by parol evidence.[6] So a grant from the State is void in which the description is "a tract of land containing one hundred and seventy-three acres, lying and being in our county of Wilkes, on a big branch of

[2] Campbell v. Johnson, 44 Mo. 247.

[3] Hardy v. Matthews, 38 Mo. 121; Johnson v. Ashland Lumber Co., 52 Wis. 458.

[4] Dickens v. Barnes, 79 N. C. 490. Said Faircloth, J., speaking for the court: "It fails to identify or to furnish the means of identifying under the maxim, *id certum est quod certum reddi potest,* the land in possession of the defendant, the *locus in quo.* It gives neither course nor distance of a single line, nor a single point, stake, or corner, anywhere to begin at. Does the tract lie on the north, south, east, or west side of the lands of Phelps and Pender? What course would the surveyor take if he had a beginning point? These questions cannot be answered by the aid of facts *dehors* the deed, established by parol proof, because it is a patent ambiguity, a question of law for the court, and not one of fact for the jury." When the description in the deed contains no ambiguity, and when none appears when it is applied to the land, the intent must be ascertained from the language used in the deed: Muldoon v. Deline, 135 N. Y. 150.

[5] Brandon v. Leddy, 67 Cal. 43.

[6] Brandon v. Leddy, 67 Cal. 43.

Luke Lee's Creek, beginning at or near the path that crosses the said branch, that goes from Crane's to Sutton's on a stake, running west 28 chains 50 links to a white oak, on Miller's line, then north 60 chains to a stake, then east 28 chains 50 links to a stake, then south 60 chains to the beginning."[7] A description in a memorandum of contract of the land to be conveyed as a tract of one hundred and fifty acres, "lying on Watery Branch, in Johnston County," is so indefinite that no decree for a conveyance can be based upon it.[8] So a description, "for fifty acres of land, situate and lying on the headwaters of Elk Shoal Creek as far as the waters of Radford Creek, to interfere with no land before sold," is insufficient to admit of the introduction of parol evidence to identify the land.[9]

§ 1011. **Illustrations of uncertainty.**—The description, "beginning at a *point* in Laurel Swamp; thence along the margin of the swamp to a *point;* thence north 85 deg. W. 90

[7] Hinchey v. Nichols, 72 N. C. 66.

[8] Capps v. Holt, 5 Jones Eq. 153.

[9] Radford v. Edwards, 88 N. C. 347. The court said, the instrument being a bond for a deed: "As land, unless it has as a tract or lot acquired a name to distinguish it, and by which it is known, can only be ascertained by boundary lines, and separated from all other, the necessity of identifying by a description which admits of a definite location is obvious; and where this cannot be done, no title to it as a distinct portion can pass by the deed or written instrument, the sole office of parol evidence being to fit the description to the thing described, and not to add to the words of description. Recurring to our own case, it may be asked how can the surveyor find a starting point on either creek? And if he could, how far, if he pursues the course of the creek, is he to run, and where stop for a corner? In what direction will he go thence to the other creek, and where find a corner there? And how will he get back to the assumed beginning? These inquiries find no solution in the instrument, and the runnings must be wholly arbitrary in order to ascertain where the fifty acres lie. There is not furnished even any *indicia* of the form of the land; and if form were given, the locations could be made indefinite in number, and all fulfilling equally the conditions and requirements of the language of the bond."

poles; thence 40 deg. W. 86 poles; thence N. 40 deg. east 60 poles to a *point* in a pond; thence along the pond to a *point;* thence S. 77 deg. 88 poles to the beginning, containing one hundred and forty-four acres on the south side of Broad Creek, lot 10," is so vague that no land can be located under it.[1] A *stake,* unless identified, is an imaginary point, and therefore no land can be located under a description in which the beginning call is for a stake, and the remainder of description is for course and distance.[2] In the description in a deed the boundary line was given as running from a creek which was several thousand feet in length, without any other designation of the starting point. This rendered the land incapable of identification, for the reason that the condition of the description could be complied with by running a line starting from any position on the creek. The deed, on account of the incurable uncertainty in the description, thus became inoperative.[3] But where a call in a deed is from a certain point " to the hills," this term, though by itself indefinite, will, in case of a studied repetition of that call in all the deeds forming the chain of title, prevail over a call for a specified quantity of land.[4] A description giving the number and subdivisions of certain sections only, but omitting the names of the township, range, or county in which the land is situated, renders the deed void for the patent ambiguity in the description.[5] But if the land is situated in a city, and the land is described as being in a certain city, although the

[1] Archibald v. Davis, 5 Jones (N. C.), 322.

[2] Mann v. Taylor, 4 Jones (N. C.), 272, 69 Am. Dec. 750. In this case the description was: "Beginning at a stake, running thence north 500 chains, thence west 250 chains, thence south 500 chains, thence east 250 chains, to the first station." See, also, Massey v. Belisle, 2 Ired. 170.

[3] Le Franc v. Richmond, 5 Saw. 601.

[4] Clamorgan v. Hornsby, 13 Mo. App. 550. See Clamorgan v. Baden, etc Ry. Co., 72 Mo. 139.

[5] Fuller v. Fellows, 30 Ark. 657. What are the boundaries of the land conveyed is a question of law but the location of the boundaries on the ground is a question of fact to be determined by the jury. Co-

name of the State or county may not be given, the court, in an action of ejectment in which the deed is offered in evidence, will take notice that such city is in a certain county in the State.[6] And where a party enters in the United States land-office certain tracts of land, describing them by section, township, and range, and they are shown to be in a certain county within the State, and afterward, by a deed executed in the same State, conveys a portion of such land, describing it also by section, township, and range, but not designating the county or State in which the land is situated, it has been held that it will be presumed that the deed was intended to convey land in the State.[7] It seems, however, under any cir-

Operative etc. Bank v. Hawkins, (R. I.) 73 Atl. 617.

[6] Harding v. Strong, 42 Ill. 148, 89 Am. Dec. 415. In this case the description was: "Those certain tracts or parcels of land situated in the Haley's addition to the city of Monmouth, known as lot five in block one, and lot seven in block ten, in south addition to said city." A deed is void for uncertainty which describes the land sought to be conveyed as the "southeast corner" of a quarter section, without stating dimensions, or describing land as "the southwest fractional part of the north one-half" of a quarter section, but not stating the qauntity or location: Morse v. Stockman, 73 Wis. 89. Where land is described as "south part of southeast quarter of section five," and also as the "south part of section five, 225 acres," while the first description is void for uncertainty, recovery may be had of that part of the southeast quarter embraced in the latter description, the latter description being sufficient to pass title to a strip containing 225 acres of equal depth with the southern boundary of the whole section as the base line for measurement: Tierney v. Brown, 65 Miss. 563, 7 Am. St. Rep. 679. When land is described as "one-third of a league of land purchased by me of Pomeseno Nanez, being his head right," it is insufficient, without further identification, to show that this is the same land patented to the grantor as assignee of Nepomaceno Nanez: Harkness v. Devine, 73 Tex. 628. See Blow v. Vaughan, 105 N. C. 198. A description consisting of the words "a piece or parcel of land near Bacon Quarter Beach" is too vague and indefinite to convey any title: George v. Bates, 90 Va. 839. See, also, Mutual Building etc. Assn. v. Wyeth (Ala. Jan. 31, 1895), 17 So. Rep. 45; Holley's Exr. v. Curry, 58 W. Va. 70, 51 S. E. 135, 112 Am. St. Rep. 944 (quoting this portion of text with approval.)

[7] Butler v. Davis, 5 Neb. 521. And see Long v. Wagoner, 47 Mo. 178.

cumstances, that if in the description the names of the town, county, and State are omitted, the grantee nevertheless acquires an equitable interest in the property.[8] The owner of a triangular piece of land executed a deed for a portion of it, the description fixing the eastern line only. The deed recited the grantor's meaning to convey "one-half of what I now own" of the triangle, "said land to be surveyed and the bounds set." The grantor, however, before any survey was made or bounds set, conveyed to another party the westerly point of the triangle, including more than half of it. The first deed was held void for uncertainty.[9] A description in a deed of the land conveyed as "a part of section 18, in township 7, of range 2 east, containing one hundred and eighty acres," is a patent ambiguity. Parol evidence cannot explain or help it.[1] A deed is void for uncertainty in which the land attempted to be conveyed is described as "three fractions of lot 7, J and K, Fourth and Fifth streets, Sacramento City.[2] A description in a deed and mortgage of the land "as the southeast part of the southeast fourth of the northeast quarter of section 36, township 4 south, and range 2 east, containing thirty-two acres," was considered too indefinite to sustain a suit for possession of the land.[3] Possession may render certain, what otherwise would be an uncertain description.[4] If the description is so defective as to render the deed void, a suit for a breach of a covenant of seisin contained in the deed cannot be maintained without showing a mistake and seeking a reformation of the deed.[5]

[8] Lloyd v. Bunce, 41 Iowa, 660.

[9] Harvey v. Byrnes, 107 Mass. 518.

[1] Brown v. Guice, 46 Miss. 299.

[2] Tryon v. Huntoon, 67 Cal. 325, and cases cited.

[3] Shoemaker v. McManigle, 86 Ind. 421.

[4] Richards v. Snider, 11 Or. 197. A description of land as "one-half of an acre of land near the wharf or at the wharf," does not render the deed void for uncertainty, if the wharf is described and a parcel of land is surveyed as the land conveyed, or the grantee takes possession: Simpson v. Blaisdell, 85 Me. 199, 35 Am. St. Rep. 348.

[5] Gordan v. Goodman, 98 Ind. 269. In this case the description

§ 1011a. **Further Illustrations of uncertainty.**—A description is too vague and indefinite which specifies the property sought to be conveyed as "lot No. 3, containing two acres more or less, bounded as follows: North by land of G; east by street running North and South; South by A, railroad company; west by lands of L. Sr.," but which fails to state in what town, county or state the property is situated.[6]

While oral proof may be resorted to yet, if, after the exhaustion of such proof, what was intended to be conveyed is still a matter of conjecture, the deed will be void for uncertainty in description.[7] The land described in the administrator's deed as well as in the probate proceedings leading up to the deed was described as "half interest in and to 893 acres" of a specified survey. It appeared by parol evidence offered to identify the land that the survey contained more than 893 acres, and, accordingly, the court held that no title passed on account of the vagueness and uncertainty of the description.[8] The following description is so indefinite as to render the deed void: "Beginning at a white oak, running south of west 33 rods to a stake; thence east of south, 33 rods to a stake; thence west of north 33 rods to the beginning,

was: "The following described real estate, situate in the county of Pulaski, State of Missouri, to wit: And part of the southeast quarter of section 25, commencing at the southwest corner of the southwest quarter of the southeast quarter of said section, running thence west to the cross fence, between Berry Warther and Alvis Goss, thence northeast to the half-mile line, thence south with said line to the place of beginning, containing in all one hundred and eighty acres." As the township and range were not given, the location of the land from the description supplied by the deed became impossible. It is necessary that a definite and certain description of the land to be sold should be contained in an order of the probate court for the sale of the land of a minor by his guardian. Reference to documents not contained in the order itself cannot help an insufficient description in the order: Hill v. Wall, 66 Cal. 130.

[6] Glover v. Newson, 132 Ga. 796, 65 S. E. 64.

[7] Wetzler v. Nichols, 53 Wash. 285, 101 Pac. 867.

[8] Herman v. Likens, 90 Tex. 448, 39 S. W. 282.

containing six acres more or less." [9] A deed is void for uncertainty in which the land is described as a certain acre out of a tract of land, without a specification of the part of the tract from which the land is to be taken.[1] If the description and proof offered are insufficient to locate the beginning point, the description is insufficient.[2] A deed is void for uncertainty which fails to designate the section, township and range in which the land is located, although it describes the land by metes and bounds.[3] A deed is void which purports to convey forty acres of a tract of one hundred and fifty acres but which fails to indicate the form of the forty acre tract or to give any data enabling the division line to be made.[4] A deed granting a railroad company a right of way will be void unless it contain a description sufficient to identify the land, or such a description as by resort to evidence will enable the land to be identified.[5] No title will pass by a deed failing to show the state and county in which the land lies, the meridian to which the range should be referred, or whether the township given in the description is either north or south.[6] Nor on account of uncertainty will a deed convey title, in which the land is described as "27 acres, fractional section 15," in a specified town and range, where the section contains a greater quantity of land.[7] If the description contained in the deed is insufficient to enable the subject matter to be ascertained, the deed is void for uncertainty.[8] A deed that fails to describe any land is not rendered valid by a statute which allows parol evidence to be admitted to identify

[9] Kennedy v. Maness, 138 N. C. 35, 50 S. E. 450.

[1] Hanna v. Palmer, 194 Ill. 41, 56 L.R.A. 93, 61 N. E. 1051.

[2] Holmes v. Sapphire Valley Co., 121 N. C. 410, 28 S. E. 545.

[3] Hamilton v. Oger, 10 Kan. App. 241, 62 Pac. 708.

[4] Smith v. Proctor, 139 N. C. 314, 2 L.R.A.(N.S.) 172, 51 S. E. 889.

[5] Hoard v. Huntington & B. S. R. Co., 59 W. Va. 91, 53 S. E. 278.

[6] Hartigan v. Hoffman, 16 Wash. 34, 47 Pac. 217.

[7] Craven v. Butterfield, 80 Ind. 503.

[8] Edens v. Miller, 147 Ind. 208, 46 N. E. 526; Gordon v. Goodman, 98 Ind. 269.

land in actions for the possession of real estate.[9] A deed is void in which the description is so uncertain as to be meaningless and the deed supplies nothing to enable the premises to be identified.[1] A description is insufficient, where although metes and bounds are given no reference is made to any government survey and neither the county nor the state, in which the land is situated is mentioned.[2] But although a deed must be held to be void in which the description is so uncertain as to give no reliable clue to a more definite description, yet the instrument will be held valid, if from a consideration of all the facts which it shows upon its face and if, also from all the legal presumptions naturally arising from these facts, it is possible to supply a true description by means of proper averments and proof.[3] Still a description is not sufficient where the land cannot be located without an arbitrary discretion.[4] A deed is void for indefiniteness where the land described is "a certain portion of land lying and being in the county of Nash, formerly belonging to Elias Barrett and others, on both sides of the road leading to Nashville, to contain forty acres to be taken from" a larger tract. "It purports," said the court, "to cut off forty acres from the main body of the land, and does not in any way indicate the shape, or give any data by which the divisional line can be indicated."[5]

§ 1012. **What is a sufficient description.**—A deed is not void for uncertainty because there may be errors or an inconsistency in some of the particulars. If a surveyor, by

[9] Moore v. Fowle, 139 N. C. 51, 51 S. E. 796.

[1] McBride v. Steinweden, 72 Kan. 508, 83 Pac. 722.

[2] Pfaff v. Cilsdoor, 173 Ill. 86, 50 N. E. 670.

[3] Calton v. Lewis, 119 Ind. 181, 21 N. E. 475.

[4] Diamond Plate Glass Co. v. Tennell, 22 Ind. App. 132, 52 N. E. 168.

[5] Smith v. Proctor, 139 N. C. 314, 2 L.R.A.(N.S.) 172, 51 S. E. 889.

applying the rules of surveying, can locate the land, the de-
~~to be that the deed will be sustained, if it is possible from the~~
scription is sufficient.[6] And, generally, the rule may be stated to be that the deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed.[7] Thus, a deed was held not to be void for

[6] Pennington v. Flock, 93 Ind. 378; Smiley v. Fries, 104 Ill. 416. This section is quoted with approval in McCullough v. Olds, 108 Cal. 529. If a description by appropriate evidence may be shown to apply to the land, the deed is not void for uncertainty of description: Fudickar v. East Riverside I. Dist., 109 Cal. 41. The court says in Bogard v. Barhan, 52 Ore. 121, 96 Pac. 673, 132 Am. St. Rep. 676, 678: "The rule for determining the sufficiency of a description in a deed or any other writing in relation to real property is: Can a surveyor, with a deed or other instrument before him, with or without the aid of extrinsic evidence, locate the land and establish the boundaries?" See also, Harris v. Iglehart (Tex.) 113 S. W. 170.

[7] Lyman v. Loomis, 5 N. H. 408; Eggleston v. Bradford, 10 Ohio, 312; Brown v. Warren, 16 Nev. 228; Stanley v. Green, 12 Cal. 148; Smith v. Dean, 15 Neb. 432; Bailey v. Allegheny Nat. Bank, 104 Pa. St. 425; Coleman v. Manhattan Beach Improvement Co., 94 N. Y. 229; Vose v. Bradstreet, 27 Me. 156; Douthit v. Robinson, 55 Tex. 69; Mason v. White, 11 Barb. 173; Brown v. Coble, 76 N. C. 391; Berry v. Wright, 14 Tex. 270; Farris v. Gilbert, 50 Tex. 350; Bosworth v. Sturtevant, 2 Cush. 392; Warren v. Makely, 85 N. C. 12; Andrews v. Pearson, 68 Me. 19; Spect v. Gregg, 51 Cal. 198; Andrews v. Murphy, 12 Ga. 431; English v. Roche, 6 Ind. 62; Enochs v. Miller, 60 Miss. 19; Reed v. Lammel, 28 Minn. 306; Bowles v. Beal, 60 Tex. 322; Hall v. Shotwell, 66 Cal. 379; Peck v. Mallams, 10 N. Y. (6 Seld.) 509; Jackson v. Delancy, 11 Johns. 365; Pipkin v. Allen, 29 Mo. 229; Harmon v. James, 15 Miss. (7 Smedes & M.) 111, 45 Am. Dec. 296; Neel v. Hughes, 10 Gill & J. 7; Bird v. Bird, 40 Me. 398; Middlebury College v. Cheney, 1 Vt. 336; Barlow v. Chicago etc. R. R. Co., 29 Iowa, 276; Roberts v. Grace, 16 Minn. 126; Conover v. Wardell, 22 N. J. Eq. 492; Everett v. Boardman, 58 Ill. 429; Shackelford v. Orris, 129 Ga. 791, 59 S. E. 772 (citing text); Morton v. Root, 2 Dill. 312; Charter v. Graham, 56 Ill. 19; Alexander v. Knox, 6 Saw. 54; McLaughlin v. Bishop, 35 N. J. L. 512; Cooley v. Warren, 53 Mo. 166; Shewalter v. Pirner, 55 Mo. 218; Bybee v. Hageman, 66 Ill. 519; Sherman v. McCarthy, 57 Cal. 507; Hoar v. Goulding, 116 Mass. 132; Thayer v. Torrey, 37 N. J. L. 339; Armstrong v. Colby, 47 Vt. 359; Billings v. Kankakee Coal Co., 67 Ill. 489; Bartlett v. Corliss, 63 Me. 287; Tucker v. Allen, 16 Kan. 312; Cohen v. Woollard, 2 Tenn. Ch. 686; Auburn Congregational Church v.

uncertainty where the land conveyed was described as "two hundred and twenty-two and a half acres off the south and west part of the south half of section 24, T. 1, R. 7 west, in De Soto County." [8] And a deed describing the land conveyed as situated in a certain county and school district, and bounded by certain metes and bounds and visible monuments, but omitting to state the section and township, was held not to be void for uncertainty.[9] It is not essential to the validity

Walker, 124 Mass. 69; Scheiber v. Kaehler, 49 Wis. 291; Choteau v. Jones, 11 Ill. 300; 50 Am. Dec. 460; Hanley v. Blackford, 1 Dana, 1, 25 Am. Dec. 114; Cilley v. Childs, 73 Me. 130; Dunn v. Tousey, 80 Ind. 288; McElhinney v. Kraus, 10 Mo. App. 218; Bowen v. Galloway, 98 Ill. 41; Sharp v. Thompson, 100 Ill. 447, 39 Am. Rep. 61; Wiley v. Lovely, 46 Mich. 83; Whitney v. Robinson, 53 Wis. 309; Irving v. Cunningham, 58 Cal. 306; Keening v. Ayling, 126 Mass. 404; Paroni v. Ellison, 14 Nev. 60; Friedman v. Nelson, 53 Cal. 589; Prettyman v. Walston, 34 Ill. 175; Miller v. Mann, 55 Vt. 475; Walsh v. Ringer, 2 Ohio, 327, 15 Am. Dec. 555; Camley v. Stanfield, 10 Tex. 546, 60 Am. Dec. 219; Bullen v. Runnels, 2 N. H. 255, 9 Am. Dec. 55. See, also, Gates v. Paul, 117 Wis. 170, 94 N. W. 55; Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208, 1 L.R.A. (N.S.) 806; Ball v. Loughridge, (Ky.) 100 S. W. 275; Veatch v. Gray (Tex.) 91 S. W. 324; Cleveland v. Shaw (Tex.) 119 S. W. 883; Sylvester v. S. 46 Wash. 585, 91 Pac. 15; Hoard v. R. Co., 59 W. Va. 91, 53 S. E. 278. As that is certain which can be made certain the description, if it will enable a person of ordinary prudence acting in good faith and making inquiries which the description would suggest to him, to identify the land is sufficient. Ford, (S. D.), 124 N. W. 1108. See, also, Hayes v. Martin, 144 Ala. 532, 40 So. 204; Burton v. Mullenary, 147 Cal. 259, 81 P. 544. The object of a description may be said to be to prevent imposition: Bates v. Bank of Missouri, 15 Mo. 309, 55 Am. Dec. 145. See, also, as to construction of particular descriptions, Howard v. Pepper, 136 Mass. 28; Mast v. Tibbles, 60 Tex. 301; Bowles v. Beal, 60 Tex. 322. In a mortgage the land affected was described as being north of the "ground of the C. C. C. & I. R. R." The court held that the description was not rendered void by the use of the word "ground" instead of "right of way:" Pence v. Armstrong, 95 Ind. 191.

[8] Goodbar v. Dunn, 61 Miss. 618. "The office of description in a deed or other writing is not to identify the land, but to furnish means of identification. Holley's Exr. v. Curry, 58 W. Va. 70, 51 S. E. 135, 112 Am. St. Rep. 944 (citing text).

[9] Dorr v. School District, 40 Ark. 237. Said the court, per Smith, J:

of a deed that the description should be by boundaries, courses, or distances, or by reference to monuments. If the description is general, the particular subject matter to which the description applies may be ascertained by parol evidence, and the deed will not be held void for uncertainty, if, with the aid of such evidence, the land intended to be conveyed can be located. Thus, the property intended to be conveyed was described in the deed as "Pelican beach, near Barren island, in the town of Flatlands." The name "Pelican beach" had originally been applied to the salt meadows, marsh, and beach, on the westerly end of Barren Island, subsequently an inlet opened across the beach, and the greater portion of it was thereby separated from the island. The title of the grantee to the beach was undisputed, and it was held in an action of ejectment that the deed was not void for uncertainty, but conveyed the title to that portion of the beach cut off by the inlet.[1] The court will not resort to arbitrary rules of construction, if, without

"Is the description so defective that it is impossible, by the aid of parol evidence, to locate the land? It is in a certain county, and in a certain school district, which has definite boundaries, is parcel of the tract upon which stood the residence of Benjamin I. Edwards, contains three acres, and is described by metes and bounds, and by visible monuments, to wit, the graveyard, the schoolhouse, the highway, corner stakes, and initial tree from which to start. And defendant had gone into possession. A competent surveyor could have found the land without much difficulty. In conveyancing, lawyers commonly follow the system of notation established by the general government, distinguishing lands according to their legal subdivisions. This furnishes a description at once convenient and accurate. But it is not necessary to mention the section, township, and range: Cooper v. White, 30 Ark. 513. When the land lies in a city or town, the description is usually by reference to the lots and blocks of a recorded plat."

[1] Coleman v. Manhattan Beach Improvement Co., 94 N. Y. 229. A sheriff's deed to a lot in a city describing it as "part of lot, 17, fronting on Gallatin street fifty feet, extending eastwardly seventy-three feet, as the property of said Isaac Jamison," was held not to be void on its face for uncertainty, for it might be shown by parol evidence that the extent of the frontage of the lot on Gallatin street was only fifty feet; or that Jamison, when the deed was executed, was the owner of a defined part of the lot fronting on such street measuring fifty feet, and known

so doing, the intention of the parties can be ascertained. The deed and its descriptive clauses will be construed as any other contract would be.[2] When a doubtful description is to be construed, the court should endeavor to assume the position of the parties, the circumstances of the transaction should be carefully considered, and in the light of those circumstances, the words should be read and interpreted.[3] All doubts must be resolved against the grantor.[4] But this rule cannot be used to destroy the grantor's intent fairly appearing from the deed as an entirety.[5]

§ 1013. Illustrations.—A grantor described land conveyed as "my homestead farm situated in said Buckfield," and described the various parcels of which it was composed, and gave as a description of the last parcel "twelve and a half acres out of lot numbered eight in the first range." It was held that the whole parcel passed, notwithstanding it contained twenty-five acres.[6] A description is sufficiently definite

"as the property of said Isaac Jamison." But when it is shown by extrinsic proof that the frontage of lot 17 on Gallatin street was about one hundred and forty-seven feet, all of which had been conveyed to Jamison except about twenty-five feet, and it is not shown that any part of this had been disposed of by Jamison at the time of the execution of the deed, and it is not shown that the fifty feet front had ever been separated from the other, or that there was any identification of any fifty feet known "as the property of said Isaac Jamison," the deed on account of the insufficient identification of the property is void for uncertainty: Bernstein v. Humes, 71 Ala. 260. Parol evidence may be received to identify the land where the land described in a contract to convey is uncertain; Stromme v. Rieck, 107 Minn. 177, 119 N. W. 948, 131 Am. St. Rep. 452.

[2] Kimball v. Semple, 25 Cal. 440.

[3] Truett v. Adams, 66 Cal. 218. If there is an ambiguity as to which one of two plats is referred to in the description of the land, the court may regard the circumstances connected with the transaction the situation of the parties to the deed and the state of the land conveyed. Cook v. Hensler, (Wash.), 107 Pac. 178. In the case of ambiguity the construction placed upon a deed will be strongest against the grantor.

[4] Hunt v. Hunt, 119 Ky. 39, 68 L.R.A. 180, 82 S. W. 998.

[5] Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468.

[6] Andrews v. Pearson, 68 Me. 19. Hensler, (Wash.), 107 Pac. 178.

if it gives the corner of a certain lot as the beginning, and courses and distances from this, with metes and bounds.[7] A description in a deed of, "all lands and real estate belonging to the said party of the first part, wherever the same may be situated," is sufficient to pass any land belonging to the grantor at the time of the execution of the deed.[8] A deed for "one-half of my lot," when it is shown by extrinsic evidence that the grantor owned but one lot at the time in the place, is not void for vagueness or uncertainty of description. The grantee takes as a tenant in common of an undivided one-half of the lot.[9] Where land was situated in the bend of a river, it was held that a description in which one of the lines was described as running "nearly due west along the top or brow of the bluff on the south side of said river," was sufficiently definite and certain.[1] A deed in which the land is described as "beginning at a servisberry corner, thence north to a white oak, thence east to a white oak, thence south to limestone quarry, thence to a white oak," when accompanied by a transfer of possession, and when it is shown that the trees are marked, is sufficient to pass the title, although no mention is made of the locality of the land.[2] In Ohio, it has been held that a description of land as "seventy acres lying and being in the southwest corner" of a certain section, is sufficiently definite, and that the land conveyed will lie in a square.[3] In a deed conveying several parcels of land the description was: "The following tracts or parcels of land,

[7] Meikel v. Greene, 94 Ind. 344.

[8] Pettigrew v. Dobbelaar, 63 Cal. 396. And see Brown v. Warren, 16 Nev. 228.

[9] Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383.

[1] Smith v. Dean, 15 Neb. 452.

[2] Banks v. Ammon, 27 Pa. St. 172.

[3] Walsh v. Ringer, 2 Ohio, 327, 15 Am. Dec. 555. Said the court: "The general position of the land conveyed is given with sufficient certainty. It is in the southwest corner. According to the rules of decision, both in this State and in Kentucky, that corner is a base point from which two sides of the land conveyed shall extend an equal distance, so as to include by parallel lines the quantity conveyed. From this point the section lines extend north and east so as to fix the boundary west and south, the east and north boundaries only are

all of which lying and being in the military tract in the State of Illinois, that is to say, the northwest ¼, section 27, 11 S., 2 W.," with several other tracts with the word "section" omitted. It was held that the word "section" would be understood, and hence that the description of the other tracts was sufficient.[4] A description of the land conveyed as, "all my right, title, and interest in and to a parcel of land situate in the town of San Francisco, being block No. 9, the same on which I now reside. The part thus donated commences at the northeast corner of said block, running twenty-five varas west from said corner, thence back one hundred varas" —is sufficient to sustain the deed. The land thereby conveyed would be a strip off the easterly side of the block, which in width would be twenty-five varas, and in depth one hundred varas.[5] Although there may be a deflection of twenty-five degrees from the cardinal points of the compass in the lines of a lot, a description of the land conveyed as the "north twenty feet" of such lot is sufficiently defined.[6] A deed in which the land to be conveyed was described as "commencing at the southeast corner of section 21, township 84, range 26," was held to be sufficient, notwithstanding that the deed did not mention the county and State in which the land was situated, it appearing that the township and range specified were nowhere else than in the county and State in which the land was claimed to lie.[7] A deed is sufficient so far as certainty of description is concerned, if it states the name of the tract and county, and refers to deeds of record clearly describing the land for a more specific description.[8] Where the description is uncertain, reference may be made to prior deeds

to be established by construction, and the rule referred to gives them with sufficient certainty."

[4] Bowen v. Prout, 52 Ill. 354.

[5] Le Levillain v. Evans, 39 Cal. 120. See Banks v. Moreno, 39 Cal. 233.

[6] Jenkins v. Sharpf, 27 Wis. 472.

[7] Beal v. Blair, 33 Iowa, 318.

[8] Steinbeck v. Stone, 53 Tex. 382. See, also, Knowles v. Torbitt, 53 Tex. 557.

conveying the same land.[9] If the description is "the north half of the southwest quarter the southwest quarter," of a certain section, the deed will convey the north half of the

[9] Bowman v. Wettig, 39 Ill. 416. Where land is described in general terms, and also as all the lands of the grantors and each of them, the description can be made certain by proof, and is sufficient: Harvey v. Edens, 69 Tex. 420, 6 S. W. Rep. 306. The following description is not void for uncertainty: "All the lands contained in Patent No. 383, vol. 15, first class, to me granted by the State of Texas, and that have not been legally sold or disposed of for location, the above lands being situate and lying in the county of W., and fully described in a patent which accompanies this deed: Falls Land and Cattle Co., v. Chisholm, 71 Tex. 523, 9 S. W. Rep. 479. A sheriff's deed giving accurately only one boundary line, but describing the land by name and features familiar in that neighborhood, is not void for uncertainty where it clearly appears that it is well known by that name, and has, in previous conveyances, been described by it, and a surveyor who surveyed the tract previously easily found the land with the sheriff's deed before him: Hammond v. Johnston, 93 Mo. 198, 6 S. W. Rep. 83; Hammond v. Gordon, 93 Mo. 223; Hammond v. Horton, 6 S. W. Rep. 94 (Mo. Nov. 28, 1887). See, also, Wolfe v. Dyer, 95 Mo. 545, 8 S. W. Rep. 551. A deed which did not state the State in which the land was situated was held not to be void for uncertainty: Calton v. Lewis, 119 Ind. 181, 21 N. E. Rep. 475. The words "quarter of" preceding the word "section" may be supplied by construction as a palpable omission: Campbell v. Carruth, 32 Fla. 264. See, also, Smith v. Nelson, 110 Mo. 552; Bryan v. Wisner, 44 La. Ann. 832; Slack v. Dawes, 3 Tex. Civ. App. 520, 22 S. W. Rep. 1053; Johnson v. Williams, 67 Hun, 652. Where the land described is "all those parcels of land sold to" the grantor by a third person, and such person had agreed to sell more land than he actually conveyed to the grantor, parol evidence may be received for the purpose of explaining whether the deed conveyed the land described in the agreement or only that actually conveyed by such person: Bradish v. Yocum, 130 Ill. 386. The fourth side of a rectangle may be supplied where the intent of the parties is clear, and the grantee has entered into possession of the rectangular tract with the grantor's consent: Ray v. Pease, 95 Ga. 153, 22 S. E. Rep. 190. Where it appears from the description that the shape of the land is triangular, if the quantity of land and the angle between two of the lines are given, the description is sufficient: Wells v. Heddenberg (Tex. Civ. App.) 30 S. W. Rep. 702. A deed is not void for uncertainty where a right of way is conveyed described as a strip one hundred feet wide, of which the center line of the route of the railroad company to whom the deed is

southwest quarter of the southwest quarter of the section, where the call for quantity supports such a construction.[1] If the description uses the term "half," this is not to be taken in its literal sense, if a different meaning is indicated by the context, by concomitant circumstances, or by subsequent acts of the parties.[2] A description designating a tract of land as "ten acres off the northwest corner of said quarter sec-

made, as "now surveyed, staked, and located, is the center line of said route," over certain land which is specifically described: Denver M. & A. Ry. Co. v. Lockwood, 54 Kan. 586. See, also, Thompson v. Southern Cal. M. R. Co., 82 Cal. 497. Where land is described as one hundred and thirty-four acres on the north side of a lot of land made by statute, a square, described by its number, district, and county, the description will embrace such a parallelogram as would result from drawing a line across a line running parallel with its northern boundary, so as to cut off one hundred and thirty-four acres: Gress Lumber Co. v. Coody, 94 Ga. 519. Although the field notes as described in a deed show a mistake because they do not close, yet the instrument is admissible in evidence when it appears from the deed that the scrivener in copying the field notes, mistook the character used to denote degrees for a cipher: Coffee v. Hendricks, 66 Tex. 676. A deed is not void for uncertainty where the description is so many acres to be taken from a larger tract at the selection of the grantee: Dohoney v. Womack, 1 Tex. Civ. App. 354. Nor is a deed void where an uncertainty as to the identity of the land described can be explained by extrinsic evidence: McWhirter v. Allen, 1 Tex. Civ. App. 649.

[1] Burnett v. McCluey, 78 Mo. 675.

[2] Jones v. Pashby, 48 Mich. 634. For cases in which particular descriptions have on various points been construed, see Kirch v. Davies, 55 Wis. 287; Platt v. Jones, 43 Cal. 219; Winslow v. Cooper, 104 Ill. 235; Fratt v. Woodward, 32 Cal. 219, 91 Am Dec. 573; Dwight v. Packard, 49 Mich. 614; Farley v. Deslonde, 58 Tex. 588; Altschul v. San Francisco etc. Ass'n., 43 Cal. 171; Smiley v. Fries, 104 Ill. 416; Cox v. Hayes, 64 Cal. 32; Atchison, Topeka etc. R. R. Co. v. Patch, 28 Kan. 470; Santa Clara Mining Assn. v. Quicksilver Mining Co., 8 Saw. 330, 17 Fed. Rep. 657; Small v. Wright, 74 Me. 428; Armstrong v. Dubois, 90 N. Y. 95; Parkinson v. McQuaid, 54 Wis. 473; Hatch v. Brier, 71 Me. 542; Avery v. Empire Woolen Co., 82 N. Y. 582; Cunningham v. Webb, 69 Me. 92; Hathorn v. Hinds, 69 Me. 326; Montgomery v. Reed, 69 Me. 510; Jewett v. Hussey, 70 Me. 433; Ames v. Hilton, 70 Me. 36; Snow v. Orleans, 126 Mass. 453; Herrick v. Ammerman, 32 Minn. 544; Hampton v. Helms, 81 Mo. 631; Irwin v. Towne, 42 Cal. 326; Garwood v. Hastings, 38 Cal. 216;

tion," is not indefinite and uncertain. Such a description means ten acres in the corner lying in a square, and bounded by four equal sides. If, however, the only words of description are "ten acres more or less of said quarter section," the description is so uncertain as to render the description void.[3] A deed is void for uncertainty where the starting point is given as "commencing at the N. W. of the N. W., S. E. of section 19."[4] So a description, the "S. ½ of the N. E. ¼ of S. E. ¼" of a section is fatally defective. There cannot be a southeast half of a section. If the word "quarter" was used, making the description the "S. ½ of the N. E. ¼ of S. E. ¼" of the section, the description would be good.[5] If one of the boundaries is described as a line commencing a certain distance below the mouth of a creek and to run at right angles with the creek, the deed, in the absence of anything on its face to indicate that the creek does not run in a course perfectly straight, or that a straight line drawn along the thread of the stream would fail to intersect the beginning point of the contested line, is not void for un-

De Levillain v. Evans, 39 Cal. 120; Mayo v. Mazeaux, 38 Cal. 442; Lake Vineyard Land and Water Assn. v. The San Gabriel etc. Assn., 58 Cal. 51; Persinger v. Jubb, 52 Mich. 304; Frost v. Angier, 127 Mass. 212; White v. Gay, 9 N. H. 127, 31 Am. Dec. 224; Melvin v. Proprietors of Locks, etc., 5 Met. 15, 38 Am. Dec. 384; Kirkland v. Way, 3 Rich. 4, 45 Am. Dec. 752; Gourdin v. Davis, 2 Rich. 481, 45 Am. Dec. 745; Patterson v. Trask, 30 Me. 28, 50 Am. Dec. 610; Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371. In a deed one call from a bound specified by courses and distances, was "to the road," etc. The next call then proceeded "in said road," etc. It was held that the first call was ambiguous, it not appearing as to what point in the road the first call ran to, or whether it only ran to the road, and this was a question for the jury: Ames v. Hilton, 70 Me. 36. Where the calls were, "thence by the road to A's land, thence southerly by said A's land to B's land," it was held in a real action that by "A's land" was meant land owned by him, not land possessed by him, especially as by giving this construction to the language, exactly the amount of land to which the grantor had title would be conveyed: Jewett v. Hussey, 70 Me. 433.

[3] Wilkinson v. Roper, 74 Ala. 140.

[4] Pry v. Pry, 109 Ill. 466.

[5] Pry v. Pry, 109 Ill. 466.

certainty on its face with respect to such line.[6] Where the land is described as "Lot No. 62, containing 50 52-100 acres, situate in the town and county of Santa Barbara, State of California, and numbered and marked on the official map or plan of outside lands of the town of Santa Barbara, made by William Norway, Surveyor," the court cannot say, as a matter of law, that the deed is void for uncertainty in the description.[7] An entire tract known by a general name may be described by such name. The same principle applies where a tract designated by a general name is excepted from a grant by metes and bounds. The excepted tract so described does not pass by the deed.[8] A deed is not void for uncertainty of description in which the land conveyed is described as "all the right, title, interest, and demand which the grantor has

[6] Irvin v. Towne, 42 Cal. 326. See Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103.

[7] Thompson v. Thompson, 52 Cal. 154. See, also, Meyers v. Farquharson, 46 Cal. 191, as to description in a bill of sale of a mining claim.

[8] Truett v. Adams, 66 Cal. 218. Where in one deed land was described as "Gift Map No. 2, lots No. 398 to 405 inclusive," and in a second deed executed in Illinois, the description was, "all lands and real estate belonging to the said party of the first part wherever the same may be situated," the court held that the first description was sufficient if there was a map in San Francisco known as "Gift Map No. 2," and that if the lands in controversy were owned by the grantor named in the second deed they passed by it: Pettigrew v. Dobbelaar, 63 Cal. 396. See Penry v. Richards, 52 Cal. 496; Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383. As to the certainty of description required in a decree of foreclosure, see Crosby v. Dowd, 61 Cal. 558. A, who owned an undivided tenth of a tract of land, executed a deed to B, describing the land conveyed as "all of the grantor's right, title, and interest in the following described property, viz: One-half interest in that right, title, and interest of the party of the first part in and to an undivided one-tenth part of that certain tract or parcel of land," etc. B, the grantee, subsequently executed a deed to C, conveying "all his right, title, interest, etc., in the following property, to wit: One-half interest in that right, title, and interest of the party of the first part in and to an undivided one-tenth part of that certain tract or parcel of land," etc. The court held that by the latter deed only an undivided half-interest of B, that is, an undivided one-fortieth of the land, passed to C: Hayes v. Wetherbee, 60 Cal. 396.

or ought to have in and to all those lots and parcels of land lying in the town of Silverton, which remained undivided amongst the proprietors of said townsite, upon delivery of deeds by the trustee of said townsite to the said proprietors, the same being one-twelfth undivided interest in said undivided lots." [9]

§ 1013a. **Further illustrations—Certainty.**—Parol evidence may be received to identify the land conveyed where it is described as "Known as the Pruett place, near Batesville, Ala. and the land near Hoboken, and one mile north of the city of Eufaula, all of which was my first wife's (Ann B. Pruett's) separate estate." [1] It is a sufficient description of the reversion where a person died seised of a lot of a certain number, out of which dower was set apart to his widow to describe it as "Known and distinguished as part of" the lot mentioned.[2] A deed is not invalidated because the land conveyed is described as being in the *city* of Shellrock, instead of the *town* of Shellrock.[3] If a surveyor from the whole description can locate and ascertain the land, it is sufficient.[4] Where land is described as being in "Tallahatchie County, Miss.," the deed is not void because the land is not described as being located in the State of Mississippi.[5] A deed is not void for uncertainty which is dated Atlanta, Ga., and describes the land as "my lot 50 ft. front on Fortune St. bounded north by X, and south by Y." The date line in the deed, will be taken as prima facie showing that the street was located in that place.[6] If the land conveyed can be identified by the other

[9] Blair v. Burns, 8 West C. Rep. 285.

[1] Eufanta Nat. Bank v. Pruett, 128 Ala. 470, 30 So. 128.

[2] Smith v. Wilson, 99 Ga. 276, 25 S. E. 637.

[3] Goodwin v. Goodwin, 113 Iowa, 319, 85 N. W. 31.

[4] Walker v. Lee, 51 Fla. 360, 40 So. 881.

[5] Wilkerson v. Webb, 75 Miss. 403, 23 So. 180.

[6] Horton v. Murden, 117 Ga. 72, 43 S. E. 876.

calls of the description, an *impossible* or *senseless* course will not be considered.[7] The fact that evidence aliunde the deed may be required to determine the land conveyed does not render insufficient a general description pointing out the subject with reasonable certainty.[8] The intent of the grantor may be made clear by extraneous evidence where some of the terms are equivocal and uncertain.[9] If a description is sufficient when it is made, a change in the conditions subsequently made cannot invalidate it.[1] There is no latent ambiguity in a description of land as the "southeast forty of the northeast quarter."[2] The court will take judicial knowledge of the *meridian* where land is described as situated in a certain county, and the township and range are numbered.[3] Where a deed gives certain courses and distances and states that the commencement is at "A's" corner "and running S. 70 degrees east 161 chains to B's corner" the deed is not void on its face, as by reference to "B's" corner the corner of "A" may be located by parol as well as the course and distance between them.[4] Where the land is irregular in form a description of it as being bounded on three sides by well-defined boundaries and on the fourth by the land of the grantor and as containing an exact number of acres, does not make the deed void for uncertainty.[5] Nor is a deed void for uncertainty where the land is described as being "a lot 90 x

[7] Brose v. Boise City Railway & Terminal Co., 5 Idaho, 694, 51 Pac. 753.

[8] Gates v. Paul, 117 Wis. 170, 94 N. W. 55.

[9] Barbour v. Tompkins, 58 W. Va. 572, 3 L.R.A.(N.S.) 715, 52 S. E. 707. See, also, Holley's Executor v. Curry, 58 W. Va. 70, 51 S. E. 135, 112 Am. St. Rep. 944.

[1] Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250.

[2] Evans v. Gerry, 174 Ill. 595, 51 N. E. 615.

[3] Harrington v. Goldsmith, 136 Cal. 168, 68 Pac. 594. See, also, Faekler v. Wright, 86 Cal. 210. Rogers v. Cady, 104 Cal. 288, 43 Am. St. Rep. 100; Borchard v. Eastwood, 133 Cal. XIX, 65 Pac. 1047.

[4] Babb v. Gay Mfg. Co., 150 N. C. 139, 63 S. E. 609.

[5] Moody v. Vondereau, 131 Ga. 521, 62 S. E. 821.

450 on the northwesterly corner" of streets named in a given city, county and state, if it is shown by the evidence that the grantor was the owner of a lot at that corner of those dimensions and was the owner of no other land in that neighborhood.[6] Whether the property can be ascertained or not is a question of fact.[7]

§ 1013b. Same subject—Additional illustrations.—A court is not justified in rejecting a deed as indefinite and uncertain where one of the calls is "and from said tree up the hill about six rods to another white oak standing on a bench on a hillside."[8] If a deed describes land as being situated in a certain fraction of a designated section, township and range, the fact that the county in which the land is situated is not mentioned, will not render the deed void for uncertainty where it appears that the description given is applicable only to certain land situated in the county in which as shown by the caption of the deed, it was executed.[9] A description is sufficiently certain where there is but one line to find to locate the land as the land conveyed may be identified by extrinsic evidence.[1] Where the grantor was the owner of the northwest quarter of a certain section containing forty-four acres, and was not the owner of any other land in that section, a deed, describing the land conveyed as the "north part of the west half" of this quarter section "containing 44 acres more or less," is not void by reason of uncertainty of description.[2] No ambiguity is created by a description of land as the "southeast forty of the northeast quarter."[3] A deed is not void on its face for uncertainty

[6] Burton v. Mullenary, 147 Cal. 259, 81 Pac. 544.

[7] Kykendall v. Clinton, 3 Kan. 85. In that case the description was the '"Clinton House,' together with all the rooms, houses, garden lots, etc., used in connection therewith" the name of the city and county in which the property was situated being given.

[8] Pilkerton v. Robertson, 65 S. E. 835.

[9] Scheuer v. Kelly, 121 Ala. 323, 26 South, 4.

[1] Cleveland v. Shaw, 119 S. W. 883.

[2] Walker v. David, 68 Ark. 544, 60 S. W. 418.

[3] Evans v. Gerry, 174 Ill. 595, 51 N. E. 615.

of description in which the land is described as "two acres of land lying in the west half of section 24, township 18, range 29, situated in the southwest part and on line of said property known as Silas place, situated in Lee county, Alabama." [4] The following description was held not to be uncertain: "Beginning at the head of Southwest Harbor, in Mt. Desert aforesaid, the corner bound on the shore between said lot and Isaac Mayo's lot, and follows the shore southerly to the corner of Jonathan Brown's lot; then follows said Brown's and Mayo's lines westerly to the head of said lot, which is called Cockle's lot." [5] But a deed is void for uncertainty, where the property is described as beginning at a *stake,* and all the corners are mentioned as at a *stake.*[6] If by a simple mathematical computation, one of the corners can be located, the description well be considered sufficient.[7] Where the land was described as 140 acres in the east part of a specified quarter section, and a portion of this quarter section was covered by a lake, the deed is not void for uncertainty in description, because it is possible to lay off the land in a strip of equal width from the east side of the quarter section, notwithstanding that such strip might include a part of the lake.[8] If a person owns 476 acres of a certain survey, constituting its eastern boundary and owns no other land in the survey, a description in his deed of the land as "476 acres being the eastern portion of" such survey sufficiently identifies the land.[9] If the land is fully and correctly described with the exception that the number of the township is erroneously given as "45" instead of "4," and it is possible to identify the land by the remaining parts of the

[4] Seymour v. Williams, 139 Ala. 414, 36 So. 187.

[5] Carter v. Clark, 92 Me. 225, 42 Atl. 398.

[6] Barker v. Southern Ry. Co., 125 N. C. 596, 34 S. E. 701, 74 Am. St. Rep. 658.

[7] Wall v. Club Land & Cattle Co., (Tex. Civ. App.), 92 S. W. 984, reversing S. C. 88 S. W. 534.

[8] Mendota Club v. Anderson, 101 Wis. 479, 78 N. W. 185.

[9] Arnall v. Newcom, 29 Tex. Civ. App. 521, 69 S. W. 92.

description, the deed will not be invalidated by the error.[1] Where a deed contained this description: "The west half of the southeast quarter of section nine (9), township thirty (30), range six (6), except one acre from the southeast corner of the southwest quarter of the southwest quarter of said section, town and range, together with the buildings thereon"—and it appeared from parol evidence that at the time of the execution of the deed, the grantor was and had continued thereafter to be in the possession of a dwelling and outbuildings and of a tract of land extending a distance in length of sixteen rods from east to west and a distance in width of ten rods from north to south and that it was impossible to lay off an acre at the southwest corner as specified in the description which would include all the buildings without making it of the size and dimensions specified, and also without the exclusion of the whole of a highway along the south boundary of the tract of the land described in the excepting clause, the court determined that it was not necessary to construe the description in the exception as requiring the tract to be square in form, but that on the contrary, it would be construed as including the land in the form of a parallelogram and as excluding the whole of the highway.[2] A description of land as lying in a specified

[1] Borchard v. Eastwood, 133 Cal. XIX, 65 Pac. 1047.

[2] Lego v. Medley, 79 Wis. 211, 24 Am. St. Rep. 706. It was said by Mr. Justice Taylor: "The learned counsel also insist that the court erred in permitting respondent to introduce parol evidence of the situation of her buildings in the south-east corner of said west half of the southwest quarter mentioned in her deed to her son, for the purpose of locating the acre of land so excepted from her deed; the claim being that the exception in the deed is the exception of an acre in the southeast corner in the form of a square, and that parol evidence is inadmissible to show that any other form was intended by the parties. The rule contended for by the learned counsel is undoubtedly the correct rule, when there is nothing else in the deed which calls for a different form. But the rule does not apply to a case when the exception is of a certain quantity of land, and the exception from the tract described in the conveyance refers to other

quarter section "except two acres in the southeast corner" is not void for uncertainty, but it will be considered that the parties by the exception meant that the two acres should be

objects than mere locality. It is not denied by the learned counsel that if the exception had been of one acre in the southeast corner of the tract conveyed, including the grantor's dwelling-house situated thereon, that evidence would not be admissible to show that one acre in a square form would not cover the dwelling-house, and that in such case the bounds of the acre should be so located as to include the dwelling-house, if this could be done, and still locate the acre on the southeast corner of the tract conveyed. The surroundings and the objects on the ground would control the shape of the acre, which, in the absence of such surroundings and objects called for in the deed, the law would construe to mean a square acre. In such case there is no mistake in the description, which, if corrected at all, must be corrected in an action brought for that purpose. It is a mere question of the location of the tract excepted in the conveyance.

But the learned counsel insists that an acre in a square form will cover all the material calls for boundary mentioned in the deed, because the evidence shows that an acre in a square form will include some of the buildings of the defendant situate in the southeast corner of the land described in the deed. That fact we do not think meets the call for the buildings evidently intended by the parties to the deed. Such acre would not include the defendant's dwelling-house, which was evidently far the most valuable building situated on the southeast corner of the land described in the deed; and that fact, with the other evidence introduced, raises a fair presumption that that building, of all others, was the one intended by the parties as one of the buildings which they intended the excepted acre should include.

It is true that the description of the excepted acre in the conveyance from the mother to the son is not as particular and specific as it should have been, but under the evidence showing that at the time the conveyance was made the grantor owned an adjoining eighty acres, and that her dwelling-house and out-houses were situate on the eighty acres conveyed to her son, that these houses constituted her home at the time, and that after the execution of the deed she remained in the occupation of her dwelling and outhouses as she had done before, claiming to own the same, strongly tend to show that such dwelling-house and other buildings were situate on the acre excepted in the conveyance to her son; and as an acre of land can be laid off in the southeast corner of the tract described in the conveyance in a convenient and useful form, so as to include the buildings, it seems to us that the court properly directed that it should be so laid off and bounded. The words

in the form of a square, bounded equally on the four sides.[3] The rule to be observed as stated in one case is that the construction of the grant should be favorable, "and as near the mind and intention of the parties as the rules of law will admit, and to ascertain this intention parol evidence may be resorted to, not to contradict or vary the words of the grant, but to show from the situation and condition of the subject-matter what meaning the parties attached to the words used, especially in matters of description."[4]

§ 1013c. **Exception void for uncertainty.**—If the land converted is described as an entire tract excepting a parcel described, and the description of the parcel in the exception is vague and uncertain the uncertainty will affect the exception only, and that will fail and not the grant.[5] Thus, where the land was described as: "all that certain piece and parcel of land lying and being in the county of Mobile, and state of Alabama, in township No. 7, south of range number 3 west, and part of the southeast quarter of the northwest quarter

in the description are general, and not specific, and, in the absence of anything indicating a different boundary, the law would determine that the acre should be a square; but when there is anything in the description which would not be complied with by making the acre a square, then the question as to what was intended by the parties by the words used is to be determined by the surrounding circumstances. In such case there is a latent ambiguity on the face of the deed when applied to the facts existing at the time the conveyance was executed, and the intent of the parties in such case becomes a question of fact, and not one of law, to be determined alone by the mere words under in the conveyance."

[3] Green v. Jordan, 83 Ala. 220, 3 Am. St. Rep. 711.

[4] Dunn v. English, 23 N. J. L. 126. As to parol evidence to show the intention of the parties, see Finlayson v. Finlayson, 17 Or. 347, 3 L.R.A. 801, 11 Am. St. Rep. 836; Hecklin v. McClear, 18 Or. 126; Bonaparte v. Carter, 106 N. C. 534; Enliss v. McAdams, 108 N. C. 507; Emery v. Webster, 42 Me. 204, 66 Am. Dec. 274; Shore v. Miller, 80 Ga. 93, 12 Am. St. Rep. 836; Wilson v. Cochran, 48 Pa. St. 107, 86 Am. Dec. 754.

[5] De Roach v. Clardy, (Tex. Civ. App.), 113 S. W. 22.

of section number 26, in said township and range, and containing thirty-nine acres and 33¼ hundredths. The above piece or parcel of land includes the whole of the southeast quarter of the northwest quarter of section number 26, in said township less 66¾ hundredths of an acre," the grant is valid, as the uncertainty is in the exception only.[6] The same is true, where the deed describes a tract of land "less 80 acres" previously sold. The uncertainty affects the exception only.[7]

§ 1013d. **Description to be liberally construed.**— Where a description is doubtful, the court will interpret the language in the light of the circumstances and for that purpose will consider the position of the parties to the deed, and the circumstances under which it was made.[8] Every call in the deed is to be answered if it is possible consistently to do so.[9] For the purpose of construing the extent of the property conveyed, the acts of the grantee in the case of an uncertain description may be considered.[1] While a specific description will generally prevail over a general description, yet, if there are two inconsistent descriptions in the deed, the controlling description will be that which from a consideration of the entire instrument seems best to express the intention of the parties.[2] The description the most certain is to be adopted

[6] Bromberg v. Smee, 130 Ala. 601, 30 So. 483.

[7] Loyd v. Oates, 143 Ala. 231, 38 So. 1022, 111 Am. St. Rep. 39. See, also, Waugh v. Richardson, 30 N. C. (8 Ired.) 470; Henry v. Whitaker, 82 Tex. 5, 17 S. W. 509; Baldwin v. Winslow, 2 Minn. 213; McAllister v. Honea, 71 Miss. 256, 14 So. 264; Maier v. Joslin, 46 Minn. 228, 48 N. W. 909; Cornwell v. Thurston, 59 Mo. 156; Thayer v. Torrey, 37 N. J. L. (8 Vroom.) 339; Falls Land & Cattle Co. v. Chisholm, 71 Tex. 523, 9 S. W. 479. If the land is described as all of a certain league excepting certain tracts which cannot be located, the uncertainty renders the deed void: Dwyre v. Speer, 8 Tex. Civ. App. 88, 27 S. W. 585.

[8] Abercrombie v. Simmons, 71 Kan. 538, 1 L.R.A.(N.S.) 806, 81 Pac. 208, 114 Am. St. Rep. 509.

[9] Chapman v. Hamblett, 100 Me. 454, 62 Atl. 215.

[1] Jacob Tome Inst. etc. v. Crothers, 87 Md. 569, 40 Atl. 261.

[2] Whitaker v. Whitaker, 175 Mo.

where two descriptions in a deed do not agree.[3] The principal purpose of construction is to ascertain the true intent of the language, and when that intent has been ascertained, it should be allowed to have paramount force,[4] and great liberality is always exercised in construing that part of the deed in which the property conveyed is described,[5] and the description will be sufficient if it supplies the means for identifying the land to be conveyed.[6] The parties to a deed are presumed to have in mind the actual state of the property conveyed at the time of the execution of the deed, and therefore, are supposed to refer to this for a proper definition of the terms used in the descriptive words.[7]

§ 1014. Land of reputed owner as boundary.—If the boundaries are given as the lands of others, the description may be sufficient, although the true names of the owners are not given, if the boundaries can otherwise be sufficiently identified. Thus the land conveyed in a deed was described as "bounded on the north by the land of Joseph C. Palmer." The fact was that Palmer did not own the land on the north, but the grantor had always recognized such land as belonging to him for the reason that he had been the agent who purchased

1, 74 S. W. 1029; State Sav. Bank v. Stewart, 93 Va. 447, 25 S. E. 443.

[3] Glenn v. Augusta Perpetual Bldg. Assn., 99 Va. 695, 40 S. E. 25.

[4] Rosenberger v. Wabash R. Co., 96 Mo. App. 504, 70 S. W. 395.

[5] Key v. Ostrander, 29 Ind. 1.

[6] Rucker v. Steelman, 73 Md. 396.

[7] Dawson v. James, 64 Ind. 162; Scheible v. Slagle, 89 Md. 323. See as to other cases giving rules for construction of doubtful description: Scott v. Michael, 129 Ind. 250, 28 N. E. 546; Stone v. Commonwealth, 181 Mass. 438, 63 N. E. 1074; Percival v. Chase, 182 Mass. 371, 65 N. E. 800; Jones v. Pashby, 62 Mich. 614, 29 N. W. 374; Nichols v. New England Furniture Co., 100 Mich. 230, 59 N. W. 155; Hendricks v. Vivion, 118 Mo. App. 417, 94 S. W. 318; Johnson v. Bowlware, 149 Mo. 451, 51 S. W. 109; Foster v. Byrd, 119 Mo. App. 168, 96 S. W. 224; Novotny v. Danforth, 9 S. D. 301, 68 N. W. 749; Gray v. Folwell, 57 N. J. Eq. 446, 41 Atl. 869; Huffman v. Eastham, 19 Tex. Civ. App. 227, 47 S. W. 35.

it for another. The court held that the northern boundary was sufficiently identified.[8] It is sufficient that the grantor recognized the person in possession as the owners and that the boundary line of the adjacent tract is established by evidence.[9] A deed is not invalidated by the fact that it describes the land as being in "surveys Nos. 56 and 75," while a part of the land is in survey 41 where the land conveyed is carefully described by courses and distances and also by visible monuments.[1] A deed which describes the land as all the lands owned by the grantor in a certain county with certain exceptions, will convey all the land in such county owned by the grantor and not embraced in the exceptions.[2] If a deed conveys a right of way to lands lying in a county named in the deed its effect will be limited to lands in such county although the grantor may own land in other counties which, under the terms of the deed without the limitation would be affected.[3] If a deed describes the land of a certain person as one of the boundaries of the land conveyed, though the title of such person may be defective, still if the grantor recognized him as the owner and the boundary of the adjacent tract is shown by extraneous evidence competent for that purpose, the description will be sufficient.[4]

§ 1015. General description and unrecorded deed.— Where a grantor executes a deed of all his real estate without description, the grantee obtains only such property as is vested in the grantor by a legal title. Property conveyed by an unrecorded deed, of which the grantee was ignorant, does not, by a deed in which the description is thus general, pass to him.[5]

[8] McKeon v. Millard, 47 Cal. 581.
[9] Moody v. Vondereau, 131 Ga. 521, 62 S. E. 821.
[1] Rucker v. Steelman, 73 Ind. 396.
[2] Borchard v. Eastwood, 133 Cal. XIX, 65 Pac. 1047.
[3] Flanary v. Kane, 102 Va. 547, 46 S. E. 312, 681.
[4] O'Farrell v. Vondereau, 68 S. E. 485.
[5] Jamaica etc. Corp. v. Chandler, 9 Allen, 159.

§ 1015a. Situation and condition shown by parol evidence.—The meaning that the parties attached to the language employed, especially in matters of description, may be shown by parol evidence relating to the situation and condition of the subject matter, for the deed should be given a favorable construction, and one as near the meaning and intention of the parties as the rules of law will allow.[6] A deed conveying all the lands of the grantor is not void for uncertainty of description, and passes the title to all land in which he has an interest. Nor does the fact that the description excepts from the operation of the deed all property of the grantor exempt from execution render the conveyance void for uncertainty in description, as that is certain which may be made certain.[7] The declarations of the grantor subsequently made relating to the boundaries of the land conveyed are admissible in evidence against those claiming title under him.[8] But declarations by a former owner, under whom a person claims, made forty years before the commencement of a suit to recover a strip of land bounded by a river, are inadmissible to show that the river has changed its bed.[9] Still the rule is well established that in case of a disputed boundary line which is in doubt, the declarations of the grantor, made at and before the execution of the deed, as to the location of the boundary line, may be received in evidence against him and those who claim under him.[1] Parol evidence may be received to fix boundaries by showing that when the grantor, in delivering the deed, pointed out stakes, and said the land

[6] Lego v. Medley, 79 Wis. 211, 24 Am. St. Rep. 706; Lyman v. Babcock, 40 Wis. 512; Dunn v. English, 23 N. J. L. 126; Cravens v. White, 73 Tex. 577, 15 Am. St. Rep. 803.

[7] McCulloh v. Price, 14 Mont. 320, 43 Am. St. Rep. 637.

[8] Simpson v. Blaisdell, 85 Me. 199, 35 Am. St. Rep. 348.

[9] Taylor v. Glenn, 29 S. C. 292, 13 Am. St. Rep. 724.

[1] Sharp v. Blankenship, 79 Cal. 411; McFadden v. Ellmaker, 52 Cal. 349; Stanley v. Green, 12 Cal. 148; McFadden v. Wallace, 38 Cal 51.

conveyed lay between them, and that afterward the grantor and grantee erected fences inclosing the land between the stakes.[2]

§ 1015b. **Center line of railroad route.**—Contemporaneous facts and circumstances may be taken into consideration for the purpose of giving certainty to a description that otherwise might be vague and uncertain. Thus, where a deed described the land conveyed as fifty feet on each side of a center line of a route which had been surveyed, staked and located, and an attack was made upon the description on the ground that it was indefinite the court said that "the law will not declare a deed void for uncertainty when the light which contemporaneous facts and circumstances furnish renders the description definite and certain." [3] A court, in the construction of a doubtful construction, will assume as nearly as is possible the position of the parties to the deed. It will take into consideration all the circumstances attending the transaction, and in the light of these circumstances will read and construe the words which the parties have em-

[2] Hooten v. Comerford, 152 Mass. 591, 23 Am. St. Rep. 861. See, also, Lovejoy v. Lovett, 124 Mass. 270; Dodd v. Witt, 139 Mass. 63, 52 Am. Rep. 700; Reed v. Proprietors of Locks and Canals, 8 How. 274, 12 L. ed. 1077; Miles v. Barrows, 122 Mass. 579. Where the deed described the land conveyed as "parts" of certain lots, without stating what parts, it may be shown by parol evidence what land was intended to be conveyed. The ambiguity may be explained: Shore v. Miller, 80 Ga. 93, 12 Am. St. Rep. 239. See, also, Bonaparte v. Carter, 106 N. C. 534; Houston v. Bryan, 78 Ga. 181, 6 Am. St. Rep. 252.

[3] Denver M. & A. R. Co. v. Lockwood, 54 Kan. 586, 38 Pac. 794. See, also, Tucker v. Allen, 16 Kan. 312; Seaton v. Hixon, 35 Kan. 663, 12 Pac. 22; Thompson v. Motor Road Co., 82 Cal. 497, 23 Pac. 130; Pennsylvania R. Co. v. Pearsol, 173 Pa. 496, 34 Atl. 226; Croffs v. Hibbard, 4 Met. 438; Oxford v. White, 95 N. C. 525; Horton v. Murden, 117 Ga. 72, 43 S. E. 786; Armstrong v. Mudd, 10 B. Mon. 144, 50 Am. Dec. 545; Lohff v. Germer, 37 Tex. 578; McPike v. Allman, 53 Mo. 551.

ployed.[4] A deed contained this description: "A perpetual right of way over and across lots 2 and 5, in block 32, in said city of Colton, according to the Colton Land and Water Company's survey, for the purpose of constructing, maintaining and operating said motor road, such right of way to be along the line as surveyed and laid out by H. C. Kellogg, civil engineer of said corporation, being a distance in length of 1,113 feet more or less, and running in a northerly and southerly direction, a map of which is hereto attached and made a part hereof." When the deed was offered in evidence objection was made, on the ground that it was void for uncertainty. To overcome this objection, the proponent of the deed offered to introduce additional evidence to show that at the time of the execution of the deed, the road had been commenced, and the line of the right of way, claimed under

[4] Thompson v. Motor Road Co., 82 Cal. 497, 23 Pac. 130. The court said:

"It is true that a deed must so describe the land sought to be conveyed thereby that it can be identified. But that is certain which can be made certain. (Civ. Code, sec. 3538). And extrinsic evidence is always admissible to explain the calls of a deed for the purpose of their application to the subject-matter, and thus to give effect to the deed. (Reamer v. Nesmith, 34 Cal. 624). In construing a doubtful description in a grant, the court must assume as nearly as possible the position of the contracting parties, and consider the circumstances of the transaction between them, and then read and interpret the words used in the light of these circumstances. (Truett v. Adams, 66 Cal. 218).

Now, if we assume the position of the contracting parties, and consider the circumstances of the transaction, we shall see a railroad in process of construction by the defendant. The proposed line of the road extends across the plaintiff's lots. The defendant is desirous of obtaining a right of way over the lots for its road. Without objection, its engineer has gone upon the lots and has surveyed and distinctly marked, by stakes stuck in the ground, the line of the road. A map of this survey has been made and is before the parties. Under these circumstances the deed in question is made, granting a right of way over the lots for the construction and operation of a railroad, "such right of way to be along the line as surveyed and laid out" by the engineer of the grantee. The road was then constructed across the lots, following the exact line of the survey."

the deed, and occupied by the road, had been surveyed and designated by stakes stuck into the ground, so that it could be traced without difficulty. The trial court thereupon overruled the objection, and the explanatory evidence was received and on appeal the court upheld this ruling and decided that to be certain which can be made certain and that extrinsic evidence is always admissible for the purpose of explaining the calls of a deed to make the deed effectual by applying the calls to the subject matter.[5] In another case a railroad company had surveyed and staked out a route for a railroad and when about to commence construction of the railroad over the land of an owner purchased from him a strip of land, which, in the deed, was described as: "all the lands in the southwest quarter of section 15, township 9, south of range 7 west, lying within 50 feet of the center line of said railroad and containing 6.23 acres more or less." A week after the purchase, the railroad company made a map and profile of the route intended to be adopted, which was filed in the proper public office, but the railroad was never constructed or even graded over the land of the grantor. During the lifetime of the grantor, the entire quarter section was inclosed and cultivated by the grantor, but the railroad company paid taxes on the strip to a time when it executed a deed to another with the same description as that contained in the deed to the railroad company. It was contended in an action of ejectment brought by the grantee from the railroad company, that the deed to the company was so indefinite in the description of the property conveyed as to be void, and that even if the description should be sufficient, it conveyed nothing more than a right of way, and consequently, when it was not used for that purpose, the title reverted to the original owner. The court decided that the deed was not void by reason of any indefiniteness in the description, and that in the construction of a doubtful description the position of the contracting

[5] Thompson v. Motor Road Co., 82 Cal. 497, 23 Pac. 130.

parties will be considered as well as the circumstances of the transaction, and that the construction to be given to the conveyance will be made in the light of such circumstances. Under the circumstances mentioned while the description was not defective, the court held that the interest acquired by the railroad company was not an absolute title but was limited to the use for which the land was obtained, and that upon the abandonment of that use the property would revert.[6]

§ 1016. **Surplusage.**—The deed will not be void for uncertainty from the fact that the description in part is false or incorrect, if there are sufficient particulars given to enable the premises intended to be conveyed to be identified. Thus,

[6] Abercrombie v. Simmons, 71 Kan. 538, 1 L.R.A.(N.S.) 806. Mr. Chief Justice Johnson, in delivering the opinion of the court said: "On the point of indefiniteness of description, it is claimed that it was impossible to locate or identify the land from the description given; that the description of a part of the quarter section 'lying within 50 feet of the main track of the railroad' furnished no means of identification where in fact no railroad had been built. The agreed facts, however, show that, prior to the execution of the deed, the company contemplated the construction of a railroad, over this land, and had actually surveyed and staked out a route and line. The map and profile of the route was in the course of preparation, and was completed a few days later, and this was the one which was filed with the county clerk. The company was negotiating for land upon which to construct and operate a railroad. It had marked out on the face of the land the line or track which it proposed to build. The owner sold it to the company for that purpose, and obviously both parties contracted with reference to these facts. In construing a doubtful description in a conveyance, the court must keep in mind the position of the contracting parties, the circumstances under which they acted, and interpret the language of the instrument in the light of these circumstances. When so construed, we may fairly say that, as the only way of locating the strip was by a resort to the line which had been surveyed and staked out by the company as the statute authorized, the parties contracted with reference to this survey, and it may be looked to as a part of the description. Under the principle that that will be considered certain which can be made certain, we can look not only to the survey, but also to the map and profile made by the company."

where a lot is described by its number on a recorded plat, which in itself is a sufficient description, but there is a misdescription in a boundary line, such misdescription will be rejected.[7] In a deed the land was described as lot 77 of

[7] Union Railway & Transit Co. v. Skinner, 9 Mo. App. 189; Thompson v. Ela, 60 N. H. 562; Husbands v. Stemple, 13 Mo. App. 589; Reamer v. Nesmith, 34 Cal. 624; Irving v. Cunningham, 66 Cal. 15; Beaumont v. Field, 1 Barn. & Ald. 247; Norwood v. Byrd, 1 Rich. 135, 42 Am. Dec. 406; Clark v. Munyan, 22 Pick. 410, 33 Am. Dec. 752; White v. Gay, 9 N. H. 126, 31 Am. Dec. 224; Morton v. Jackson, 1 Smedes & M. 494, 40 Am. Dec. 107. See, also, Shewalter v. Pirner, 55 Mo. 218; Cooley v. Warren, 53 Mo. 166; Seaman v. Hogeboom, 21 Barb. 398; Hobbs v. Payson, 85 Me. 498, 27 Atl. Rep. 519; Sink v. McManus, 49 Hun, 583; Maker v. Lazell, 83 Me. 562, 23 Am. St. Rep. 795, 22 Atl. Rep. 474; Shackelford v. Orris, 129 Ga. 791, 59 S. E. 772 (citing text) Arambula v. Sullivan, 80 Tex. 615, 16 S. W. 436; Barnard v. Good, 44 Tex. 638; Coffey v. Hendricks, 66 Tex. 676; Kingston v. Pickens, 46 Tex. 99; Oliver v. Mahoney, 61 Tex. 610; Smith v. Chatham, 14 Tex. 322; Birdseye v. Rogers (Tex. Civ. App.), 26 S. W. Rep. 841; Peterson v. Ward, 5 Tex. Civ. App. 208, 23 S. W. Rep. 637; Minor v. Powers (Tex. Civ. App.), 24 S. W. Rep. 710; Sherwood v. Whiting, 54 Conn. 330, 1 Am. St. Rep. 116; Evans v. Greene, 21 Mo. 170; Gibson v. Bogy, 28 Mo. 478; Rutherford v. Tracy, 48 Mo. 325, 8 Am. Rep. 104; Jamison v. Fopiano, 48 Mo. 194; West v. Bretelle, 115 Mo. 653, 22 S. W. Rep. 705; Bray v. Adams, 114 Mo. 486, 21 S. W. Rep. 853; Johnson v. Simpson, 36 N. H. 91; Harvey v. Mitchell, 31 N. H. 475; Eastman v. Knight, 35 N. H. 551; Benton v. McIntyre, 64 N. H. 598, 15 Atl. Rep. 413; Driscoll v. Green, 59 N. H. 101; Elliott v. Thatcher, 2 Met. 44; Worthington v. Hylyer, 4 Mass. 196; Melvin v. Proprietors of Locks and Canals, 5 Met. 15, 38 Am. Dec. 384; Bond v. Fay, 12 Allen, 86; Bosworth v. Sturtevant, 2 Cush. 392; Hastings v. Hastings, 110 Mass. 280; Morse v. Rogers, 118 Mass. 573–578; Lovejoy v. Lovett, 124 Mass. 270; Morse v. Rogers, 118 Mass. 572; Auburn Cong. Church v. Walker, 124 Mass. 69; Cassidy v. Charlestown Sav. Bank, 149 Mass. 325, 21 N. E. Rep. 372; Thompson v. Jones, 4 Wis. 106; Green Bay v. Hewitt, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. Rep. 382; Lochte v. Austin, 69 Miss. 271, 13 So. Rep. 838; Miller v. Travers, 8 Bing. 244; Winnipisiogee Paper Co. v. N. H. Land Co., 59 Fed. Rep. 542; Hamm v. San Francisco, 17 Fed. Rep. 119; Wade v. Deray, 50 Cal. 376; Wilcoxon v. Sprague, 51 Cal. 640; Reed v. Spicer, 27 Cal. 57; Jackson v. Clark, 7 Johns. 217; Baldwin v. Brown, 16 N. Y. 359; Jackson v. Barringer, 15 Johns. 471; Loomis v. Jackson, 19 Johns. 449; Schoenewald v. Rosenstein, 25 N. Y. St. Rep. 964, 5 N. Y. Supp. 766; Robinson v. Kime, 70 N. Y. 147; Case v. Dexter, 106 N. Y. 548; Muldoon v. Deline, 135 N. Y. 150;

the original plat of the town as recorded, but the original plat did not contain over twenty-nine lots, and another plat, which, on account of defects in execution, was not entitled to record, described the land erroneously as lot 78. There was another plat which contained the lot, but this plat was not recorded, and it was shown that the lot, for more than twenty-five years, had been held, taxed, and dealt with as lot 77. Under these circumstances, it was held that the deed was not invalidated for the error in the description.[8] In a mortgage several lots were described by numbers, with the additional clause, "being all of block 25." This block did not contain the numbers mentioned in the instrument, but they were in another block. It appeared, however, that it was the intention of the mortgagor to mortgage the block in which he resided, and that he resided in block 25, and, accordingly, it was held that block 25 was subject to the

Danziger v. Boyd, 21 J. & S. 398; Llewellyn v. Earl of Jersey, 11 M. & W. 183; Duncan v. Madard, 106 Pa. St. 562; Wiley v. Lovely, 46 Mich. 83, 8 N. W. Rep. 716; Wilt v. Cutler, 38 Mich. 189; Lodge v. Lee, 6 Cranch, 237, 3 L. ed. 210; Land Co. v. Saunders, 103 U. S. 316, 26 L. ed. 546; Jackson v. Sprague, 1 Paine, 494; Prentice v. Stearns, 113 U. S. 435, 28 L. ed. 1059; White v. Herman, 51 Ill. 243, 99 Am. Dec. 543; Kruse v. Wilson, 79 Ill. 233; Myers v. Ladd, 26 Ill. 415; Holston v. Needles, 115 Ill. 461, 5 N. E. Rep. 530; Stevens v. Wait, 112 Ill. 544; Bowen v. Allen, 113 Ill. 53, 55 Am. Rep. 398; Clements v. Pearce, 63 Ala. 284; Chadwick v. Carson, 78 Ala. 116; Bryan v. Wisner, 44 La. Ann. 832, 11 So. Rep. 290; Simpson v. King, 1 Ired. Eq. 11; Proctor v. Pool, 4 Dev. 370; British and American Mortgage Co. v. Long, 113 N. C. 123, 18 S. E. Rep. 165; Shaffer v. Hahn, 111 N. C. 1, 15 S. E. Rep. 1033; Raymond v. Coffey, 5 Or. 132; Keith v. Reynolds, 3 Me. 393; Cate v. Thayer, 3 Me. 71; Chandler v. Green, 69 Me. 350; Andrews v. Pearson, 68 Me. 19; Abbott v. Abbott, 53 Me. 356; Jones v. Buck, 54 Me. 301; Getchell v. Whittemore, 72 Me. 393; Kinsey v. Satterthwaite, 88 Ind. 342. So, also, where the erroneous portion can be disregarded: Borchard v. Eastwood (Cal.) 65 Pac. 1047; Goodwin v. Goodwin, 113 Ia. 319, 85 N. W. 31; Douthit v. Robinson (Tex.) 39 S. W. 988; Goodson v. Fitzgerald, 40 Tex. Civ. App. 619, 90 S. W. 898; Gallup v. Flood, 46 Tex. Civ. App. 644, 103 S. W. 426; Risch v. Jensen, 92 Minn. 107, 99 N. W. 628.

[8] Wiley v. Lovely, 46 Mich. 83. See Vose v. Handy, 2 Greenl. 323, 11 Am. Dec. 101.

mortgage.[9] Where there are several calls in a deed, and, with the exception of one, they may all be applied upon the face of the earth, constituting a correct and intelligent description of the lot to which they refer, the one that does not apply will be rejected as surplusage, and the others will prevail.[1] A description in a deed, made in 1840, stated that the land was situated in the county of Lenawee and territory of Michigan, and part of the land conveyed was assigned to a certain township and range. The townhsip and range described were in Monroe county, but not in Lenawee county, and Michigan was no longer a territory at the time at which the deed bore date; but, in the construction of the deed, it was held to convey the land in the township and range mentioned, and the general description by the name of the county was rejected.[2] If the deed contains two descriptions, one correct and the other false in fact, the latter should be rejected as surplusage.[3] Where one of two different descriptions applies to land to which the grantor had title, and the other to land which he did not own, the former will be taken as the true description, and the latter will be rejected as false.[4]

[9] Sharp v. Thompson, 100 Ill. 447, 39 Am. Rep. 61.

[1] Chandler v. Green, 69 Me. 350.

[2] Wilt v. Cutler, 38 Mich. 189. But if all the particulars are essential to the description, the estate conveyed must agree with every part of the description. See Peck v. Mallams, 10 N. Y. 533; Kruse v. Wilson, 79 Ill. 235.

[3] Reed v. Spicer, 27 Cal. 57. And see, also, Harvey v. Mitchell, 31 N. H. 575; Abbott v. Abbott, 53 Me. 356; Bond v. Fay, 12 Allen, 86; Lane v. Thompson, 43 N. H. 320; Vose v. Handy, 2 Greenl. 322, 11 Am. Dec. 101; Reed v. Proprietors of Locks, etc., 8 How. 274, 12 L. ed. 1077; Robertson v. Mosson, 26 Tex. 248; Eastman v. Knight, 35 N. H. 551; Thompson v. Jones, 4 Wis. 106; White v. Gay, 9 N. H. 126, 31 Am. Dec. 224; Jackson v. Root, 18 Johns. 60; Gibson v. Bogy, 28 Mo. 478; Myers v. Ladd, 26 Ill. 415; Norwood v. Byrd, 1 Rich. 135, 42 Am. Dec. 407. And see, also, Hibbard v. Hurlburt, 10 Vt. 173; Jackson v. Barringer, 15 Johns. 471; Clough v. Bowman, 15 N. H. 504; Goodright v. Pears, 11 East, 58.

[4] Piper v. True, 36 Cal. 606.

If sufficient remains after rejecting a part of the description which is false, the deed will take effect.[5]

§ 1017. **Illustrations.**—A deed described the land conveyed as the "west half of lot 284, and half of gore, both containing fifty acres, being the same, more or less, as surveyed by Israel Johnson and Isaac Boynton, by order of the court of sessions." As a matter of fact the persons named never surveyed the land described by order of any court, but, as a committee of the court of common pleas, duly partitioned the lot and assigned the west half to the grantor. The court held that if the words relating to the survey were to be regarded as erroneous, there was a sufficient description in the remaining language, "west half of lot 284," to pass the title.[6] In a deed the description was: "A certain sawmill site in Levant village, with the sawmill, machinery, and fixtures thereon standing, including shingle machine and cutting-off saw, also one undivided fourth part of mill common," with other parcels particularly described, and adding, "meaning to convey to said Baxter all the premises which said William Bradbury purchased of Benjamin Garland, by deed, dated March 19, 1832, and recorded in Penobscot Registry, book 28, page 448, with all the privileges, and subject to all the restrictions therein expressed, reference thereto for a more particular description of said premises." The court decided that by this description the mill and the whole land thereunder would pass, notwithstanding that by the deed to which reference was had, the grantor acquired but a part

[5] Irving v. Cunningham, 66 Cal. 15. But where a grantor did not have an interest beyond an estate for life, a deed executed by him purporting to convey "one divided fourth part" of the land, cannot be construed as conveying an undivided fourth part of the property. The court cannot reject the word "divided" from the description: Ford v. Unity Church Soc., 120 Mo. 498, 23 L.R.A. 561, 41 Am. St. Rep. 711.

[6] Abbott v. Abbott, 53 Me. 356.

of the property upon which the mill was erected.[7] A deed bearing date of April 13, 1838, described the lands intended to be conveyed, as described in a deed from A to the grantor, "of even date herewith," referring to the latter deed for a description of the premises. Only one deed had been made by A to the grantor, and this deed was dated April 5, 1838. In the construction of the description the court rejected the words "of even date herewith" as erroneous. But as there was no doubt as to the deed or the land intended, the title was held to pass.[8] So in the case of a devise of "all my homestead farm, being the same farm whereon I now live, and the same which was devised to me by my honored father," the whole of the homestead farm will pass, although the fact may be that a part of the farm was not devised by the father.[9] Where an island is described by its name, to which is added a description by courses and distances, and the latter on resurvey are found to exclude a part of the island, the whole island will pass by force of the first description.[1] An owner of land lying partly in lot number 10 and partly in lot number 9 conveyed a tract of land which he described in the deed as lot number 10, but bounded on all sides by the land of other persons. The court held that the whole tract lying in both lots was conveyed by the deed, although mistakes had been made as to the owners of the adjoining lots in the description.[2] The description in a deed

[7] Crosby v. Bradbury, 20 Me. 61, and see cases cited therein.

[8] Eastman v. Knight, 35 N. H. 551, and cases cited.

[9] Drew v. Drew, 28 N. H. (8 Fost.) 489. This case is frequently cited as an authority, and is valuable for its examination and collection of authorities.

[1] Lodge's Lessee v. Lee, 6 Cranch, 237, 3 L. ed. 210.

[2] Tenny v. Beard, 5 N. H. 58. Where a deed in the granting clause declared that the grantor "releases, quitclaims, and conveys" to the grantee, "and its successors and assigns forever, all his right, title, and interest of every name and nature, legal or equitable, in and to" the land, and in a subsequent clause, declares that "the interest and title intended to be conveyed by this deed is only that acquired by" the said grantor "by virtue of"

was: "All that my farm of land in said Washington, on which I now dwell, being lot No. 17 in the first division of lands there, containing one hundred acres, with my dwelling-house and barn thereon standing, bounding west on land of Joseph Chaple, northerly by a pond, easterly by lot No. 18, and southerly by lot No. 19, having a highway through it." The fact was that the limits of the lot were correctly described, but the farm on which the grantor lived was not lot No. 17, but a different parcel of land. The court decided that this false particular of the description should be rejected, because the description was sufficiently definite without it, for, if considered as an essential part of the description, the effect would be to nullify the deed.[3]

§ 1018. **Subject continued.**—In designating a lot, the number of it was not given, but it was described as adjoining the land of four several individuals. But this description taken in full would include three several lots, and a quantity of land exceeding greatly that mentioned in the deed. If, however, one of the names of the persons should be rejected, one lot only would be definitely designated. Under these circumstances, it was evident that the statement that such person was an adjoining owner was a mistake, and, taking this view, the court decided that this part of the description

a certain deed which had been previously executed to him, and conveying, it is assumed, only an undivided half of the land, the two clauses are inconsistent. The granting clause will prevail, and the whole interest of the grantor will pass by the deed: Green Bay v. Hewett, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382.

[3] Worthington v. Hylyer, 4 Mass. 196. The court said: "For by no construction can lot No. 17 be considered as conveyed, to the exclusion of the farm, as the lot is mentioned as descriptive of the farm, and not the farm as descriptive of the lot. Indeed, rather than the deed should be deemed void, a construction ought to be adopted, on which both the farm and the lot should be conveyed; for a farm on which the mortgagor then lived is certainly intended to be conveyed; and the lot is also bounded as descriptive of, and may therefore be considered as part of the premises."

should be rejected as such.[4] A description was: "All my real property, or homestead, so called, lying and being in Dartmouth, consisting of a dwelling-house and outbuildings, together with about thirty acres of land, let the same be more or less, with all the orchards, privileges, and appurtenances thereto belonging or any way appertaining—more particular boundaries, reference may be had to a deed given by Clark Ricketson to David Thatcher, of the above-mentioned premises." When the deed was executed, David Thatcher owned only a part of the land which he had purchased from Ricketson. He had, however, bought about as much from Leban Thatcher adjoining the land purchased by him, David, from Ricketson, and in fact, had about the same quantity of land altogether as he had purchased from the latter. The principal part of the land conveyed came from Ricketson, but by inadvertence the deed from Ricketson to David Thatcher was referred to for particular boundaries. But the grantee entered into possession of the whole, the part purchased by David Thatcher from Ricketson as well as the part purchased from Leban Thatcher. The reference to Ricketson's deed was held to be a mistake, and was rejected as an inadvertency in the description.[5] At the time the grantor executed a deed he had been in possession of and claimed to own several tracts of land adjoining each other. The whole aggregated about two hundred and eighty acres. His deed described the land conveyed as "a certain tract or parcel of land, situate in Falmouth, containing two hundred and thirty acres, more or less, all the lands which I own in said town, the butts and bounds may be found in the county records of Portland." By an examination of the records it appeared that several different tracts of land adjoining each other had been conveyed to the grantor, and these, in the aggregate, contained two hundred and thirty-five acres. But in addition

[4] White v. Gay, 9 N. H. 126, 31 Am. Dec. 224, and cases cited.

[5] Thatcher v. Howland, 2 Met. 41.

to these several tracts there was another adjoining them. To this latter parcel it did not appear that the grantor had any title apparent by the record, or any other than a title acquired by possession. But the whole of the land, including this latter tract, was held to pass by the description.[6] If the land is described as the whole of a certain farm, and is again described in the deed by courses and distances, which, however, do not embrace the whole farm, this latter description will be rejected, and the title to the whole farm will pass by the deed.[7] In another case, a person owned a farm, title to which he had acquired by two deeds, the first conveying to him an undivided one-third part, and the second the residue. He executed a mortgage deed of a piece of land, describing it as being the same land mentioned in his first deed, to which he referred, and as being his whole farm. The reference to the first deed was held to be intended for the description of the land only, and not as describing the quantity of estate or interest affected by the mortgage. In other words, the whole farm was considered to be embraced by the mortgage.[8] In a deed under which the grantor held, three adjoining parcels of land were conveyed, each of which was particularly described. He subsequently executed a deed, which commenced in the language of the former deed as a conveyance of three parcels, but it described only the first parcel, and referred to the deed from his grantor to himself. All three parcels, the court held, passed by the deed.[9]

§ 1019. **Parcel of larger tract.**—A deed conveying a part of a larger tract of land, but not locating the part conveyed, is construed as conveying an undivided interest in the larger tract. If the deed, however, attempts to describe

[6] Field v. Huston, 21 Me. 69.

[7] Keith v. Reynolds, 3 Greenl. 393. And see Cate v. Thayer, 3 Greenl. 71.

[8] Willard v. Moulton, 4 Greenl. 14.

[9] Child v. Fickett, 4 Greenl. 472.

a specific portion, designating the number of acres, and describing it as a parcel of a larger tract, but the calls do not describe the tract of land intended to be conveyed, or any tract of land, the deed does not convey an interest in the whole tract, nor does it make the grantee a tenant in common in the larger tract with the grantor.[1] "Where a deed is of a given quantity of land, parcel of a larger tract, and the deed fails to locate the quantity so conveyed by a sufficient description, the grantee, on delivering the deed, becomes interested in all the lands embraced within the larger area as tenant in common with his grantor, and as such tenant the grantee can claim a partition under proceedings instituted for that purpose, or alternatively, a partition may be made by amicable agreement between the parties." [2] Where the owners of a quarter section of land had conveyed twenty-two and twenty-nine hundreths acres taken from the southeasterly part of the quarter section, and subsequently executed a deed, describing the land conveyed as "the east one hundred acres of the quarter section, commencing on the west bank of the Feather river, and running back to the westward far enough so as to contain one hundred acres of the quarter section,

[1] Grogan v. Vache, 45 Cal. 610; Lawrence v. Ballou, 37 Cal. 518; Schenck v. Evoy, 24 Cal. 104, 110.

[2] Schenck v. Evoy, 24 Cal. 110. The court quote this language with approval in Lawrence v. Ballou, 37 Cal. 518, 520, and say: "And in view of the nature of the present action, we add that if the grantor or his grantees exclude him from the possession, he may maintain ejectment against them. To the same effect, see, also, the following cases: Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383; Gibbs v. Swift, 12 Cush. 393; Sheafe v. Wait, 30 Vt. 735; Jackson v. Livingston, 7 Wend. 136; Corbin v. Jackson, 14 Wend. 619, 28 Am. Dec. 550; The Long Island R. R. Co. v. Conklin, 29 N. Y. 572."

But in Grogan v. Vache, 45 Cal. 610, 613, the court said that it could find no case in which a deed attempting to convey a parcel of a larger tract, but not describing the land intended to be conveyed so that it may be located, "is held to operate, by reason of such insufficient description of the specific tract, as a conveyance of an undivided interest in the larger tract; and, in our opinion, there is no rule for the construction of deeds which will work that result."

excepting therefrom a small piece of land," sold by the owners as stated, the court construed the deed as conveying only seventy-seven and seventy-one hundreths acres.[3] A deed which describes the land conveyed as "324 acres of land, part of a certain tract" which is described, and which fails to identify the part of the tract to be conveyed, and which fails to state any facts by which its identity can be established, is void.[4]

In the language of Mr. Justice Smith: "The office of the descriptive words is to ascertain and to identify an object, and parol proof is heard, not to add to or enlarge their scope, but to fit the description to the thing described. When they are too vague to admit of this, the instrument in which they are contained becomes inoperative and void." [5] A contract for the purchase of a tract of a number of acres from a larger tract, without stating where it is to be taken off is so vague and indefinite that specific performance will not be decreed.[6]

§ 1020. **Reference to maps or other deeds.**—A deed, for a description of the land conveyed, may refer to another deed or to a map, and the deed or map to which reference is thus made is considered as incorporated in the deed itself.[7]

[3] Cox v. Hayes, 64 Cal. 32.

[4] Cathey v. Buchanan Lumber Co., 151 N. C. 592, 66 S. E. 580. See, also, Skoukup v. Invest. Co., 84 Ia. 448, 51 N. W. 167, 35 Am. St. Rep. 317; Savage v. Gant (Tenn.) 57 S. W. 170.

[5] Harrison v. Hahn, 95 N. C. 28.

[6] Grier v. Rhyno, 69 N. C. 350. See, also, Harris v. Woodward, 130 N. C. 580, 41 S. E. 790; Dickens v. Barnes, 79 N. C. 409; Allen v. Chambers, 39 N. C. 125; Harrell v. Butler, 92 N. C. 20; Robeson v. Lewis, 64 N. C. 734; Murdock v. Anderson, 57 N. C. 77.

[7] Lippett v. Kelly, 46 Vt. 516; Powers v. Jackson, 50 Cal. 429; Vance v. Fore, 24 Cal. 444; Foss v. Crisp, 20 Pick. 121; Schenley v. Pittsburgh, 104 Pa. St. 472; City of Alton v. Illinois etc. Co., 12 Ill. 38, 52 Am. Dec. 479; Waterman v. Andrews, 14 R. I. 589; Wuesthoff v. Seymour, 22 N. J. Eq. 66; Rutherford v. Tracy, 48 Mo. 325, 8 Am. Rep. 104; Allen v. Taft, 6 Gray, 552; Hudson v. Irwin, 50 Cal. 450; St. Louis v. Wiggin's Ferry Co., 15 Mo. App. 227; Boylston v. Carver, 11 Mass. 515; Dolde v. Vodicka, 49 Mo. 100; Reed v. Lammel,

Where the description is by courses and monuments and boundary lines of other tracts of land, and then the deed declares that the description already made is to be according

28 Minn. 306; Lunt v. Holland, 14 Mass. 149; Ferris v. Coover, 10 Cal. 622; Shirras v. Caig, 7 Cranch, 48; Davis v. Rainsford, 17 Mass. 207; Morgan v. Moore, 3 Gray, 319; Thomas v. Patten, 13 Me. 329; Kennebec Purchase v. Tiffany, 1 Greenl. (1 Me.) 219, 10 Am. Dec. 60; McDonald v. Lindall, 3 Rawle, 496; Farnsworth v. Taylor, 9 Gray, 162; Chamberlain v. Bradley, 101 Mass. 191, 3 Am. Rep. 331; Fox v. Union Sugar Co., 109 Mass. 292; Stetson v. Dow, 16 Gray, 374; McCausland v. Fleming, 63 Pa. St. 36; Jenks v. Ward, 4 Mich. 404; Allen v. Bates, 6 Pick. 460; Knight v. Dyer, 57 Me. 176, 99 Am. Dec. 765; Perry v. Binney, 103 Mass. 156. See Read v. Cramer, 1 Green Ch. 277, 34 Am. Dec. 204. And see, Turnbull v. Schroeder, 29 Minn. 49; Lovejoy v. Lovett, 124 Mass. 270; Walker v. Boynton, 120 Mass. 349; Quinin v. Reimers, 46 Mich. 605; Auburn Church v. Walker, 124 Mass. 69; Boston Water Power Co. v. Boston, 127 Mass. 374; Billingsley v. Bates, 30 Ala. 378, 68 Am. Dec. 126; Union Railway & Transit Co. v. Skinner, 9 Mo. App. 189; Baxter v. Arnold, 114 Mass. 577; Twogood v. Hoyt, 42 Mich. 609; Climer v. Wallace, 28 Mo. 556, 75 Am. Dec. 135; Jarstadt v. Morgan, 48 Wis. 245; Tate v. Gray, 1 Swan, 73; Van Blarcom v. Kip, 2 Dutch. 351; Montgomery v. Carlton, 56 Tex. 431; Caldwell v. Center, 30 Cal. 543, 89 Am. Dec. 131; Simmons v. Johnson, 14 Wis. 526; Whiting v. Dewey, 15 Pick. 434; Needham v. Judson, 101 Mass. 161; Chapman v. Pollack, 70 Cal. 487; Murray v. Klinzing, 64 Conn. 78; King v. Sears, 91 Ga. 577; City of St. Louis v. Railway Co., 114 Mo. 13; Overland v. Menzzer, 83 Tex. 122; Plummer v. Gould, 92 Mich. 1, 31 Am. St. Rep. 567; Rupert v. Penner, 35 Neb. 587; Campbell v. Morgan, 22 N. Y. Supp. 1001; Whitehead v. Ragan, 106 Mo. 231; Young v. Cosgrove, 83 Iowa, 682; O'Herrin v. Brooks, 67 Miss. 266, 6 So. Rep. 844; Heffelman v. Otsego Water Co., 78 Mich. 121, 43 N. W. Rep. 1096; Marvin v. Elliott, 99 Mo. 616; Miller v. Topeka Land Co., 44 Kan. 354, 24 Pac. Rep. 420; Prentice v. Northern Pac. R. R. Co., 154 U. S. 163, 38 L. ed. 947; Winnipisiogee Paper Co. v. New Hampshire Land Co., 59 Fed. Rep. 542; Sanborn v. Mueller, 38 Minn. 27, 35 N. W. Rep. 666; Wright v. Lassiter, 71 Tex. 640; Sink v. McManus, 49 Hun, 583; Midyett v. Wharton, 102 N. C. 14; Redd v. Murry, 95 Cal. 48; Bohrer v. Lange, 44 Minn. 281; Masterson v. Munro, 105 Cal. 431, 45 Am. St. Rep. 57; Payne v. English, 79 Cal. 540; Slauson v. Transp. Co., 99 Wis. 20, 40 L.R.A. 825, 74 N. W. 574. See, also, Rupert v. Penner, 35 Neb. 587, 17 L.R.A. 824, 53 N. W. 598; Burcher v. Overlees, 6 Ind. Ter. 144, 89 S. W. 1021; Clark v. Hutzler, 96 Va. 73, 30 S. E. 469; Lumber Co. v. Ellis-Young Co., 55 Fla. 256, 45 So. 826; U. S. Blowpipe Co.

to a survey previously made by a certain person, the survey by such reference is incorporated into the deed. The title of the grantee extends only to the land contained within the exterior lines of such survey.[8] Where a recorded plat shows the existence of a street or alley, and land is conveyed by reference to such plat, a street or alley is necessarily excluded from the deed. The grantee is charged with notice of the streets and alleys shown by the map.[9] If the deed refers to a plat, containing upon its face that to which the expressions contained in the deed may be applied, the court will not reject the words of the deed, if it can connect the deed and plat in construction.[1] Where a question arises as to the true location of the boundary line between two town lots, if the lots are described by numbers only, it may be that the boundary recognized by actual use and occupation is the one intended. But when the lots are referred to "as known and designated in the plan" of the town, and the plan contains a

v. Spencer, 46 W. Va. 590, 33 S. E. 342. So reference may be made to plat and field notes in the general land office: Oil Co. v. Kimball (Tex.) 114 S. W. 662. A deed describing the land conveyed as a lot laid out on a certain plat incorporates the plat as a part of the deed to the same extent as if the plat were copied into it: Cook v. Hensler (Wash.) 107 Pac. 178. Generally, the reference to maps, plats or field notes is equivalent to incorporating them in the deed: Little v. Williams, 88 Ark. 37, 113 S. W. 340; Buckley v. Mohr, 125 Cal. xix, 58 Pac. 261; Armstrong v. Brownfield, 32 Kan. 116, 4 Pac. 185; Chicago v. Hogberg, 217 Ill. 180, 75 N. E. 242; Barringer v. Davis, 120 N. W. 65; Knowles v. Bean, 87 Me. 331, 32 Atl. 1017; Bradshaw v. Edelen, 194 Mo. 640, 92 S. W. 691; Nicolin v. Schneiderhan, 37 Minn. 63, 33 N. W. 33; St. Louis v. Missouri Pac. R. Co., 114 Mo. 13, 21 S. W. 202; Turner v. Union Pac. R. Co., 112 Mo. 542, 20 S. W. 673; Davidson v. Arledge, 97 N. C. 172, 2 S. E. 378; Rand v. Cartwright, 82 Tex. 399, 18 S. W. 794; Polson v. Aberdeen, 44 Wash. 155, 87 Pac. 73.

[8] Hudson v. Irwin, 50 Cal. 450. A description of a block of land by a number according to the official map will prevail over a description of the block by metes and bounds if there be a conflict: Masterson v. Munro, 105 Cal. 431, 45 Am. St. Rep. 57.

[9] Burbach v. Schweinler, 56 Wis. 386.

[1] City of Alton v. Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479.

specific description of the lots, the deed has the same effect as if the description contained in the plan were incorporated in the deed, and it cannot be shown by parol that the intention was that the boundaries should be different.[2] The deed referred to and the deed so referring, when taken together, must be certain in description as to the land intended to be conveyed. When land is described by reference to certain degrees of latitude and also to a certain map, the degrees of latitude, in case of a conflict between the two descriptions, will be rejected, as being less certain than the map.[4] If the description of the deed referred to is otherwise sufficient, the fact that such deed is not recorded in the county in which it is said to be recorded, is immaterial.[5] Where the land conveyed is described by lot and block, with an additional description by metes and bounds, containing a less quantity of land than the lot, the intention of the grantor is to convey the whole lot.[6] And where the land is described as that conveyed to the grantor by another deed, to which reference is made for a particular description, the grantee will not obtain title to a lot excepted from the deed thus referred to, notwithstanding that the grantor, at the time of the execution of the latter deed, had title to the excepted lot.[7] It does not necessarily follow that a particular description in a deed is to be enlarged by a succeeding general description, by way of reference to and adoption of the description contained in a former deed.[8] A deed con-

[2] Davidson v. Arledge, 88 N. C. 326.

[3] Caldwell v. Center, 30 Cal. 539; 89 Am. Dec. 131.

[4] Mayo v. Mazeaux, 38 Cal. 442. See, also, Poorman v. Miller, 44 Cal. 269.

[5] Saunders v. Schmaelzle, 49 Cal. 59.

[6] Rutherford v. Tracy, 48 Mo. 325; 8 Am. Rep. 104. A subsequent conveyance by a grantor of streets or alleys laid out on a map and dedicated to public use is void: Moose v. Carson, 104 N. C. 431; 17 Am. St. Rep. 681.

[7] Getchell v. Whittemore, 72 Me. 393.

[8] Brunswick Savings Institution v. Crossman, 76 Me. 577; Lovejoy v. Lovett, 124 Mass. 270. A map pasted by the recorder at a particular page of the record is sufficiently identified by a deed which refers

taining a description, and referring to a map having lines drawn upon it, and marking the natural boundaries and the natural objects delineated upon its surface, should be considered as giving the true description of the land, as much as if the map were marked down in the deed.[9] If any competent surveyor can locate the land and ascertain the dimensions of the various parcels, the map is sufficient.[1] But a surveyor must have data, and cannot determine lines and fix monuments according to his own ideas.[2] For the purpose of showing lines and boundaries, it can always be proven where the survey actually ran.[3] Although the plat may be defective under a statute authorizing the recordation of town plats, yet if a sale is made by the owner according to such plat the deed will convey the land included in such plat.[4] But if it is clearly shown that the intent of the parties was not to convey according to the plat, the intent will prevail.[5]

to it as "recorded" in such a book and page: McCullough v. Olds, 108 Cal. 529.

[9] Chapman v. Polack, 70 Cal. 487; Slauson v. Goodrich Transportation Co., 99 Wis. 20, 40 L.R.A. 825, 74 N. W. 574 (quoting this section of the text.)

[1] Village of Auburn v. Goodwin, 128 Ill. 58.

[2] Jones v. Lee, 77 Mich. 37; Fisher v. Dowling, 66 Mich. 370.

[3] Euliss v. McAdams, 108 N. C. 507.

[4] Schweiss v. Woodruff, 73 Mich. 473, 41 N. W. 511.

[5] Owsley v. Johnson, 95 Minn. 168, 103 N. W. 903. For other cases where deeds have conveyed lands with references to maps and surveys, see Board of Park Commissioners v. Taylor, 133 Iowa, 453, 108 N. W. 927; Beardsley v. Town of Nashville, 64 Ark. 240, 41 S. W. 853; Sanchez v. Grace, 114 Cal. 295, 46 Pac. 2; Fisk v. Ley, 76 Conn. 295, 56 Atl. 559; Overland Mach. Co. v. Alpenfels, 30 Colo. 163, 69 Pac. 574; Brown v. Taber, 103 Iowa, 1, 72 N. W. 416; Backman v. City of Oskaloosa, 130 Iowa, 600, 104 N. W. 347; Nichols v. New England Furniture Co., 100 Mich. 230, 59 N. W. 155; Downes v. Dimock etc. Co., 78 N. Y. S. 348, 75 App. Div. 513; Bond v. Texas etc., Ry. Co., 15 Tex. Civ. App. 281, 39 S. W. 978; Snooks v. Wingfield, 52 W. Va. 441, 44 S. E. 257; State Sav. Bank v. Stewart, 93 Va. 447, 25 S. E. 543; Neumeister v. Goddard, 125 Wis. 82, 103 N. W. 241.

§ 1020a. **Conflict between map and survey.**—Where a deed describing the land conveyed refers to a map and also to the survey upon which the map is based, the map, in the absence of evidence to the contrary, will be presumed correctly to represent the survey, and it is unnecessary to look to the latter. But if, instead of agreeing, there are discrepancies between them, the survey must prevail.[6] In an early case in New York, a tract of land which was granted by the commissioners of the land-office to several persons, with a description by its exterior boundaries alone, was directed to be surveyed by the surveyor general, and patents were directed to be issued for the several lots according to the return and map of such survey. The patents described the lots by reference to the map, but it was held that the patents were to be understood as referring to the field-book and actual survey as well as to the map on file. It was also held that the owners were bound by their several locations as they appeared by the lines on the ground, although it might be that some of the lots would exceed, and others would not equal, the quantity of acres mentioned in the patents.[7] Where a deed refers to a map as an official map for a further description, and the map purports on its face to be "laid out" by an individual, these words are equivalent to "as surveyed" by such individual, and include a reference to the monuments erected by the surveyor. The deed is to be construed as referring to such monuments, and such monuments, in case of a discrepancy, will control the courses and distances laid down on the map.[8] The fact that a deed of a lot in a town refers to the official map of the town-plat for a description does not preclude the introduction of parol evidence to show that the survey in the field, from which the map was made, conflicts with

[6] Whiting v. Gardner, 80 Cal. 79; O'Farrell v. Harney, 51 Cal. 125; Penry v. Richards, 52 Cal. 496.

[7] Jackson v. Freer, 17 Johns. 30. See, also, Jackson v. Cole, 16 Johns. 256.

[8] Penry v. Richards, 52 Cal. 496.

the map. If the points and lines established by the survey can be proved, the survey must prevail over the map in arriving at the correct boundary of the lot.[9]

§ 1021. **Loss of plat.**—The loss of a plat referred to in a deed, rendering it difficult to ascertain the boundaries of the land conveyed, does not avoid the deed.[1] The plan is a part of the deed, and is to be so construed when attempted to be controlled by the general language of the deed calling for natural monuments and boundaries.[2] If in an action of ejectment both parties claim under deeds which refer to a recorded town-plat, for the purpose of identifying the lot, the record, notwithstanding that the plat may not have been made in conformity with law, is proper evidence.[3]

§ 1022. **Parol evidence as to plat.**—Where a plat is referred to as annexed to a deed, although it may have become separated from the deed, yet it may, when it is admitted or shown that it is the same plat referred to, be received in evidence.[4] If the land is described as a lot of land in a town "known and described on the official map of said town as block No. 6," parol evidence is admissible to identify the map, and, when so identified, the map forms a portion of the deed.[5] The words on the face of a map of a town, "as laid out" by

[9] O'Farrell v. Harney, 51 Cal. 125. See, also, Chenoweth v. Haskell's Lessees, 3 Pet. 93, 7 L. ed. 614.

[1] New Hampshire Land Co. v. Tilton, 19 Fed. Rep. 73.

[2] Schenley v. Pittsburgh, 104 Pa. St. 472. See, also, Slauson v. Goodrich Transp. Co., 99 Wis. 20, 40 L.R.A. 825, 74 N. W. 574 (citing text.) A deed calling for a tract of land in block 7, according to a specific survey, cannot be extended to cover land in some other block by the evidence received or offered at the trial: Slauson v. Goodrich etc., Co., *supra*. The fact that the recorder indorses on the map a later survey of a part of the land delineated on it will not destroy its identity with the map referred to in the deed: McCullough v. Olds, 108 Cal. 529.

[3] Burk v. Andis, 98 Ind. 59.

[4] McCullough v. Wall, 4 Rich. 68, 53 Am. Dec. 715.

[5] Penry v. Richards, 52 Cal. 496.

a certain person, are equivalent to "as surveyed" by him, and embrace a reference to the monuments placed on the land by the surveyor. If such map is referred to in a deed as a part of the description, the deed is to be construed as referring to such monuments, and they, rather than the courses and distances laid down on the map, will govern.[6] If a lot in a town is conveyed by a description which refers to the official map of the town plat, this reference does not prevent the reception of parol evidence for the purpose of showing a conflict between the survey in the field from which the map was made and the map itself, if the object is to determine the correct boundary of the lot.[7] The plan referred to in a deed in legal construction becomes a part of the deed. It is not subject to other explanations by extraneous evidence to any greater extent than it would be if all the particulars of the description had been set out at length in the body of the deed.[8] Where a deed conveying a mill and dam with

[6] Penry v. Richards, 52 Cal. 496. See Pettigrew v. Dobbelaar, 63 Cal. 396.

[7] O'Farrell v. Harney, 51 Cal. 125. Said the court: "The question is, where are the boundaries of the lot conveyed by Taylor to Moran? The map was intended as a representation of the survey actually made on the ground, the position of the blocks and lots as indicated by the lines as run and the stakes driven at the corners. A map which by reference to monuments established, or by some other mode, refers to a survey, is presumed to correctly represent the survey as actually made; but if there is a discrepancy between the map and the survey, the survey must prevail, if the position of the points and lines established by the survey can be proved. It must be so held upon the principle that the monuments, whether natural or artificial, must prevail over the courses and distances. But it is urged that the official map does not mention a stake at the northwest corner of block 13, and that the admission of evidence showing that such a stake had been set at the first survey, is in violation of the rule which prohibits the admission of parol evidence to vary, add to, or contradict a deed. The objection is not tenable. The map was intended, as has already been said, as a representation of the actual survey, and the evidence only proves the position of the lines as run—locates the calls mentioned in the map."

[8] Proprietors of Kennebec Purchase v. Tiffany, 1 Greenl. 219; 10 Am. Dec. 60.

water privilege refers to another deed for a specification of the privilege, the privilege conveyed must be measured by such deed, and not by the use that the grantor is actually making of the water at the time at which the conveyance is executed.[9] If a town has by ordinance declared a certain map to be the official map, deeds made after such declaration, and referring to the official map, refer to such map.[1]

§ 1023. **Right to way.**—If one of the boundaries of the description is a private way not defined in the deed, but shown upon a plan which is referred to in the deed, and which is recorded in the registry of deeds, the grantor is estopped from denying the existence of that right of way. He is also estopped from denying the existence of any connecting ways shown on the plan, enabling the grantor to reach public ways in any direction so far as the title of the grantor may extend.[2] So if the way is shown on the plan referred to in the deed, and the plan is afterward recorded by the grantor in the registry of deeds, he and those claiming under him are estopped from obstructing the way opposite the land granted and within its side lines, if produced at right angles to the course of the way.[3] A court called "Central Court" was laid out over the land, and the owner laid out house lots on the court, and erected a house on each of two adjoining lots. He afterward conveyed one of these, the description in the deed being "a brick house, and the land under and adjoining the same, being No. 4 in Central Court," and according to the reporter was thus bounded: "Beginning in front of said house, at the center of the brick partition wall between this and the adjoining house, and running easterly on a line with the center of said wall, etc., about 80 feet 9 inches, then turning and running northerly to land of Salis-

[9] Perry v. Binney, 103 Mass. 156.
[1] Penry v. Richards, 52 Cal. 496.
[2] Fox v. Union Sugar Refinery, 109 Mass. 292. See § 1025a *post*.
[3] Rogers v. Parker, 9 Gray, 445.

bury, about 27 feet 6 inches, then turning and running westerly, bounded northerly on Salisbury's land, until it comes on a line with the front of said house, about 85 feet 5 inches, then turning and running southerly on a line with the front of said house about 27 feet 2 inches, until it comes to the center of the brick partition wall first mentioned, together with the land in front of said house, under the stone steps; with a right to pass and repass on foot, and with horses and carriages, to said house and land through said Central Court at all times said Homes to pay one-half the expense of keeping the well in good order, and the expense of keeping the sidewalk in front of said house in good repair." At the time at which the deed was made the sidewalk was paved with brick, the shed of the other house of the grantor forming one side of it, the shed, however, having no door opening upon it. There was a strip of land at the northerly side of the lot conveyed. This strip was not covered by the grantee's house, but was used as a passage from which a gate opened upon the sidewalk, connecting the kitchen and backyard with Central Court over the sidewalk, and there was also another gate opening upon the sidewalk from under the front steps of the sidewalk. It was impossible to gain access to either of the gates without passing over some part of the sidewalk. The court held that whether the sidewalk was or was not a part of Central Court, the grantee was entitled to a right of way over it. The way granted was to be considered as limited and defined by the grantee's house on one side and the grantor's shed on the other, and not merely as a convenient way to be some time afterward defined.[4]

[4] Salisbury v. Andrews, 19 Pick. 250. And see, also, relating to rights of way, Stetson v. Dow, 16 Gray, 372; Atkins v. Boardman, 2 Met. 457, 37 Am. Dec. 100; Thomas v. Poole, 7 Gray, 83. See, also, Parker v. Bennett, 11 Allen, 388; Morgan v. Moore, 3 Gray, 319; Lunt v. Holland, 14 Mass. 149; Murdock v. Chapman, 9 Gray, 156; Davis v. Rainsford, 17 Mass. 207.

§ 1024. Land bounded by non-navigable stream or highway.—Unless the deed manifests an intention on the part of the grantor to limit the boundary line, the line, when the land is bounded by a non-navigable stream or highway, extends to the center of such stream or highway, if the grantor is the owner of the fee.[5] Hence, where a deed describes

[5] Dean v. Lowell, 135 Mass. 55; Pike v. Munroe, 36 Me. 309, 58 Am. Dec. 751; White v. Godfrey, 97 Mass. 472; Kittle v. Pfeiffer, 22 Cal. 484; Demeyer v. Legg, 18 Barb. 14; Webber v. Cal. & O. R. R. Co., 51 Cal. 425; Nichols v. Suncook Mfg. Co., 34 N. H. 345; Berridge v. Ward, 10 Com. B., N. S., 400; Mott v. Mott, 68 N. Y. 246; Helmer v. Castle, 109 Ill. 664; Cox v. Louisville etc., R. R. Co., 48 Ind. 178; Transue v. Sell, 105 Pa. St. 604, and cases cited; Champlin etc. R. R. v. Valentine, 19 Barb. 484; Hoff v. Tobey, 66 Barb. 347; Salter v. Jonas, 39 N. J. L. 469, 23 Am. Rep. 229; Norris v. Hill, 1 Mann. (Mich.) 202; Winter v. Peterson, 4 Zab. 524, 61 Am. Dec. 678; Banks v. Ogden, 2 Wall. 57, 17 L. ed. 818; Moody v. Palmer, 50 Cal. 31; Kingsland v. Chittenden, 6 Lans. 15; Watson v. Peters, 26 Mich. 508; Maynard v. Weeks, 41 Vt. 617; Paul v. Carver, 26 Pa. St. 223, 67 Am. Dec. 413; Newhall v. Ireson, 8 Cush. 597, 54 Am. Dec. 790; Johnson v. Anderson, 18 Me. 76; Dubuque v. Maloney, 9 Iowa, 451, 74 Am. Dec. 358; Stark v. Coffin, 105 Mass. 328; Gove v. White, 20 Wis. 432; Gear v. Barnum, 37 Conn. 229; Hawesville v. Lander, 8 Bush, 679; Sutherland v. Jackson, 32 Me. 80; Motley v. Sargent, 119 Mass. 231. And see, also, bearing on the same proposition, Child v. Starr, 4 Hill. 369, 373; Hollenbeck v. Rowley, 8 Allen, 473; Codman v. Evans, 1 Allen, 443; Chatham v. Brainerd, 11 Conn. 60; Lord v. Commrs. of Sidney, 12 Moore P. C. C. 497; Jackson v. Hathaway, 15 Johns. 454, 8 Am. Dec. 263; Read v. Leeds, 19 Conn. 182, 187; Richardson v. Vermont etc. R. R., 25 Vt. 472, 60 Am. Dec. 283; Tousley v. Galena etc., Mining Co., 24 Kan. 328; Milhau v. Sharp, 27 N. Y. 611, 624, 84 Am. Dec. 314; Regina v. Board of Works, 4 Best & Smith, 526; Bissell v. N. Y. Cent. R. R., 26 Barb. 630; Morrison v. Willard, 30 Vt. 118; Kimball v. City of Kenosha, 4 Wis. 331; Cox v. Freedley, 33 Pa. St. 124, 75 Am. Dec. 584; Paul v. Carver, 24 Pa. St. 207, 64 Am. Dec. 649; Harris v. Elliot, 10 Peters, 53; Steel v. Prickett, 2 Stark. 463; Fisher v. Smith, 9 Gray, 441; Canal Trustees v. Havens, 11 Ill. 557; O'Linda v. Lothrop, 21 Pick. 292; Witter v. Harvey, 1 McCord, 67, 10 Am. Dec. 650; Parker v. Framingham, 8 Met. 260, 267; Grose v. West, 7 Taunt. 39; Trustees v. Lander, 8 Bush, 679; Falls v. Reis, 74 Pa. St. 439; Smith v. Howdon, 14 Com. B., N. S., 398; Lewis v. Beattie, 105 Mass. 410; Fisher v. Smith, 9 Gray, 444; Winslow v. King, 14 Gray, 323; Boston v. Richardson, 13 Allen,

the land conveyed as extending five hundred feet to a street or avenue, and thence at right angles along the street one hundred and twenty feet to the place of beginning, the fee of the land to the center of the street is conveyed subject to the public easement, notwithstanding the line of five hundred feet extends only to the side of the street and not to its center. When the avenue is no longer used as a street, the land is freed from the easement.[6] But if the land is described by metes and bounds, without any reference to a street, the grantee acquires no title to the fee of an adjacent street which the grantor subsequently dedicated to the public.[7] If, however, lots are sold after the projection of, but before the opening of a public street, and the deeds describe the lots as running to and being bounded by the line of the street, the fee to the center of the street passes, and the grantees are entitled to damages upon the opening of the street.[8] And where land is laid out into blocks and lots, which are bounded by what are represented on an unrecorded or defective plat as streets, a deed referring to the plat for a true description of the premises passes to the grantee, as against the grantor and his assigns, the fee to the center of the street upon which the lot conveyed abuts.[9] Where the land conveyed lies east

154; Sleeper v. Laconia, 60 N. H. 202, 49 Am. Rep. 311, and cases cited; Claremont v. Carlton, 2 N. H. 369, 9 Am. Dec. 88; Clayton v. Gilmer County Court, 58 W. Va. 253, 2 L.R.A.(N.S.) 598, 52 S. E. 103, citing text. The batture or alluvion rights to the river frontage will pass by a deed describing the land as fronting on a certain street and extending between specified lines to the river, without any provision to that effect: Meyers v. Mathis, 42 La. Ann. 471, 21 Am. St. 385.

[6] Moody v. Palmer, 50 Cal. 31. See Webber v. California etc., R. R. Co., 51 Cal. 425.

[7] Knott v. Jefferson Street Ferry Co., 9 Or. 530.

[8] Easton Burrough's Appeal, 81 Pa. St. 85.

[9] Jarstadt v. Morgan, 48 Wis. 245. For other cases upon the construction of deeds in which one of the boundaries is a stream, see Nickerson v. Crawford, 16 Me. 245; Bishop v. Seeley, 18 Conn. 393; Agawam Canal Co. v. Edwards, 36 Conn. 476; Hatch v. Dwight, 17 Mass. 289, 9 Am. Dec. 145; Doddridge v. Thompson, 9 Wheat. 470.

of a certain street, and the deed explicitly describes the land as bounded by the east line of the street, the title to the soil

6 L. ed. 137; Granger v. Avery, 64 Me. 292; Coovert v. O'Conner, 8 Watts, 470; Herring v. Fisher, 1 Sand. 344; Hammond v. McLachlan, 1 Sand. 323; Stone v. Augusta, 46 Me. 127; Watson v. Peters, 26 Mich. 508; Gavit v. Chambers, 3 Ohio 495; Beahan v. Stapleton, 13 Gray, 427; Coldspring Iron Works v. Tolland, 9 Cush. 495; Knight v. Wilder, 2 Cush. 199, 48 Am. Dec. 660; Robinson v. White, 42 Me. 209. Between grantor and grantee, a deed of a lot of land bounded on a street in a city carries the land to the center of the street. The deed will have this effect although it does not refer to the street, but the lot is described by a number as represented upon a map, showing it as abutting on the street, and the bounds as given do not include any portion of the street: Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. Rep. 330. Mr. Justice Maynard says there is no distinction in this respect between the streets of a city and county highways, and continues: "This construction has so long prevailed that it has become a rule of property, and it is founded upon the presumed intent of the parties to the conveyance. It is not reasonable to infer that the grantor intended to reserve the title to the fee of the narrow strip lying between the physical boundaries of the lot conveyed and the center of the street, or that the grantee understood that any such reservation had been made. The use of the fee of the bed of the street is so inseparably connected with the ordinary use of the adjacent lot, that a severance of the two will not be deemed to have been effected, unless the presumption that the grantor intended to pass title to the center of the street is rebutted by other parts of the deed, and by the condition and relation of the parties to the lands conveyed and other lands in the vicinity": Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. Rep. 330. See, also, to the same effect, Dunham v. Williams, 37 N Y. 251; Mott v. Mott, 68 N. Y. 246; Bissell. v. N. Y. C. R. R. Co., 23 N. Y. 61; Perrin v. Laine, 36 N. Y. 120; In re Ladue, 118 N. Y. 220, 23 N. E. Rep. 465; Haberman v. Baker, 128 N. Y. 259, 13 L.R.A. 611; City of Buffalo v. Pratt, 131 N. Y. 298, 15 L.R.A. 413, 27 Am. St. Rep. 592; Jackson v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263; Greer v. N. Y. C. & H. R. R. Co., 37 Hun, 346; Wallace v. Fee, 50 N. Y. 694; Pollock v. Morris, 19 J. & S. 112; Hammond v. McLachlan, 1 Sand. 323; Cochran v. Smith, 73 Hun, 597; Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. Rep. 1047; Wager v. Troy etc. R. Co., 25 N. Y. 526; Story v. N. Y. Elevated R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Mott v. Mott, 68 N. Y. 246; Lozier v. N. Y. Cent. R. Co., 42 Barb. 465; Sherman v. McKeon, 38 N. Y. 266; White's Bank v. Nichols, 64 N. Y. 65; Jackson v. Louw, 12 Johns. 252; Watkins v. Lynch, 71 Cal. 21; Fraser v. Ott, 95 Cal. 661, 30 Pac. 793; Moody v. Palmer, 50 Cal. 31;

in the street does not pass.[1] But where a purchaser agrees to buy land at a certain price per acre after the making of a

Webber v. Cal. & O. R. R. Co., 51 Cal. 425; Oxton v. Graves, 68 Me. 371, 28 Am. Rep. 75; Sutherland v. Jackson, 32 Me. 80; Low v. Tibbetts, 72 Me. 92, 39 Am. Rep. 303; Cottle v. Young, 59 Me, 105; Bucknam v. Bucknam, 12 Me. 463; Johnson v. Anderson, 18 Me. 76; Canal Trustees v. Haven, 11 Ill. 554; Helmer v. Castle, 109 Ill. 664; Henderson v. Hatterman, 146 Ill. 555, 34 N. E. 1041; Banks v. Ogden, 2 Wall. 57, 17 L. ed. 818; Jacksonville etc., Ry. Co. v. Lockwood, 33 Fla. 573, 15 So. 327; Gove v. White, 20 Wis. 425; Milwaukee v. Milwaukee & Beloit R. R. Co., 7 Wis. 85; Kimball v. Kenosha, 4 Wis. 321; Jarstadt v. Morgan, 48 Wis. 245, 4 N. W. 27; Andrews v. Youmans, 78 Wis. 56, 47 N. W. 304; Woodman v. Spencer, 54 N. H. 507; Reed's Petition, 13 N. H. 381; McShane v. Main, 62 N. H. 4; Marsh v. Burt, 34 Vt. 289; Ott v. Kreiter, 110 Pa. St. 370; Paul v. Carver, 26 Pa. St. 223, 67 Am. Dec. 413; Healey v. Babbitt, 14 R. I. 533; Maynard v. Weeks, 41 Vt. 617; Church v. Stiles, 59 Vt. 462, 10 Atl. Rep. 674; Purkiss v. Benson, 28 Mich. 538; Cox v. Freedley, 33 Pa. St. 124, 75 Am. Dec. 584; Trutt v. Spotts, 87 Pa. St. 339; Transue v. Sell, 105 Pa. St. 604; Firmstone v. Spaeter, 150 Pa. St. 616, 30 Am. St. Rep. 851, 25 Atl. 41; Spackman v. Steidel, 88 Pa. St. 453; Dobson v. Hohenadel, 148 Pa. St. 367, 23 Atl. 1128; Taylor v. Armstrong, 24 Ark. 102; Montgomery v. Hines, 134 Ind. 221, 33 N. E. 1100; Cox v. Louisville N. A. & C. R. R. Co., 48 Ind. 178; Hamilton Co. v. Indianapolis Natural Gas Co., 134 Ind. 209; Warbritton v. Demorett, 129 Ind. 346, 27 N. E. 730; Terre Haute etc. R. Co. v. Scott, 74 Ind. 29; Haslett v. New Albany etc. R. Co., 7 Ind. App. 603, 34 N. E. Rep. 845; Herbert v. Rainey, 54 Fed. 248; Peabody Heights Co. v. Sadtler, 63 Md. 533, 52 Am. Rep. 519; Terre Haute etc. R. Co. v. Rodel, 89 Ind. 128, 46 Am. Rep. 164; Baltimore etc. R. R. Co. v. Gould, 67 Md. 60; Columbus & W. Ry. Co. v. Witherow, 82 Ala. 190, 3 So. 23; Moore v. Johnston, 87 Ala. 220, 6 So. 50; Chatham v. Brainerd, 11 Conn. 60; Champlin v. Pendleton, 13 Conn. 23; Peck v. Smith, 1 Conn. 103, 6 Am. Dec. 216; Watrous v. Southworth, 5 Conn. 305; Gear v. Barnum, 37 Conn. 229; Silvey v. McCool, 86 Ga. 1, 12 S. E. 175; Tousley v. Galena M. & S. Co., 24 Kan. 328; Hunt v. Brown, 75 Md. 481; Albert v. Thomas, 73 Md. 181; Ellsworth v. Lord, 40 Minn. 337, 42 N. W. 389; Rich v. City of Indianapolis, 37 Minn. 423, 5 Am. St. Rep. 861, 35 N. W. 2; In re Robbins, 34 Minn. 99, 57 Am. Rep. 40; Jacobs v. Woolfolk, 90 Ky. 426, 9 L.R.A. 551, 14 S. W. 415; Hawesville v. Lander, 8 Bush, 679; Salter v. Jonas, 39 N. J. L. 469, 23 Am. Rep. 229; Ayres v. Penn. Ry. Co., 52 N. J. L. 405; Dodge v. Penn. Ry., 43 N. J. Eq. 351.

[1] Grand Rapids & Ind. R. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306.

survey, and a street or highway is mentioned as one of the boundaries, he is compelled to pay for the land to the middle of the street, where no contrary intention appears.[2] Where the grantor has the legal title to the bed of a non-navigable river, a description, south to the river, and "thence up said river to where it is intersected by the south line of the town" will extend the line to the center of the river.[3] So, where the land is described as running to a stake on a river bank thence up the river to a sycamore on its bank, the title will pass to the center of the stream and the deed will convey all accretions to the land.[4] If a stream is navigable in the ordinary sense but not in the legal, the title will extend to the center of the stream where it is given as a boundary unless the deed clearly expresses an intention to exclude the land between the bank and the thread of the stream.[5] A person holding title under a patent from the United States has all the rights of a riparian owner in the channel of the river lying opposite to the banks of his land and such rights are not modified by the fact that two channels of the river may surround the patented land.[6] The rule that a deed bound-

[2] Firmstone v. Spaeter, 150 Pa. St. 616, 30 Am. St. Rep. 851. If the grantor owns the fee of the soil of the highway, the presumption is that his deed carries the fee: Haberman v. Baker, 128 N. Y. 253, 13 L.R.A. 611. That it will be presumed that a deed conveying land bounded by a street will carry the fee to the center, see Silvey v. McCool, 86 Ga. 1; Florida etc. Ry. Co. v. Brown, 23 Fla. 104; Matter of Ladue, 118 N. Y. 213; Low v. Tibbetts, 72 Me. 92, 39 Am. Rep. 303; Warbritton v. Demorett, 129 Ind. 346; Salter v. Jonas, 39 N. J. L. 469, 23 Am. Rep. 229.

[3] Hanlon v. Hobson, 24 Colo. 284, 42 L.R.A. 502, 51 Pac. 433.

[4] Runion v. Alley, 39 S. W. 849, 19 Ky. Law Rep. 268.

[5] Webster v. Harris, 111 Tenn. 668, 59 L.R.A. 324, 69 S. W. 782.

[6] Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 S. Ct. 530, affirming McBride v. Whitaker, 65 Neb. 137, 90 N. W. 966. See, also, as to the title passing to the center of an unnavigable stream: Berry v. Hoogendoorn, 133 Iowa, 437, 108 N. W. 923; Wilcox v. Bread, 157 N. Y. 713, 53 N. E. 1133, affirming 47 N. Y. S. 867, 92 Hun, 9; Carter v. Chesapeake & C. R. Co., 26 W. Va. 644, 53 Am. Rep. 116; Walls v. Cunningham, 123 Wis. 346, 101 N. W. 696; Roberts v. Decker, 120 Wis. 102, 97 N. W. 519.

ing the land conveyed will carry title to the center of a non-navigable stream, can have no application where the boundary in the deed is expressly fixed as the low water of the stream.[7] The presumption is where the land is described as being bounded by a highway, that the deed will pass the title to the land to the middle of the highway subject only to the easement of the public.[8] Although the lots may be described by numbers, still, until the contrary is shown, the presumption is that the owner of land bounded by a road or street owns to the center.[9]

§ 1025. **Where contrary intention appears.**—The rule given in the preceding section is one of construction only, and, of course, does not govern when it appears upon the face of the deed that the intention was that the grantee should take to the line of the street or stream, and not to

[7] Webster v. Harris, 11 Tenn. 668, 59 L.R.A. 324, 69 S. W. 782.

[8] Mangam v. Village of Sing Sing, 164 N. Y. 560, 58 N. E. 1089, affirming 50 N. Y. S. 647, 26 App. Div. 464. That the deed conveying land bounded on a highway conveys to the center unless a contrary intent appears. See Western Union Telegraph Co. v. Krueger, 36 Ind. App. 348, 74 N. E. 25; McKay v. Doty, 63 Mich. 581, 30 N. W. 591; Haberman v. Baker, 128 N. Y. 253, 13 L.R.A. 611, 28 N. E. 370; Mattlage v. New York El. R. Co., 157 N. Y. 708, 52 N. E. 1124, affirming 35 N. Y. S. 704, 14 Misc. 291; Van Winkle v. Van Winkle, 80 N. Y. S. 612, 39 Misc. 593; Mitchell v. Einstein, 94 N. Y. S. 210, 105 App. Div. 413; Sweatman v. Bathrick, 17 S. D. 138, 95 N. W. 422; Elliott v. Jenkins, 69 Vt. 134, 37 Atl. 272.

[9] Shaw v. Johnston, 17 Idaho, 676, 107 Pac. 399. See as to presumptions: Seery v. City of Waterbury, 82 Conn. 567, 25 L.R.A. (N.S.) 681, 74 Atl. 908; Frost v. Jacobs, 204 Mass. 1, 90 N. E. 357; White v. Jefferson, 125 N. W. 262. Thacker v. Wilson, 122 S. W. 938. Where a contrary intention does not appear, the deed passes the title to the center of a non-navigable stream: Walls v. Cunningham, 123 Wis. 346, 101 N. W. 696; Lampman v. Van Alstyne, 94 Wis. 417, 69 N. W. 171; Sullivan v. Spotswood, 82 Ala. 163, 2 So. 716; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Hanlon v. Hobson, 24 Colo. 284, 42 L.R.A. 502, 51 Pac. 433; Denver v. Pearce, 13 Colo. 383, 6 L.R.A. 541, 22 Pac. 774; Piper v. Connelly, 108 Ill. 646; Goff v. Congle, 118 Mich. 307, 42 L.R.A. 161, 76 N. W. 489; Hodges v. Williams, 95 N. C. 331, 59 Am. Rep. 242.

its center. Thus, where one line of the description is "thence *along the easterly line*" of a certain street, a certain distance, and no other language is employed to modify the boundary, the grantee's title does not extend to the center of the street.[1] And where land adjacent to a road is conveyed by a description beginning "at the corner formed by the intersection of the easterly line" of the road with the northerly line of another road, and ending "thence along the easterly line" of the road to which the land was adjacent, the land conveyed is not bounded by the center of the road, but by its side.[2] But the mere fact that a monument on the side of the road or on the bank of a stream is mentioned as the place of the beginning or end of a line, is not of itself sufficient to rebut the presumption that the grantee takes to the center of the road or to the thread of the stream.[3] The intention may be gathered from the language of the description, as noticed in the preceding section, where the land conveyed is bounded by the line of the street instead of the street itself.[4]

§ 1025a. **Private way or alley.**—In some cases it is held that where the land conveyed is bounded by an alley or a private right of way, the title of the grantee is not to the

[1] Severy v. Central Pacific R. R. Co., 51 Cal. 194.

[2] Mead v. Riley, 50 N. Y. Sup. Ct. 20. And see Louth v. Machlin, 40 Ohio St. 332; Tag v. Keteltas, 48 N. Y. Sup. Ct. 241; Kings County Fire Ins. Co. v. Stevens, 87 N. Y. 287, 41 Am. Rep. 361; Cottle v. Young, 59 Me. 105; O'Connell v. Bryant, 121 Mass. 557; Lee v. Lee, 27 Hun, 1; Peck v. Denniston, 121 Mass. 17; Murphy v. Copeland, 51 Iowa, 515; Babcock v. Utter, 1 Abb. N. Y. App. 27; DePeyster v. Mali, 27 Hun, 439; Keening v. Ayling, 126 Mass. 404; Smith v. Slocomb, 9 Gray, 36, 69 Am. Dec. 274; Brainerd v. Boston etc. R. R., 12 Gray, 407, 410; Hanson v. Campbell, 20 Md. 223; Perrin v. New York Cent. R. R., 40 Barb. 65.

[3] Low v. Tibbetts, 72 Me. 92, 39 Am. Rep. 303. And see Bradford v. Cressey, 45 Me. 9; Pollock v. Morris, 51 N. Y. Sup. Ct. (10 Jones & S.) 112.

[4] Grand Rapids & Ind. R. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306. The conduct of the parties may be considered: Frost v. Jacobs, 204 Mass. 1, 90 N. E. 357.

center of it. If the alley or way is not a public highway, the view sustained by some authorities is that the boundary extends only to the side of it.[5] But the rule generally adopted, is that if the title of the grantor extends to the center of a private alley or way, and he does not manifest an intent to restrict or control the boundary, his deed describing the land conveyed as bounded on such private alley or way, will convey the fee to the center.[6] The rule has thus been expressed: "In the construction of deeds, where lands are bounded on by a way, either public or private, the law presumes it to be the intention of the grantor to convey the fee of the land to the center of the way, if his title extends so far. This presumption is, of course, controlled whenever there are words used in the description showing a different intention. But it has been held that giving measurement, in the deed, of side lines which reach only to the center of the way, are not alone sufficient to overcome it." [6a] And, again: "The general rule is well settled that a boundary or a way, public or private, includes the soil to the center of the way, if owned by the grantor, and that the way, thus referred to and understood, is a monument which controls courses and distances, unless the deed by explicit statement or necessary implication requires a different construction." [7] In Massachusetts, a petition was filed for the registration of title to land under the Torrens system, and for the registration of an easement. It appeared that a passageway and lot formerly belonged to one, Gould,

[5] Bangor House v. Brown, 33 Me. 309; Ames v. Hilton, 70 Me. 36; Winslow v. Reed, 89 Me. 67, 35 Atl. 1017; Andreas v. Steigerwalt, 29 Pa. Super. Ct. 1.

[6] Wiess v. Goodhue, 46 Tex. Civ. App. 142, 102 S. W. 793; Fisher v. Smith, 9 Gray, 441; Stark v. Coffin, 119 Mass. 231; Gould v. Eastern R. Co., 142 Mass. 85, 7 N. E. 543; Freeman v. Sayre, 48 N. J. L. 237, 2 Atl. 650; Winslow v. King, 14 Gray, 321; Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. 330; Gould v. Wagner, 196 Mass. 270, 82 N. E. 10; McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076, 100 Am. St. Rep. 566.

[6a] Clark v. Parker, 106 Mass. 554.

[7] Peck v. Denniston, 121 Mass. 17.

and constituted one lot known as lot number 17, on a plan of land belonging to one Granger, and that the passageway was laid out by Gould, along the easterly line of lot 17, and that he did not then own and had not owned since that time any land easterly of it. Gould executed two mortgages, the first describing the lot mortgaged as "northeasterly on Newtonville avenue, 85 feet; southeasterly, on a pasageway, 5 feet wide, running through the grantor's land to Bennington street 117⅔ feet; southwesterly on other land of the grantor 85 feet, and northwesterly by lot 16 on said plan 117⅔ feet. In the second mortgage the lot was described as southeasterly on a passageway 5 feet wide, running through grantor's land to Bennington street 82⅓ feet; southwesterly on Bennington street 85 feet; northwesterly on lot 16, on said plan 82⅓ feet, and northeasterly on other land of the grantor 85 feet. The two lots were each 90 feet on the street. Title to the passageway was claimed by the wife of Gould, under a deed from her husband to her through a conduit of the passageway after the execution of the mortgages. The respondents claimed title to the passageway under the mortgages. The court decided that notwithstanding that the passageway was private, title passed to the center, and that this rule would not cease to operate because the distances stated in the description, did not extend to the center of the way, and held that the petitioned had title to the easterly half of the passageway, with a right of way over the westerly half, and that the respondents had a like right of way over the eastern half.[8]

[8] Gould v. Wagner, 196 Mass. 270, 82 N. E. 10. It was the opinion of Justice Lonny and Sheldon that the mortgages carried the fee in the whole of the passageway, and not in the westerly half only. Mr. Justice Morton who delivered the opinion of the majority of the court said: "The general rule is that a deed bounding on a way conveys the title to the center of the way if the grantor owns so far. (Boston v. Richardson, 13 Allen, 146, 152). The reasons for this rule are stronger in the case of a public way than in that of a private way, but the rule applies to both public and private ways. (Motley v. Sargent, 119 Mass. 231; Fisher v. Smith, 9 Gray, 441). The fact that

§ 1025b. **Intention of owner.**—If the grantor gives to the grantee as an appurtenance to the land conveyed, the right to open and use a private road lying along one side of it, the presumption is that it was not the intention of the grantor to

the distances of the side lines do not extend to the center of the way is not enough to exclude the operation of the rule. (Clark v. Parker, 106 Mass. 554; McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076, 100 Am. St. Rep. 566). The question is one of intention. If competent, the evidence which was omitted against the objection of the respondents would tend to show that it would be contrary to the intention of the grantor to construe the mortgage deeds as conveying title to the easterly line of the way. But independently of that, the question is settled, we think, in this commonwealth in favor of the ruling of the land court, though it has been decided differently in other jurisdictions. (See Haberman v. Baker, 128 N. Y. 253, 13 L.R.A. 611, 28 N. E. 370; Taylor v. Armstrong, 24 Ark. 102; In re Robbins, 34 Minn. 99, 24 N. W. 356, 57 Am. Rep. 40; Jones v. Water Lot Co., 18 Ga. 539; Healey v. Babbitt, 14 R. I. 533). In Lemay v. Furtado, 182 Mass. 280, 65 N. E. 395, a case very similar to this, it was held that the grantee took only to the middle of the way. It is true that what the court said on this point was in a sense obiter. But the point was considered and passed upon at the request of the parties with a view to disposing of the whole controversy, and the opinion is to be regarded, therefore, as deciding the question. The same question was considered in Gray v. Kelley, 80 N. E. 651, with the same result as in Lemay v. Furtado, supra, and in Hamlin v. Attorney General, 81 N. E. 275, the question was again presented and a like conclusion arrived at. In Gray v. Kelley, supra, the doctrine laid down in the cases cited above from other states was distinctly repudiated, and this was repeated in Hamlin v. Attorney General, supra. See, also, Everett v. Fall River, 189 Mass. 513, 75 N. E. 946; McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076, 100 Am. St. Rep. 566; Motley v. Sargent, 119 Mass. 231.

The evidence in regard to the laying out and construction of the way and the condition of the locality was admissible (Motley v. Sargent, supra, 235; Codman v. Evans, 1 Allen, 443, 466); but we doubt whether the evidence in regard to the ownership by the petitioner and her husband of other lots on the other side of Bennington street, and that the use of the way was of value to their lots, that the way was used by residents on Bennington street, and that the petitioner's husband was paid for such use by some of the residents, was competent. If admissible, however, it does not affect the construction which, in our opinion, should be given to the mortgage deeds."

retain the long and narrow strip of land between the tract conveyed by the deed and the road mentioned.[9] An owner of an entire square in a city, had it divided into lots, and caused a lane or alley to be laid out running through the square, all the lots adjoining, and caused a map of the property to be made which was filed in the proper public office. Subsequently, the owner conveyed a lot giving as a part of the description its boundary on the alley as marked on the map and terminating with the clause: "Together with the right of way, of the alley aforesaid, which is forever to be kept open for the use and benefit of lots to which it is adjacent; said alley being one rod in width, and extending from Washington to Jefferson streets, as laid down on the map before mentioned." The owner, after the execution of this deed, conveyed a lot on the opposite side of the alley, referring to the lot conveyed as numbered and marked upon the file, and describing the northerly line as running from one of the streets mentioned "two hundred and three feet and one third of a foot, along an alley," etc. A part of this last mentioned lot was subsequently conveyed to another, who brought an action of trespass, against the first grantee because the latter had built a fence across the alley. The court held that the grantees under these different deeds acquired title to the center of the alley, subject however, to an easement or common right of passage of the owners of the lot.[1] It was contended that the general rule that the conveyance of a lot bounded upon a street in a city, carried the title to the center of the street, because in the case cited, the north line in the description was the line along the lane, and it was insisted, that this

[9] Clayton v. Gilmer County Court, 58 W. Va. 253, 2 L.R.A.(N.S.) 598, 52 S. E. 103. But the grantee may not take the fee but only an easement. Id.

[1] Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. 330. See, also, Bissell v. N. Y. C. R. R. Co., 23 N. Y. 61; Perrin v. N. Y. C. R. R. Co., 36 N. Y. 120; In re Ladue, 118 N. Y. 220; Haberman v. Baker, 128 N. Y. 259; City of Buffalo v. Pratt, 131 N. Y. 298, 15 L.R.A. 413, 30 N. E. 233.

description did not include the fee of one half of the lane, but that the title remained in the owner of the original entire square, and that as the plaintiff was required to rely upon the strength of his own title, the action would not lie. The court said that it could not distinguish the case from the authorities laying down the general rule, stating that this construction had so long prevailed, that it had become a rule of property and was founded upon the presumed intent of the parties to the deed. The court added: "It is not reasonable to infer that the grantor intended to reserve the title to the fee of the narrow strip lying between the physical boundaries of the lot conveyed, and the center of the street, or that the grantee understood that any such reservation had been made. The use of the fee of the bed of the street is so inseparably connected with the ordinary use of the adjacent lot that a severance of the two will not be deemed to have been effected, unless the presumption that the grantor intended to pass title to the center of the street is rebutted by other parts of the deed, and by the connection and relation of the parties to the lands conveyed, and other lands in the vicinity. There is nothing inconsistent in the Hosmer [owner] deed with this presumption, but its provisions are in harmony with and support it." [2]

§ 1025c. Road as an abuttal and not a monument.— Mr. Chief Justice Shaw, declares that: "The road is an abuttal, not a monument; and if the deed does not say on what side, it shall be taken to mean the center." [3] Where the land was described as "Beginning at the easterly corner of said Baker's lot, and running south 400 west, fourteen rods to a cedar post; thence north 35¼° west sixteen rods to a stake and stones near an old road leading to the shore; thence by said road north 88¾ east thirteen rods to a stake by a pair

[2] Hennessy v. Murdock, 137 N. Y. 317, 323, 33 N. E. 330.

[3] Smith v. Slocomb, 9 Gray, 36, 69 Am. Dec. 274.

of bars; thence south 60½° east seven rods more or less," the court held that the description carried the fee to the center of the road and a right of way to the grantee and others, when the road was over the grantor's land and it was necessary to use it reasonably to enjoy the land conveyed.[4] A person conveyed to various grantees five lots, and each of the first four lots was described as extending "to a three feet wide alley, laid out and opened by" the grantor "for the accommodation of this and other lots adjoining thereto, and leading westward from the said Broad street to the depth of 80 feet. In each of the five deeds there was a grant of the free use and privilege of the said 3 feet wide alley, as, and for, a passageway and water course in common with the owners and occupiers of the said adjoining lots." Each of the owners of the lots had, from the execution of the deeds the free and uninterrupted use of the alley as passageway and water course in common with the owners and occupiers of the other four lots. The court held that in the absence of anything showing an intention to the contrary, it should be held that the description carried title to the alley.[5]

[4] McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076, 100 Am. St. Rep. 566.

[5] Saccone v. West End Trust Co., 224 Pa. 554, 24 L.R.A.(N.S.) 539, 73 Atl. 971.

The opinion of the court was delivered by Mr. Justice Potter, who went fully into the subject. He said: "If the alley in question had been a public highway, the grantees of land bounded thereby would, without doubt, have taken the fee to the center of the highway, if the grantor owns such fee, and had used no language in his deed indicating an intention to retain the fee in the highway. In one of our latest cases bearing on this question (Willick v. Beaver Valley R. Co., 222 Pa. 590, 595, 72 Atl. 237, 238), our brother Elkin said: 'If the plan of lots in the present case had been laid out by an individual in precisely the same manner as the commonwealth has done, and lots had been sold with streets as boundaries, the title of the fee to the center of the streets would have passed to the purchasers. This is the rule of our cases from Paul v. Carver, 26 Pa. 223, 67 Am. Dec. 413, to Neely v. Philadelphia, 212 Pa. 551, 61 Atl. 1096.' We can see no good reason why the same rule should not apply to land which is conveyed as bounded by a private way. The

§ 1025d. Common use of passageway.—The presumption that the deed carries the fee is not overcome by a clause providing for the common use of the way both by the grantee

doctrine was substantially adopted by this court in Ellis v. Academy of Music, 120 Pa. 608, 623, 6 Am. St. Rep. 739, 15 Atl. 494, 496, where it was said: 'Nor did the court err in charging that parties who are entitled to a free use of an alley have the same right in it that the public has in its highways, and that if the way in this case were vacated, the soil would belong to the plaintiff and defendants as tenants in common. By the several grants to the parties, their properties were not only bounded on the alley in controversy, but it was made appurtenant to those properties. Nothing, therefore, was left in the owner, and if the fee did not vest in these grantees, it is hard to tell where it is. The case is very much like that of Holmes v. Bellingham, 7 C. B. N. S., 329, in which Cockburn, Ch. J. says: 'The direction complained of is that the learned Judge told the jury that there was a presumption in the case of a private way or occupation road between two properties, that the soil of the road belongs *usque ad medium* to the owners of the adjoining property on either side. That proposition, subject to the qualification which I shall presently mention, and which, I take it, was necessarily involved in what afterwards fell from the learned Judge is in my opinion a correct one. The same principle which applies to a public road, and which is the foundation of the doctrine, seems to me to apply with equal force to the case of a private road.' As the doctrine here stated, seems to be reasonable and sound, we cannot understand why we should not adopt it. It seems to be admitted that, were the alley public, its vacation would vest in each of the parties beyond unincumbered one-half of the fee in severalty, and why this should not apply to a private way, where, just as in the case of a public way, by the grant it was made appurtenant to the several properties we cannot understand.' The reference to the above plaintiff and defendant as being tenants in common of the soil in the alley in case it was vacated later in the opinion it is stated that vacation would vest in each of the parties one-half of the fee in severalty. In Rice v. Clear Spring Coal Co., 186 Pa. 49, 40 Atl. 149, the rule which was approved by this court was thus stated: 'When the boundary given in a deed has physical extent as a road, street, or other monument having width, courts will so interpret the language of the description, in the absence of any apparent contrary intent, as to carry the fee of the land to the center line of such monument.' And in Schmovle v. Betz, 212 Pa. 32, 108 Am. St. Rep. 845, 61 Atl. 525, a case which involved the use of a private alley, the doctrine was again cited with approval that, in case of vacation, the rule which applies to a public highway is to be applied

and others.[6] If the deed conveys a tract of land by metes and bounds, but reserves a strip as a passageway for the use of the grantee and the grantor, the fee to the passageway remains in the grantor.[7] But the presumption is not rebutted by the fact that the distances as given, do not extend to the center of the way.[8] Title to the bed of an alley will pass where it was laid out on the outer edge of a lot and was referred to in the general description by a recital of its number, although in the particular description, reference was made to the alley as the boundary of the lot.[9] Likewise, title to the middle of an alley will be transferred by a deed conveying a lot described as 50 feet wide, with a depth of 85 feet to an alley 15 feet in width."[1] A deed describing land as running "to" and along a passageway carries title to the center of it.[2] If the deed declares that the boundary shall

as between parties entitled to the use of a private alley.

In the present case the language of the deeds from Caldcleugh, as set forth in the case stated, shows that at the time of the conveyances the alley was all ready 'laid out and open by the said Robert A. Caldcleugh,' and it further appears from the case stated that after the conveyances were made the owners of the lots continued the use of the alley and it was not abandoned or vacated until October 6th, 1905, a period of over seventy-three years. So that the facts of this case distinguish it clearly from Robinson v. Myers, supra, and the subsequent cases relating to unopen streets and highways. When Justice Mircur, in delivering the opinion of this court in Spackman v. Steidel, 88 Pa. 453, said: 'Where the street called for a boundary is not a public highway, or dedicated for public use, the grantee does not take title in fee to the center of it, but by implication acquires an easement or right of way only over the lands'; and then cites the case which we have above referred to (Van O'Linda v. Lothrop and Robinson v. Myers)—we think it is apparent that he had in mind cases where the deed called for a street that was unopen, as the two cases which he cites had reference to such unopen streets."

[6] Gould v. Eastern R. Co., 142 Mass. 85, 7 N. E. 543; Motley v. Sargent, 119 Mass. 231; Freeman v. Sayre, 48 N. J. L. 37, 2 Atl. 650.

[7] Stearns v. Mullen, 4 Gray, 151

[8] Clark v. Parker, 106 Mass. 554.

[9] Albert v. Thomas, 73 Md. 181, 20 Atl. 912.

[1] Lindsay v. Jones, 21 Nev. 72, 25 Pac. 297.

[2] Freeman v. Sayre, 48 N. J. L. 37, 2 Atl. 650.

run "by" the way, the fee to the center is carried, although the boundary running perpendicular to the way is described to be of a length, that is not sufficient to extend to the line of the way.[3] Where an owner of a single tract of land, conveys it in two parcels, one described as the northern half and the other as the southern half, by metes and bounds, and an alley is given as the southern and northern boundary, respectively, and an alley would be created between the two parcels by such metes and bounds, title to the center of the alley will vest in each grantee.[4] If a deed states that the land is bounded by a gangway and provides that it is made with the express understanding of the grantor's right to maintain a gateway across it, it will carry title to the center of the gangway.[5] The fact that the way was not in existence at the time of the execution of the deed, or had never been fenced off, does not overcome the presumption that title passes to the center of the way.[6] But some cases hold that where the land conveyed is bounded by a street not opened, the fee passes only to the side line of the street with an easement over its bed.[7]

[3] Lemay v. Furtado, 182 Mass. 280, 65 N. E. 395.

[4] First Pres. Church v. Kellar, 39 Mo. App. 441.

[5] Bentley v. Root, 19 R. I. 205, 32 Atl. 918. See for various other cases in which deeds have been construed as passing title to the center of the way: Wise v. Curry, 72 N. Y. Supp. 165, 35 Misc. 634; Winslow v. King, 14 Gray, 321; Morgan v. Moore, 3 Gray, 319; Pitney v. Huested, 8 App. Div. 105, 40 N. Y. Supp. 407.

[6] Stark v. Coffin, 105 Mass. 328.

[7] Clymer v. Roberts, 220 Pa. 162, 69 Atl. 548. This matter is discussed in Saccone v. West End Trust Co., 224 Pa. 554, 24 L.R.A. (N.S.) 539, 73 Atl. 971, in which the court say: "In some of our cases the language used appears to sustain the contention of appellants that there is a distinction between a call for a private highway as a boundary and a private street or alley so designated. But we think upon examination that these decisions were not intended to go further than to hold that, where land is conveyed as bounded by an unopened street, the grantee takes the fee only to the side line of the street, with an easement over its bed. Thus in Cole v. Philadelphia, 199 Pa. 464, 49 Atl. 308, the deed called for a street which was unopened, and it was held that the

§ 1025e. **Presumption as to center of alley rebutted.** The rule declaring that title is carried to the middle of a way, when it is mentioned as a boundary, is not an absolute and arbitrary rule to be applied indisciminately in all cases, without regard to the intention of the parties. It is on the contrary, a rule of construction, which the courts adopt for the purpose of ascertaining the true meaning of the language which they have employed.[8] If a deed describes the land conveyed as bounded by a passageway, referring to another deed for description, which does not convey any part of the way, and to a plan in which the measurements are minutely

call for an unopen street as a boundary only conveyed the title to the side of the street, and not to the middle thereof. In Clymer v. Roberts, 220 Pa. 162, 69 Atl. 548, the deed called for 'the middle line of Howard street, 50 feet wide; thence along the middle line of said Howard street." Howard street was at the time an unopen street; but it was held that the purpose of making the boundary to be the middle line of the street was to vest the fee in the grantee as far as the center line, notwithstanding the fact that the street was at the time unopened. In Robinson v. Myers, 67 Pa. 9, where the rule with regard to unopen streets seems to have been first laid down, this distinction is expressly made. Justice Williams, after stating the doctrine of Paul v. Carver, 26 Pa. 223, 67 Am. Dec. 413, and Cox v. Freedley, 33 Pa. 124, 75 Am. Dec. 584, said, with reference to the case then before him: 'But in this case there was no alley or street by which the lots were bounded. The recorded plan which is to be taken as a part of the defendant's title shows that the ground in question is a lot and not a street. And it is admitted that no alley was ever laid out over the lot, or ever used by the public, or by private individuals. There is, then, no ground or reason for the application of the rule laid down in Paul v. Carver, to this case.' The case of Van O'Linda v. Lothrop, 21 Pick. 292, 32 Am. Dec. 261, cited in Robinson v. Myers, and also by Justice Murcer in Spackman v. Steidel, 88 Pa. 453, relied on by appellants, was also a question of an unopen street. Morton, J. said (page 296 of 38 Mass.): 'The street did not then exist in actual use, but only in contemplation.' The decision there seems to have gone upon the ground that the deeds showed an intention by the grantors to exclude the fee of the street from the grant."

[8] Codman v. Evans, 1 Allen, 443; Motley v. Sargent, 119 Mass. 231; Crocker v. Cotting, 166 Mass. 183, 33 L.R.A. 245, 44 N. E. 214.

specified, and which excludes the way, and if the deed also grants the use of the passageway in terms, without the reservation of any rights, and if the fee to one side of the way still continues to be in those who laid out the property, and, if in addition to these facts, the parties have placed a practical construction on their acts by considering that the way was excluded by the deed, the deed will not be construed as including any part of the fee of the way.[9] It was argued that none of these facts above stated, taken singly, would be enough to exclude the fee to the right of way and that they could do no more when taken together. But Mr. Justice Holmes answered: "We do not consider whether the premise is correct, because, in our opinion, the consequence does not follow. On a question of construction, a number of facts, all pointing the same way, may have an effect which no one of them would have done." [1] A grantee does not obtain title in fee to any part of a private road, the line of which is mentioned in the deed, as a boundary of the land conveyed, and by which deed, the right to open and use the road is conferred upon the grantee.[2] If the description is by metes and bounds, the fact that it is bounded in one direction by the northerly line of a lane, will not carry title beyond the northerly line of the lane.[3] Likewise, where the deed describes the land conveyed by metes and bounds, without mentioning an abutting strip of land, which is in the nature of an alley, the conveyance in the deed, of an easement of a right of way in this alley does not pass title to any part of the alley.[4] As said by Mr. Justice Frick: "At common law, where a grant is bounded by a public street or highway, which is expressly referred to in the convey-

[9] Crocker v. Cotting, 166 Mass. 183, 33 L.R.A. 245, 44 N. E. 214.

[1] Crocker v. Cotting, 166 Mass. 183, 33 L.R.A. 245, 44 N. E. 214.

[2] Clayton v. Gilmer County Court, 58 W. Va. 253, 2 L.R.A.(N.S.) 598, 52 S. E. 103.

[3] Jones v. Cowman, 2 Sandf. 234.

[4] Brown v. Oregon Short L. R. Co., (Utah), 24 L.R.A.(N.S.) 86, 102 Pac. 740.

ance as such, the title passes to the grantee to the center of such street or highway, if the grantor had the title; and in such case, if the street or highway is vacated, the land in the highway reverts to the abutting landowner. The principle, however, is not of universal application under all circumstances. The grantor may restrict his conveyance by apt words, to the precise parcel of land intended to be conveyed, and he may reserve to himself the title to that portion of the land within the street, subject to the public easement; and, if it appears that such was the intention of the parties, the intention will prevail, and the land in the street, in case it is vacated, will revert to the grantor, and not to the abutting owner." [5] The fee does not pass where the grantor conveys a tract of land described by metes and bounds, except a strip of a certain width, which he reserved as a passageway, for the common use of the grantee and himself and those holding under him.[6] If the land is described as being bounded on the east on a 30 foot way "by a line which is parallel with and 190 feet distant from B street," and if the way is thirty feet in width and apparently west of the street is only one hundred and sixty feet in distance from the street, title to any part of the way does not pass.[7] No part of the way passes to the grantee, where the description runs one line "to" the near line of way, and another call carries it from that point "by" such line.[8] The grantee will take to the side line only of a passageway, where it is described as "lying between" the land conveyed and land which the grantor retains, and

[5] Brown v. Oregon S. L. R. Co., (Utah), 24 L.R.A.(N.S.) 86, 102 Pac. 740. See, also, Elliott Roads & Streets, 2d ed. 886; White's Bank v. Nichols, 64 N. Y. 65; Lankin v. Tarwilliger, 22 Or. 97, 29 Pac. 268.

[6] Stearns v. Mullen, 4 Gray, 151.

[7] Brainard v. Boston & N. Y. C. R. Co., 12 Gray, 407.

[8] McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076, 100 Am. St. Rep. 566. See, also, Treat v. Joslyn, 139 Mass. 94, 29 N. E. 653; Gray v. Kelley, 194 Mass. 533, 80 N. E. 651; Lough v. Machlin, 40 Ohio St. 332.

where the deed recites measurements and refers to a plot, which tends to show the exclusion of the way, and where a convenant is contained in the deed that the grantee shall have the use and benefit of the passageway described as situated "between" the two holdings.[9]

§ 1026. **Land bounded by lake or pond.**—If the land is bounded by a natural lake or pond, the grantee's title extends to low-water mark.[1] But if the land is bounded by an artificial pond, the grantee's title extends to the middle of the pond.[2] A deed described the land as bounded on a certain pond. It appeared, however, upon applying the deed to the local objects embraced within the description that the pond was a natural one, which was raised to various heights at different times by means of a dam existing and in use at the time of the execution of the deed. The court held that there was a latent ambiguity in the deed, and that it was competent to show by parol evidence that at the time of the execution

[9] Codman v. Evans, 1 Allen, 443. See, also, Frost v. Jacobs, (Mass.), 90 N. E. 357.

[1] King v. Young, 76 Me. 76, 49 Am. Rep. 596; Wheeler v. Spinola, 54 N. Y. 377; West Roxbury v. Stoddard, 7 Allen, 167; Stephens v. King, 76 Me. 197. See Seaman v. Smith, 24 Ill. 521; Bradley v. Rice, 13 Me. 198, 29 Am. Dec. 501; Canal Commissioners v. The People, 5 Wend. 423; Champlin etc. R. R. Co. v. Valentine, 19 Barb. 484; Austin v. Rutland R. R. Co., 45 Vt. 215; Hathorne v. Stinson, 12 Me. 183, 28 Am. Dec. 167. When land is bounded by a river, a description will be construed as though the grantor did not intend to retain a mere narrow strip between the land conveyed and his boundary line, where there was in the deed no express provision to that effect, and especially when it would deprive the grantee of valuable water privileges: Brown Oil Co. v. Caldwell, 35 W. Va. 95, 29 Am. St. Rep. 793.

[2] Hathorne v. Stinson, 1 Fairf. 238, 25 Am. Dec. 228; State v. Gilmanton, 9 N. H. 461. See Lowell v. Robinson, 16 Me. 357, 33 Am. Dec. 671; Smith v. Miller, 5 Mason, 196; Mansur v. Blake, 62 Me. 38; Robinson v. White, 42 Me. 209; Cook v. McClure, 58 N. Y. 437, 17 Am. Rep. 270; Wood v. Kelley, 30 Me. 55; Phinney v. Watts, 9 Gray, 269, 69 Am. Dec. 288; Ledyard v. Ten Eyck, 36 Barb. 102; Fletcher v. Phelps, 28 Vt. 257.

of the deed a certain line was agreed upon and understood to be the boundary of the pond.[3] Where a city took a portion of two lots divided by a brook for a use as a stone reser-

[3] Waterman v. Johnson, 13 Pick. 261. The opinion was delivered by Chief Justice Shaw, who said: "The rule is clear, that where the parties make any definite agreement in their deed, such agreement will control any legal implication. But where general terms are used in a description, the court will put a construction upon those terms, where any definite rule has been established, and, in such case, parol evidence will not be admissible to control the legal effect of such description, any more than to control the plain meaning or legal effect of any clause or stipulation contained in a deed. As where the deed bounds the premises upon the sea or salt water, the legal effect is to give a title to the soil, subject to certain limitations, to low-water mark, such being the legal construction put upon this description by the colony ordinance and by usage. So if the premises conveyed are bounded on a river not navigable, the grant extends, by legal operation, to the *filum aquæ* or thread of the river, though in both these cases the parties, if they think fit, may limit their grants by definite language, so as to give them a different operation, and thus exclude the flats or the bed of the river in the above cases respectively. But where a description is employed which has not, by statute, usage, or judicial decision, acquired a fixed legal construction, or a boundary is referred to which is fluctuating and variable, other means must be resorted to in order to ascertain the meaning and construction of the deed. Now the word 'pond' is indefinite. It may mean a natural pond, or an artificial pond raised for mill purposes, either permanent or temporary, and in both cases the limits of such body of water may vary at different times and seasons, by use or by natural causes, and where the one or the other is adopted as a descriptive limit or boundary, a different rule of construction may apply. A large natural pond may have a definite low-water line, and then it would seem to be the most natural construction, and one which would be most likely to carry into effect the intent of the parties, to hold that land bounded upon such a pond would extend to low-water line, it being presumed that it is intended to give to the grantee the benefit of the water, whatever it may be, which he could not have upon any other construction. Where an artificial pond is raised by a dam, swelling a stream over its banks, it would be natural to presume that a grant of land bounding upon such a pond would extend to the thread of the stream upon which it is raised, unless the pond had been so long kept up as to become permanent, and to have acquired another well-defined boundary. But it is difficult to apply either of these rules to the present case, which is that of a pond originally natural, but which has been raised more or less by artificial means.

voir in which to store water, and afterwards abandoned the reservoir, a deed, made when the reservoir was in existence, by the owner of one of the lots, describing the land as bounded "by the city reservoir," will not pass title to that portion of the original lot occupied by the reservoir, where it does not appear that the enjoyment of the land occupied by such reservoir was required for that portion of the land sold. In such a case the rule as to the division of streams does not apply to the reservoir.[4]

§ 1026a. Effect of meander lines.—The object of a meander line is to show the general course of the stream, and is not to be construed as limiting the boundary line so as to prevent it running as far as it would run if the stream itself was named as a boundary. The purpose of such lines is well explained in the language of Mr. Justice Clifford: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the bank of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser." [5] Or to

The discovery of this fact, upon applying the deed to the local objects embraced within its descriptive terms, discloses a latent ambiguity. According to a well-established rule of evidence, therefore, it is competent to resort to parol proof, showing all the circumstances from which a legal inference can be drawn, that one or another line was intended by the ambiguous description used in the deed. And this is, in truth, what both parties have done in the present case."

[4] Dillon v. Burke, 73 N. H. 539, 63 Atl. 927. That generally the middle of an artificial pond is the boundary, see Boardman v. Scott, 102 Ga. 404, 51 L.R.A. 178, 30 S. E. 982; Warren v. City of Gloversville, 80 N. Y. S. 912, 81 App. Div. 291.

[5] Railroad Co. v. Schurmer, 7 Wall. 272, 19 L. ed. 74; Jefferis v. East Omaha Land Co., 134 U. S. 178, 33 L. ed. 872. In Harden v. Jordan, 140 U. S. 371, 35 L. ed. 428, the court say: "It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterward granted

quote the language of Mr. Justice Dillon: "The plaintiff's theory seems to be that defendant is only entitled to the quantity of land called for in the patent and shown on the plat; that the grant is limited to the meandered line. This is an error. The grantee gets all down to the river, be it more or less. The line is meandered chiefly to obtain the quantity, and the meander line is not a line of boundary." [6] The principle is so well established that it would serve no good purpose to elaborate it. Some of the cases in which it has been applied will be found in the note.[7] Unless the deed expressly makes them so, meander lines are not boundary lines. The wet land as well as the dry will pass by a deed both within and without the meander line.[8] But although meander lines will not restrict the title of the grantee within the legal subdivision on which he is located, they will not pass title to land located in some other legal subdivision.[9] The upland owner has the title to land lying between the

out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of water." In the case just cited the court held that the ruling of the Supreme Court of Illinois in Trustees of Schools v. Schroll, 120 Ill. 509, 60 Am. Rep. 575, that a grant of lands bounded by a lake or stream does not extend to the center, was not essential to the decision of the case, was opposed to the previous decisions in that State, and, hence, it was disregarded. See, also, Mitchell v. Smale, 140 U. S. 406.

[6] Kraut v. Crawford, 18 Iowa, 549, 87 Am. Dec. 414. See, also, Musser v. Hershey, 42 Iowa, 364.

[7] Schurmeier v. St. Paul R. R. Co., 10 Minn. 82, 88 Am. Dec. 59; Fuller v. Dauphin, 124 Ill. 542, 7 Am. St. Rep. 388; Middleton v. Pritchard, 3 Scam. 510, 38 Am. Dec. 112; Bruce v. Taylor, 2 J. J. Marsh, 160; Chandos v. Mack, 77 Wis. 573, 10 L.R.A. 207, 20 Am. St. Rep. 139; Minto v. Delaney, 7 Or. 342; Ladd v. Osborne, 79 Iowa, 93; Sphung v. Moore, 120 Ind. 352; Brown v. Huger, 21 How. 320, 16 L. ed. 130; Yates v. Van de Bogert, 56 N. Y. 526; Churchill v. Grundy, 5 Dana, 100; Oakes v. De Lancey, 133 N. Y. 227, 28 Am. St. Rep. 628.

[8] Tolleston Club of Chicago v. State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690.

[9] Palmer v. Dodd, 64 Mich. 474, 31 N. W. 209.

meander line of a navigable lake and the line created by ordinary high water.[1]

§ 1027. **Estoppel from description of land as bounded by a street.**—Where the deed describes the premises as fronting a certain number of feet on a street, the grantor and all claiming under him are estopped from subsequently asserting that the street mentioned in the deed did not extend in front of the premises.[2] In such a case the grantee is entitled to have the street kept open for his accommodation in the enjoyment of his property.[3] But a description in a

[1] Johnson v. Brown, 33 Wash. 588, 74 Pac. 677. The meander line of a government survey along a stream is not considered to be a boundary line: Berry v. Hoogendoom, 133 Iowa, 437, 108 N. W. 923. See further as to meander lines: Heald v. Yumesko, 7 N. D. 422, 75 N. W. 806; Olson v. Thorndike, 76 Minn. 399, 79 N. W. 399; Kirby v. Potter, 138 Cal. 686, 72 Pac. 338; Tolleston Club etc. v. Lindgren, 39 Ind. App. 448, 77 N. E. 818; Leonard v. Wood, 33 Ind. App. 383, 70 N. E. 827; Dizon v. City of Logansport, 151 Ind. 626, 44 L.R.A. 814, 50 N. E. 377; Johnson v. Tomlinson, 41 Or. 198, 68 Pac. 406; Coburn v. San Mateo Co., 75 Fed. 520; Chapman etc. Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534; Johnson v. Hurst, 10 Idaho, 308, 77 Pac. 784; Hendricks v. Feather River Canal Co., 138 Cal. 423, 71 Pac. 496; Schulte v. Warren, 218 Ill. 108, 13 L.R.A. (N.S.) 745, 75 N. E. 783, reversing 120 Ill. App. 10; Tolleston Club etc. v. State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; Welch v. Browning, 115 Iowa, 690, 87 N. W. 430; Schlosser v. Hemphill, 118 Iowa, 452, 90 N. W. 842; Goff v. Cougle, 118 Mich. 307, 42 L.R.A. 161, 76 N. W. 489; Hanson v. Rice, 88 Minn. 273, 92 N. W. 982; Sherwin v. Bitzer, 97 Minn. 252, 106 N. W. 1046; Provins v. Lovi, 6 Okla. 94, 50 Pac. 81; Barnhart v. Ehrhart, 33 Or. 274, 54 Pac. 195; Griffin v. Barbere, 29 Tex. Civ. App. 325, 68 S. W. 698; Washougal etc. Co. v. The Dalles etc. Co., 27 Wash. 490, 68 Pac. .74; Maynard v. Puget Sound Nat. Bank, 24 Wash. 455, 64 Pac. 754.

[2] White v. Smith, 37 Mich. 291; Smith v. Lock, 18 Mich. 56; Parker v. Smith, 17 Mass. 413, 9 Am. Dec. 157. See Transue v. Sell, 105 Pa. St. 604, and cases cited.

[3] Smith v. Lock, 18 Mich. 56; Farming v. Osborne, 34 Hun, 121. In Smith v. Lock, 18 Mich. 56, the description of the premises sold was: "Commencing at the northeast corner of the M. S. Railroad depot grounds, in the village of Burr Oak, thence south one hundred feet, thence easterly along the

deed of land bounded by a street, is not equivalent to a covenant of the existence of a street of the same width as a street of that name, when such street, though graded and laid out in a plan published by the former owner of the property, has subsequently been closed and plowed up. Such a description under these circumstances amounts only to a covenant of the existence of a way of reasonable width necessary and convenient for the use of the grantee in the use of the land conveyed.[4] A grantor in a deed bounding the land on a private way not defined in the deed, but shown upon a plan referred to in the deed, and recorded in the registry of deeds, is estopped to deny the existence of such way.[5] If the land conveyed is bounded by an alley, the alley when closed reverts to the owners adjoining.[6]

line of the company's ground until it intersects the creek, thence northerly along the line of said creek until it intersects the line of Front Street, thence westerly along said line of said street to the place of beginning." The grantor claimed afterward that Front Street did not extend along the front of this lot, and sold the land on the north side of the lot up to the grantee's line to another party, and the latter began to build a house upon the land which he thus bought. A bill was filed to obtain a perpetual injunction, and it was not denied that there was a street called Front Street which extended to the grantee's lot on the west, and which was fifty feet in width, and which, if extended in front of the lot in question, would include the house that the second purchaser was building. The court held that it did not follow because no street had been regularly laid out or dedicated to the public in front of the grantee's lot, that he was not entitled to relief; that it was a matter of private right, and was not affected by the question whether the public had acquired a right of way or not. And see De Witt v. Van Schoyk, 35 Hun, 103.

[4] Walker v. City of Worcester, 6 Gray, 548.

[5] Fox v. Union Sugar Refinery, 109 Mass. 292; Parker v. Bennett, 11 Allen, 388; Murdock v. Chapman, 9 Gray, 156; Morgan v. Moore, 3 Gray, 319; Lunt v. Holland, 14 Mass. 149; Sheen v. Stothart, 29 La. Ann. 630; Davis v. Rainsford, 17 Mass. 207. And see Tobey v. Taunton, 119 Mass. 404; Stetson v. Dow, 16 Gray, 372.

[6] Cincinnati & Georgia R. R. Co. v. Mims, 71 Ga. 240; Healey v. Babbitt, 14 R. I. 533.

§ 1028. **Navigable streams and tide-waters.**—The rule where land is bounded by navigable streams or tide-waters is, that the grantor's right extends only to high-water mark.[7] In a case in Connecticut, Mr. Justice Daggett said: "The doctrine of the common law is, that the right to the soil of the proprietors of land on navigable rivers extends only to high-water mark; all below is *publici juris*—in the king, in England. That is the law in Connecticut; for we have no statute abrogating it. It was the law brought by our ancestors; it is our law; the soil being not indeed owned by the king, but by the State." [8] In a technical sense, arms of the sea, and rivers which flow and reflow with the tide are said to be navigable. But generally, in this country, all rivers which are in fact navigable are considered to be such.[9]

§ 1028a. **Reason for these rules.**—The natural presumption where a deed conveys land bordering on a stream or highway is, that the grantor means to convey what he owns, and not to reserve a strip of land of no value to him, but the loss of which to the grantee might be productive of great injury. He has power by apt words to reserve what and as much as he pleases, or so to frame the language of his conveyance as to limit the land conveyed to the line of the stream or highway, without extending further, and, in all such cases, courts are bound to give effect to his expressed intention. But in the absence of words showing such an intention, it is not presumed that the grantor intended to retain in himself the fee to the street or stream when he has parted

[7] Tomlin v. Dubuque etc. R. R. Co., 32 Iowa, 106, 7 Am. Rep. 176; Middleton v. Pritchard, 3 Scam. 520, 38 Am. Dec. 112; Adams v. Pease, 2 Conn. 481; McManus v. Carmichael, 3 Iowa, 1; Haight v. The City of Keokuk, 4 Iowa, 199; Canal Commissioners v. The People, 5 Wend. 423; Mayhew v. Norton, 17 Pick. 357, 28 Am. Dec. 300; Barney v. City of Keokuk, 4 Cent. L. J. 491.

[8] Chapman v. Kimball, 9 Conn. 38, 21 Am. Dec. 707.

[9] See term "Navigable," Bouvier Law. Dict.

with the adjoining land. Therefore it may be said to be a universal rule, that a deed giving a stream as a boundary will convey title to the center of the stream or to low or high water mark, depending upon how far the grantor's title extends. By such a description the grantor will convey all that he owns, unless a contrary intent appears from the language of the deed.[1] The deed is taken most strongly against the grantor in the application of this rule, and courts will not favor the presumption that he has retained title to the bed of the stream.[2] Where title passes to the thread of the stream, it will include an island lying between the thread of the stream and the land abutting the stream.[3] So islands are included which are separated from the mainland by sloughs.[4] A water line given as the boundary of a lot remains the boundary, however it may shift, and land up to such shifting water line is conveyed by a deed describing the lot by its number. When accretion occurs, the water line

[1] Norcross v. Griffiths, 65 Wis. 610; Chandos v. Mack, 77 Wis. 573, 10 L.R.A. 207, 20 Am. St. Rep. 139; Moody v. Palmer, 50 Cal. 31; Williamsburgh Boom Co. v. Smith, 84 Ky. 375; Watson v. Peters, 26 Mich. 508; McCullough v. Wall, 4 Rich. 68, 53 Am. Dec. 715; Morrison v. Keen, 3 Greenl. 474; Sleeper v. Laconia, 60 N. H. 201, 49 Am. Rep. 311; Brown Oil Co. v. Caldwell, 35 W. Va. 95, 29 Am. St. Rep. 793; Middleton v. Pritchard, 3 Scam. 510, 38 Am. Dec. 112; Boston v. Richardson, 105 Mass. 351; Doane v. Willicutt, 5 Gray, 328; Mayhew v. Norton, 17 Pick. 359, 28 Am. Dec. 300; Lampish v. Bangor Bank, 8 Greenl. 85; Winslow v. Patten, 34 Me. 25; Chapman v. Edmands, 3 Allen, 512; Berry v. Snyder, 3 Bush, 266, 96 Am. Dec. 219; Lowell v. Robinson, 16 Me. 357, 33 Am. Dec. 671; Harlow v. Fisk, 12 Cush. 304; Williams v. Buchanan, 1 Ired. 535, 35 Am. Dec. 760; Warren v. Thomaston, 75 Me. 329, 46 Am. Rep. 397; Oakes v. De Lancey, 133 N. Y. 227, 28 Am. St. Rep. 628; Dunlap v. Stetson, 4 Mason, 336; Moore v. Griffin, 22 Me. 350; Thomas v. Hatch, 3 Sum. 178; Brown v. Hager, 21 How. 306, 16 L. ed. 125.

[2] Palmer v. Farrell, 129 Pa. St. 162, 15 Am. St. Rep. 708; Brown Oil Co. v. Caldwell, 35 W. Va. 95, 29 Am. St. Rep. 793; Holden v. Chandler, 61 Vt. 291.

[3] Chandos v. Mack, 77 Wis. 573, 10 L.R.A. 207, 20 Am. St. Rep. 139.

[4] Fuller v. Dauphin, 124 Ill. 542, 7 Am. St. Rep. 388.

continues to be the boundary when named as such, and a deed passes title to all land extending to the water line.[5] Where land is described as beginning on the west bank of the creek, "thence follow said west bank on a general course of north, four degrees twenty-four minutes west," the grantee takes the land to the margin of the creek at low-water mark, notwithstanding a survey of the land by courses and distances, set out in the deed, would not extend the line to the creek. The creek is a natural monument, and will prevail over the courses and distances.[6]

§ 1028b. Presumption overcome only by actual reservation.—The presumption mentioned in the preceding section can be overcome only by an actual reservation in the deed, or by facts evincing an intention to limit the land conveyed to the precise boundaries of the description. Hence, if a grantor describes lands by metes and bounds, which include the whole of the bank of the stream, extending the whole distance of the part conveyed, the presumption is that he intended to convey all his interest in the bed of the stream, lying in front of the land conveyed, although no reference is made to the stream.[7] But where a description in a statute

[5] Jeffries v. East Omaha Land Co., 134 U. S. 178, 33 L. ed. 872.

[6] Yates v. Van de Bogert, 56 N. Y. 526.

[7] Norcross v. Griffiths, 65 Wis. 599, 56 Am. Rep. 642. The court states the reasons for this rule in the language of Justice Redfield in the case of Buck v. Squires, 22 Vt. 484, 494: "The rule itself is mainly one of policy, and one which to the unprofessional might not seem of the first importance; but it is, at the same time, one which the American courts, especially, have regarded as attended with very serious consequences when not rigidly adhered to, and its chief object is to prevent the existence of innumerable strips and gores of land along the margins of streams and highways, to which the title for generations shall remain in abeyance, and then, upon the happening of some unexpected event, and one consequently not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up to vex and harass those who, in good faith, had supposed themselves secure from such embarrassment. It is,

is "to the channel of George's river, thence down said channel till it intersects the town line, where it crosses the George's river"—the boundary line is the thread of the channel. "The channel," said the court, "is the deepest part of the river. It is the navigable part—the water-road over which vessels pass and repass. It is the highway of commerce. Had the line run to the river and down the river, the boundary would have been the bed of the stream—the *filum aquæ*. But the

as I understand the law, to prevent the occurrance of just such contingencies as these, that in the leading, best reasoned, and best considered cases upon the subject, it is laid down and fully established that courts will always extend the boundaries of land, deeded as extending to and along the sides of highways and fresh water streams not navigable, to the middle of such streams and highways, if it can be done without manifest violence to the words used in the conveyance, and to have this rule of the least practical importance to cure the evil which it is adopted to remedy, it must be applied to every case where there is not expressed an evident and manifest intention to the contrary—one from which no rational construction can escape. The rule, to be of any practical utility, must be pushed somewhat to the extreme of ordinary rules of construction, so as to apply to all cases, when there is not a clearly expressed intention in the deed to limit the conveyance short of the middle of the stream or highway. If it is only to be applied like the ordinary rules of construction as to boundary, so as to reach as far as may be the clearly formed idea in the mind of the grantor at the time of executing the deed, it will ordinarily be of no utility as a rule of expediency or policy; for in ninety-nine cases in every hundred the parties at the time of the conveyance do not esteem the land covered by the highway of any importance either way; hence they use words naturally descriptive of the prominent ideas in their minds at the time, and in doing so define *the line which it is expected the party will occupy and improve.*" See, also, Jones v. Pettibone, 2 Wis. 308; Yates v. Judd, 20 Wis. 425; Walker v. Shepardson, 4 Wis. 486, 65 Am. Dec. 324; Ford v. C. & N. W. R. Co., 14 Wis. 609, 80 Am. Dec. 791; Kimball v. Kenosha, 4 Wis. 321; Gove v. White, 20 Wis. 425; Wisconsin R. Imp. Co. v. Lyons, 30 Wis. 61; Wright v. Day, 33 Wis. 260; Pettibone v. Hamilton, 40 Wis. 402; Kneeland v. Van Valkenburgh, 46 Wis. 427, 32 Am. Rep. 719; Smith v. Ford, 48 Wis. 163; Valley P. & P. Co. v. West, 58 Wis. 599; Mariner v. Schulte, 13 Wis. 692; Elson v. Merrill, 42 Wis. 203; Boorman v. Sunnuchs, 42 Wis. 233; Young v. Harrison, 6 Ga. 130; Arnold v. Elmore, 16 Wis. 509; Moses v. Eagle & P. Mfg. Co., 62 Ga. 455.

thread of a stream is the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of the water. The channel and the thread of the river are entirely different. The channel may be one side of the thread of the river or the other."[8] Where a city is divided into lots and the lots are conveyed by numbers, a deed of those lying along a stream will carry the grantor's title to the land lying between the lot and the thread of the stream.[9] But if a deed conveying a specified number of acres of a block adjoining a street transfers title to the center of the street, it is not a necessary conclusion that this number of acres is to be estimated by extending the line to the center of the street. If the blocks are uniform in size, as four-acre blocks, for instance, and a deed describing them as such conveys the north two acres of a block, it practically conveys the north half of the block, excluding the street, and especially so if the deed describes a right of way over another portion of the same block.[1]

§ 1029. **Courses and distances controlled by monuments.**—If there is a conflict between them, the courses and distances given in the description must yield to the monuments.[2] "It is a general principle," says Chief Justice Mar-

[8] Warren v. Thomaston, 75 Me. 329, 46 Am. Rep. 397. The thread of the stream is a line equally distant from the two banks at the ordinary stage of the water: Boscawen v. Canterbury, 23 N. H. 188; Hopkins v. Dickinson, 9 Cush. 552.

[9] Mariner v. Schulte, 13 Wis. 775; Watson v. Peters, 26 Mich. 508; Trustees v. Haven, 11 Ill. 554. Where the word "shore" is used as a boundary, the decisions are not uniform as to the construction to be given to it. By some decisions the grantee takes to low-water mark: Stevens v. King, 76 Me. 197, 49 Am. Rep. 609; Child v. Starr, 4 Hill. 369. A deed, on the other hand, giving a boundary as "running to the river, and thence on the river shore" was held to convey land to the center of the stream: Sleeper v. Laconia, 60 N. H. 201, 49 Am. Rep. 311. And see Starr v. Child, 20 Wend. 149; Woodman v. Spencer, 54 N. H. 507; Low v. Tibbitts, 72 Me. 92, 39 Am. Rep. 303.

[1] Fraser v. Ott, 95 Cal. 661.

[2] Turnbull v. Schroeder, 29 Minn.

shall, "that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey

49; Watson v. Jones, 85 Pa. St. 117; Burkholder v. Markley, 98 Pa. St. 37; Ayers v. Watson, 113 U. S. 594, 28 L. ed. 1093; Ellis v. Hunnicutt, 71 Ga. 637; Hurley v. Morgan, 1 Dev. & B. 425, 28 Am. Dec. 579; Hall v. Powel, 4 Serg. & R. 456, 8 Am. Dec. 722; Ripley v. Berry, 5 Greene, 24, 17 Am. Dec. 201; Den v. Graham, 1 Dev. & B. 76, 27 Am. Dec. 226; Davis v. Rainsford, 17 Mass. 207; Adams v. Alkire, 20 W. Va. 480; Daggett v. Willey, 6 Fla. 482; Welder v. Hunt, 34 Tex. 44; Credle v. Hays, 88 N. C. 321; Coles v. Wooding, 2 Pat. & H. 189; Beaudry v. Doyle, 8 West C. Rep. 299; Lewis v. Lewis, 4 Or. 177; Bolton v. Eggleston, 61 Iowa, 163; Simonton v. Thompson, 55 Ind. 87; Benton v. Horsley, 71 Ga. 619; Brown v. Huger, 21 How. 305, 16 L. ed. 125; Woodward v. Nims, 130 Mass. 70; Kronneberger v. Hoffner, 44 Mo. 185; Haynes v. Young, 36 Mo. 557; Hogans v. Carruth, 19 Fla. 84; Evansville v. Page, 23 Ind. 527; Keenan v. Cavanaugh, 44 Vt. 268; Carville v. Hutchins, 73 Me. 227; Cottingham v. Parr, 93 Ill. 233; Kellogg v. Mullen, 45 Mo. 571; Walsh v. Hill, 38 Cal. 481; Morse v. Rogers, 118 Mass. 572; Norfolk Trust Co. v. Foster, 78 Va. 413; West v. Shaw, 67 N. C. 494; Husbands v. Semples, 13 Mo. App. Marsh v. Mitchell, 25 Wis. 706; 589; Thompson v. Wilcox, 7 Lans. 376; Park v. Pratt, 38 Vt. 552; Riddlesburg etc. Coal Co. v. Rogers, 65 Pa. St. 416; Tyler v. Fickett, 73 Me. 410; Cunningham v. Curtis, 57 N. H. 157; Winans v. Cheney, 55 Cal. 567; Howe v. Bass, 2 Mass. 380, 3 Am. Dec. 59; Lodge v. Barnett, 46 Pa. St. 477; Wendell v. Jackson, 8 Wend. 183, 22 Am. Dec. 635; Brand v. Daunoy, 8 Martin, N. S. 159, 19 Am. Dec. 176; Frost v. Spaulding, 19 Pick. 445, 31 Am. Dec. 150; McPherson v. Foster, 4 Wash. C. C. 45; Harris v. Hull, 70 Ga. 831; Cilley v. Childs, 73 Me. 130; Clamorgan v. Baden etc. R. R. Co., 72 Mo. 139; Sanborn v. Rice, 129 Mass. 387; Cudney v. Early, 4 Paige, 209; Piercy v. Crandall, 34 Cal. 334; Smith v. McAllister, 14 Barb. 434; Bosworth v. Sturtevant, 2 Cush. 392; Town v. Needham, 3 Paige, 546, 24 Am. Dec. 246; Urquhart v. Burleson, 6 Tex. 502; Gavery v. Hinton, 2 Greene, 344; People v. Law, 34 Barb. 494, 22 How. Pr. 109; Nivin v. Stevens, 5 Har. (Del.) 272; Mitchell v. Burdett, 22 Tex. 633; Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111; Miller v. Beeler, 25 Ill. 163; Newman v. Foster, 4 Miss. (3 How.) 383, 34 Am. Dec. 98; Colton v. Seavey, 22 Cal. 496; Clark v. Wethey, 19 Wend. 157; Nelson v. Hall, 1 McIowa, 249; Woods v. Kennedy, 5 Mon. 174; Van Wyck v. Wright, 18 eWnd. 157; Nelson v. Hall, 1 McLean, 518; Nichols v. Turney, 15 Conn. 101; Campbell v. Clark, 8 Mo. 553; Cleaveland v. Smith, 2 Story, 278; Smith v. Dodge, 2 N. H. 303; Sumter v. Bracey, 2 Bay, 515; Massengill v. Boyles, 4 Humph.

the land according to that actual survey; consequently, if marked trees and marked corners be found conformably to the calls of the patent, or if watercourses be called for in the patent, or mountains, or any other natural objects, distances must be lengthened or shortened, and courses varied, so as to conform to those objects. The reason of the rule is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses and distances are more probable and more frequent than in marked trees, mountains, rivers, or other natural objects capable of being clearly designated and accurately described." [3] An action was brought for a breach of covenant of warranty in a deed, which described the land conveyed as bounded on the west by the land of a certain person. The distance on the north line from the east to the west end, as specified in the deed, extended seventeen feet beyond such person's northeast corner, and the distance on the south line extended six and a half feet beyond such person's southeast corner, so that by measurement the deed included a strip seventeen feet wide at the north end, and six and a half feet at the south end, and this strip was at the time of the execution of the deed in the possession of such third person, and was separated from the land owned by the grantor by a shed and a division fence. It was held that the shed

205; Call v. Barker, 12 Me. (3 Fairf.) 320; Robinson v. White, 42 Me. 209; McGill v. Somers, 15 Mo. 80; Funa v. Manning, 11 Humph. 311; Pernam v. Wead, 6 Mass. 131; Aiken v. Sanford, 5 Mass. 494; Gerrish v. Bearce, 11 Mass. 193; Jackson v. Camp, 1 Conn. 605; Mayhew v. Norton, 17 Pick 357, 28 Am. Dec. 300. See Piercy v. Crandall, 34 Cal. 334; Benedict v. Gaylord, 11 Conn. 332, 29 Am. Dec. 299; Peay v. Briggs, 2 Mill. Const. 98, 12 Am. Dec. 656; Hostetter v. Los Angeles T. Ry. Co., 108 Cal. 38. See, also, Powers v. Orville Bank, 136 Cal. 486, 69 Pac. 151; Kendrick v. Burchette (Ky.) 89 S. W. 239.

[3] McIver's Lessee v. Walker, 9 Cranch, 173, 177, 3 L. ed. 694, 696. As to measurement of land bounded on one side by a meandering stream, see Kimball v. Semple, 25 Cal. 440; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573; Spring v. Hewston, 52 Cal. 442; Hall v. Shotwell, 66 Cal. 379.

and fence constituted monuments controlling the distances in the deed, and hence that there was no breach of the covenant of warranty.[4] A line was described as running "thence *westerly* including the cañadas to a stake, so that a line running from thence to the Dos Pedros will pass about two hundred yards from the present new corral of the said Jose Jesus Lopez." It was held that the monuments should control, although they determined the course of the line to be northeasterly instead of westerly.[5] Where a natural object is one of the monuments, and a line does not reach it, the line must be extended to such object, and the distance given must not be considered.[6] When a call is from one monument to another, the law will presume that a straight line was intended. But this presumption does not arise where it is evident from the language of the deed that a different line was intended.[7] If the call in the deed is from a monument to a creek, without specifying a definite point, the creek is not to be considered a monument within the meaning of this rule.[8] Where the former owner of adjacent lots erected houses, bulkheads and fences, and sold them when ready for occupancy, placing the purchasers in possession of the respective lots as they were inclosed and improved, the boundary lines as shown by the

[4] Cunningham v. Curtis, 57 N. H. 157. And see, also, Smith v. Negbauer, 42 N. J. L. 305; Crampton v. Prince, 83 Ala. 246, 3 Am. St. Rep. 718; Andrew v. Watkins, 26 Fla. 390; Cowles v. Reavis, 109 N. C. 417; Adair v. White, 85 Cal. 314; Northern Ry. Co. v. Jordan, 87 Cal. 23; Payne v. English, 79 Cal. 540; Hubbard v. Dusy, 100 N. C. 212; Scott v. Pettigrew, 72 Tex. 321; Jones v. Andrews, 72 Tex. 6; McAninch v. Freeman, 69 Tex. 445; King v. Brigham, 19 Or. 560; Morse v. Rollins, 121 Pa. St. 537; Bloom v. Ferguson, 128 Pa. St. 362; Bushey v. Iron Co., 136 Pa. St. 541; Menasha etc. Co. v. Lawson, 70 Wis. 600. Although the monuments were never seen by the parties, they control the courses and distances: Anderson v. Richardson, 92 Cal. 623.

[5] Colton v. Seavey, 22 Cal. 496. Text Gal. 343.

[6] Strickland v. Draughan, 88 N. C. 315; Hogans v. Carruth, 19 Fla. 84.

[7] Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573.

[8] Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573.

improvements, constitute monuments fixed by the original survey and measurement of the adjacent lots by the common vendor. They, therefore, fix the actual location of the lines upon the ground, and will control the description as given by the distances mentioned in the deeds.[9] The best and primary evidence of the location of a corner is the monument established by the United States surveyor, and will control the field notes or any other class of evidence.[1] If the deed shows no ambiguity on its face and the calls are for marked corners found on the ground, but one of the lines in course and distance does not correspond with such corners, the line should be run straight between the corners.[2] It is the duty of the court, where there is a controversy as to a section line, to ascertain if possible the line as indicated by the monuments established by the government surveyor.[3]

[9] Bullard v. Kempff, 119 Cal. 9, 50 Pac. 780. Natural and ascertained objects control courses and distances: Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668, 64 C. C. A. 180; Belding v. Hebbard, 103 Fed. 532, 43 C. C. A. 296; Hammond v. George, 116 Ga. 792, 43 S. E. 53; Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591; Bartlett v. Rochelle, 68 N. H. 211, 44 Atl. 302; Dows Real Estate & Trust Co. v. Emerson, 125 Iowa, 86, 99 N. W. 724.

[1] Roads v. Stangaer, 41 Wash. 583, 84 Pac. 405.

[2] Sloan v. King, 29 Tex. Civ. App. 599, 69 S. W. 441.

[3] McGray v. Monarch Elevator Co., 16 S. D. 109, 91 N. W. 457. See as to other cases showing that monuments and natural objects prevail over courses and distances: Reusens v. Lawson, 91 Va. 226, 21 S. E. 347; Watkins v. King, 118 Fed. 524, 55C. C. A. 290; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Whitcomb v. Dutton, 89 Me. 212, 36 Atl. 67; Richardson v. Watts, 94 Me. 476, 48 Atl. 180; Ayers v. Huddleston, 30 Ind. App. 242, 66 N. E. 60; Olson v. Keith, 162 Mass. 485, 39 N. E. 410; Le Compte v. Lueders, 90 Mich. 495, 51 N. W. 542, 30 Am. St. Rep. 450; Keyser v. Sutherland, 59 Mich. 455, 26 N. W. 865; Woodbury v. Venia, 114 Mich. 251, 72 N. W. 189; Brudin v. Inglis, 121 Mich. 410, 80 N. W. 115; Granby etc. Co. v. Davis, 156 Mo. 422, 57 N. W. 126; Bricken v. Cross, 163 Mo. 449, 64 S. W. 99; Patton v. Fox, 179 Mo. 525, 78 S. W. 804; Bowen v. Gaylord, 122 N. C. 816, 29 S. E. 340; Hill v. Dalton, 140 N. C. 9, 52 S. E. 273; Moore v. McClain, 141 N. C. 473, 54 S. E. 382; Christenson v. Simmons, 47 Or. 184, 82 Pac. 805; Miller v. Cramer, 190 Pa. 315, 42 Atl. 690; Mays v.

§ 1029a. Erroneous description in incident of title.—It is the duty of courts to uphold deeds when possible, and

Hinchman, 57 W. Va. 602, 50 S. E. 823. Where the calls are conflicting, those for corners and lines identified on the ground by bearing trees will prevail over those for distances: Granberry v. Storey, 127 S. W. 1122. Monuments fixed by a government survey, will, when they can be found, prevail as to the location of section corners: Runkle v. Welty, 86 Neb. 680, 126 N. W. 139. The reason that a call for a natural boundary will prevail over one for course and distance, is that the former, if fixed, is unchangeable, and more likely to be true: Wilson Lumber Co. v. Hutton, 152 N. C. 537, 68 S. E. 2. If however the deed describes the land by courses and distances such description will not be affected by monuments subsequently erected: Talbot v. W. K. Smith, Sec. Sav. & T. Co., 107 Pac. 480, 108 Pac. 125. A description by distinct and clear metes and bounds enabling the easy ascertainment of the boundaries of the tract conveyed will control any general words of description which may be added. Texas Mexican Ry. Co. v. Scott, 129 S. W. 1170. The priority to be observed in the calls in the field notes should be first, calls for natural objects; second, calls for artificial objects; third, calls for courses; fourth, calls for distance; and as a corollary to the two last named, calls for quantity. These are not absolute rules as calls of a lower owner may prevail, when it appears that those of a higher owner were made by mistake: State v. Sulflow, 128 S. W. 652. See, also, Turner v. Creech, 108 Pac. 1084; Bacon v. Boston & M. R. R., 83 Vt. 421, 76 Atl. 128. Where there is no clear intimation to the contrary, the presumption is that a straight line is intended in a course or a distance called for between two points: Wright v. Hurst, 127 S. W. 701. The survey is constituted of marks on the ground and courses and distances constitute only evidence: Andrews v. Wheeler, 10 Cal. App. 614, 103 Pac. 144. The highest proof of a boundary line is found in the actual line of a survey, and monuments, and natural or permanent objects definitely located, the next highest proofs of this character control courses and distances: Meeker v. Simmons, 10 Cal. App. 250, 101 Pac. 683. Calls for monuments will prevail over courses and distances: Stewart v. May, 111 Md. 162, 73 Atl. 460. A false or incorrect call may be rejected: Hubbard v. White, 221 Mo. 672, 121 S. W. 69. The chief purpose is to ascertain the true intent of the parties: Co-operative Bldg. Bank v. Hawkins, 30 R. I. 171, 73 Atl. 617. See, also, as to courses and distances and monuments: Page v. Whatley, 50 So. 116; Bell v. Redd, 133 Ga. 5, 65 S. E. 90; Bell v. Powers, 121 S. W. 991; Guill v. O'Bryan, 121 S. W. 593; Bullion Beck & C. Min. Co. v. Eureka Hill Min. Co., 103 Pac. 881; Grand Cent. Min. Co. v. Mammoth Min. Co., 104 Pac. 573; Pilkerton v. Roberson, 65 S. E. 835.

where a question arises as to the sufficiency of the form of the deed to convey the land intended, the fact that an incident in the history of the title of the land is erroneously described will not prevail against the force of metes, bounds, courses, distances, and visible monuments. In the interpretation of all contracts, the object is to effectuate the intention of the parties.[4] Where the land to be conveyed was described as "all that tract or upper island of land called Eden," and was then described by bounds, courses, and distances, which did not embrace all the island, the court held that the title to the whole island passed by the deed.[5] If the land is described

[4] Sherwood v. Whiting, 54 Conn. 330, 1 Am. St. Rep. 116. In that case the property intended to be conveyed was described as "All the real estate of Oran Sherwood, deceased, which was distributed to Franklin Sherwood in the distribution of said estate, and afterwards conveyed to me by said Franklin Sherwood, by sundry deeds as recorded in Fairfield land records." As a matter of fact Franklin Sherwood had conveyed before the distribution of the estate, and not afterward, and had made the conveyance for the purpose of concealing the property from his creditors. His deed, however, described fully the land conveyed. Suit was brought to compel the heirs of the grantor to execute a corrected deed, but the court held that it required no correction. If the deed contains ambiguous calls or those which obviously are erroneous, they may be rejected and the location of the land may be determined by the other calls. Hammond v. George, 116 Ga. 792, 43 S. E. 53; Naughton v. Elliott, 68 N. J. Eq. 259, 59 Atl. 869; Fuller v. Carr, 33 N. J. L. 157; Craft v. Taylor, 31 Ky. Law Rep. 1349, 105 S. W. 128; Johnson v. Bowlware, 149 Mo. 451, 51 S. W. 109; Union R. etc., Co. v. Skinner, 9 Mo. App. 189; Tucker v. Satterhwaite, 123 N. C. 511, 31 S. E. 722; Albert v. Salem, 39 Or. 466, 65 Pac. 1068, 66 Pac. 233; Bleidorn v. Pilot Mountain Coal, etc. Co., 89 Tenn. 166, 15 S. W. 737; Scates v. Henderson, 44 S. C. 548, 22 S. E. 724; Matheny v. Allen, 63 W. Va. 443, 60 S. E. 407.

[5] Lodge v. Lee, 6 Cranch, 237, 3 L. ed. 210. See, for further instances, Worthington v. Hilyer, 4 Mass. 196; Jackson v. Barringer, 15 Johns. 471; Melvin v. Proprietors, 5 Met. 15, 38 Am. Dec. 384; Cate v. Thayer, 3 Me. 71; Keith v. Reynolds, 3 Me. 393. The owner of a farm conveyed it by deed, which described it as "the farm on which I now live, and is the same which was deeded to me by J. G., March 15, 1810, reference being had to said deed. The deed of March 15, 1810, did not include a lot of land which had formed part of the farm for

as a "homestead farm," with a designation of the number of acres, the whole parcel will pass, although it contains twice the number of acres mentioned.[6] So parties in making a conveyance are presumed to make it with reference to the state or condition of the premises at the time, and, if the description be sufficient when made, no subsequent changes in conditions can make it invalid.[7]

§ 1030. **When courses and distances prevail.**—Where the monument described in the deed cannot be found, and neither its location nor existence can be proven, the location of the land must be determined by the other parts of the description. If the land is described by definite and distinct boundaries from which it may be located, the description cannot be varied or controlled by parol evidence.[8] If one of the lines is described as running a certain number of rods to a stake and stones, and there is no such monument, the end of the line, in the absence of evidence that there was a contrary intent, is to be determined by the measurement.[9] Where the deed shows an intention to convey a specific quantity of land, and this exact quantity is included within the courses and distances, and the description by monuments embraces a larger or smaller quantity, the former description will prevail.[1] When the deed would be defeated by applying the rule that monuments control courses and distances, and when the re-

forty years, but it had been conveyed to the grantor by J. G. by a deed dated January 11, 1810, and the court held that this lot was conveyed by the deed: Hastings v. Hastings, 110 Mass. 280.

[6] Andrews v. Pearson, 68 Me. 19. See, also, Dwight v. Tyler, 49 Mich. 614; Wiley v. Lovely, 46 Mich. 83; Deacons etc. v. Walker, 124 Mass. 69; Union etc. v. Skinner, 9 Mo. App. 189; Green Bay etc. v. Hewitt, 55 Wis. 96, 42 Am. Rep. 701.

[7] Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250.

[8] Drew v. Swift, 46 N. Y. 204; Bagley v. Morrill, 46 Vt. 94.

[9] Wilson v. Hildreth, 118 Mass. 578.

[1] Higinbotham v. Stoddard, 72 N. Y. 94; Buffalo etc. R. R. Co. v. Stigeler, 61 N. Y. 348.

jection of a call for a monument will reconcile other parts of the description and leave sufficient to identify the land, the rule as to monuments will not be enforced.[2] Where no monuments are referred to in the deed, and none are intended to be erected, the distances stated in the description must govern the location.[3] The rule that courses and distances are controlled by natural objects will not be applied where it appears that the natural object is variable in its position.[4] Nor does the rule prevail when the calls for monuments are false or mistaken. Thus if it appears that the larger portion of the boundary of a grant containing a large quantity of land was not run on the ground but was platted in and that the surveyor, either mistook or did not know the true location of the boundaries called for, and, that, if the boundaries were to be determined by the monuments as located, the grant would contain but a trifle over one fifth of the acreage, while as platted, running the lines according to courses and distances, it would contain the acreage called for by the grant, the courses and distances, must govern.[5] The distances stated in a deed, cannot be controlled by fences to which the deed does not refer.[6] If the survey was not made on the ground but was copied from other surveys, the rule that courses and distances yield to marked trees and lines when found on the ground, has no application.[7] If by allowing monuments to control courses and distances, an absurdity would result, or

[2] White v. Luning, 93 U. S. 514, 23 L. ed. 938.

[3] Negbauer v. Smith, 44 N. J. L. 672. And see Winans v. Cheney, 55 Cal. 567. For a case in which a monument was considered as descriptive only, and that it should not receive undue prominence, see Jones v. Bunker, 83 N. C. 324. See, also, Loring v. Norton, 8 Me. (8 Greenl.) 61; Preston v. Bowmar, 2 Bibb, 493; Hamilton v. Foster, 45 Me. 32; Bradford v. Hill, 1 Hayw. (N. C.) 22, 1 Am. Dec. 546; O'Hara v. OBrien, 107 Cal. 309.

[4] Smith v. Hutchinson, 104 Tenn. 394, 58 S. W. 226.

[5] King v. Watkins, 98 Fed. 913.

[6] Kashman v. Parsons, 70 Conn. 295, 39 Atl. 179.

[7] Bell v. Preston, 19 Tex. Civ. App. 375, 47 S. W. 375, 753. For other cases in which courses and distances control: See Resurrection

if the monuments are inconsistent with a proper construction of the deed, they do not control. If the calls for the monuments are merely incidental, courses and distances control. As said by Mr. Justice Burnett: "A monument or natural object is of importance only when clearly identified. It is manifestly of no value as an aid to the intention of the parties when its identity cannot be determined." [8]

§ 1031. **Latent ambiguity as to monument intended.** —There may be cases where there is a latent ambiguity as to the monument intended by the parties. The monument, if it can be ascertained, must control. But when a latent ambiguity exists as to its location, courses and distances, and the estimated quantity of the land, are entitled to some weight in determining what the intention of the parties was.[9] Where a grantor executes on the same day two deeds of contiguous lots of land, by the course and distance calls of which the lots overlap each other, a common boundary line is not established. The party who is in possession to the

Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668, 64 C. C. A. 180; Ulman v. Clark, 100 Fed. 180; Security Land etc. Co. v. Burns, 193 U. S. 167, 48 L. ed. 662, 24 S. Ct. 425, affirming 87 Minn. 97, 63 L.R.A. 157, 94 Am. St. Rep. 684, 91 N. W. 304; Deaver v. Jones, 119 N. C. 598, 26 S. E. 156; Taylor v. McConigle, 120 Cal. 123, 52 Pac. 129; Seeders v. Shaw, 200 Ill. 93, 65 N. E. 643; Palmer v. Osborne, 115 Iowa, 714, 87 N. W. 712; Whitridge v. City of Baltimore, 103 Md. 412, 63 Atl. 808; Sherwin v. Bitzer, 97 Minn. 252, 106 N. W. 1046; Whitehead v. Atchison, 136 Mo. 485, 37 S. W. 928; Mires v. Summerville, 85 Mo. App. 138; Muse v. Caddell, 126 N. C. 265, 35 S. E. 466; Echerd v. Johnson, 126 N. C. 409, 35 S. E. 1036; Elliott v. Jefferson, 133 N. C. 207, 64 L.R.A. 135, 45 S. E. 558; Pohlman v. Lohmeyer, 60 Neb. 364, 83 N. W. 201; Whitaker v. Cover, 140 N. C. 280, 52 S. E. 581; Montgomery v. Lipscomb, 105 Tenn. 144, 58 S. W. 306; Matthews v. Thatcher, 33 Tex. Civ. App. 133, 76 S. W. 61; Missouri etc. Ry. Co. v. Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781; McIrwin v. Charlebois, 38 Wash. 151, 80 Pac. 285.

[8] Goss v. Golinsky, 12 Cal. App. 71, 106 Pac. 604. See, also, Beall v. Weir, 11 Cal. App. 364, 105 Pac. 133.

[9] Doe v. Vallejo, 29 Cal. 385.

extent warranted by the calls of his deed cannot be ousted by the calls of the other deed.[1]

§ 1031a. **Supplying omissions.**—Omissions may be sometimes supplied so as to cure an imperfect description in a deed, if the instrument contains, in other respects, sufficient facts to enable this to be done. For instance, the word "of" was supplied in a description, reading, "the north half of the southwest quarter the southwest quarter" of a certain section, when the call for quantity supported this construction.[2] Where a call is "east with" it may be construed to mean "east *parallel* with." "When the deed," says Mr. Justice Black, "applied to the subject matter, shows a manifest omission in the description, and there is sufficient data furnished by the deed to supply the omission, the omission will be supplied by construction."[3] Where the land was

[1] Keen v. Schnedler, 15 Mo. App. 590.

[2] Burnett v. McCluey, 78 Mo. 676. Said the court: "The general rule is, that effect should be given, if practicable, to every part of the description. The words 'the north half of the southwest quarter the southwest quarter of section 6' certainly constitute a novel description. It would seem to be highly improbable that a grantor would, under any circumstances, first grant the north half of the southwest quarter, and then, by words immediately following, grant the entire southwest quarter: Campbell v. Johnson, 44 Mo. 247. If the description were an abbreviated one, and stood thus: 'N. 1-2, S. W. 1-4, S. W. 1-4, sec. 6,' few persons familiar with the system adopted for the survey and subdivision of lands in the western States, and the abbreviations in use for the designation of such subdivisions, would hesitate to construe such description to mean the north half of the southwest quarter of the southwest quarter of section 6. But when such abbreviated descriptions are translated into words, it is usual to insert both the words 'of' and 'the' after the words and figures designating the subdivisions."

[3] Deal v. Cooper, 94 Mo. 62. See, also, Wells v. Heddenberg, 11 Tex. Civ. App. 3, 30 S. W. 702. "Descriptions omitting town, county or state where the property is situated, have been held sufficient where the deed or writing provides other means of identification": Holley's Exr. v. Curry, 58 W. Va. 70, 58 S. E. 135, 112 Am. St. Rep. 944. See, also, Black v. Mfg. Co., 53 Fla. 1090, 43 So. 919; Gex v. Dill, 86 Miss. 10, 38 So. 193; Crotty v. Effler, 60 W.

described as the "northwest quarter of the northwest section 8, T. 29 south, of range 16 east, containing 40 acres," the words "quarter of" next preceding the word "section" in the description were supplied by construction as an evident omission.[4] If a deed omits one of the calls in the field notes, yet if, by the description given, and by reversing the calls in the field notes, the missing call can be supplied and the land to be conveyed ascertained, the deed is not void for uncertainty.[5] Parol evidence may be received for the purpose of aiding a deed of this character.[6] Where it appeared from the whole description in a deed that a certain block was intended, a call for the block by an erroneous number was held to be properly rejected.[7]

§ 1032. **Subsequent survey.**—Where the description of a deed gives as the commencing point of the tract conveyed a visible monument, which is clearly ascertained, and the other parts of the description are certain and definite, every requirement of the law as to sufficiency of description is satisfied, and the title of the grantor passes to the grantee if apt words of conveyance are used. If a survey is subsequently made which changes the location of a larger tract, within which, according to the language of the deed, the land conveyed was located, or if the subsequent survey restricts the area of such tract, the title of the grantee is not

Va. 258, 54 S. E. 345; Garden City Sand Co. v. Miller, 157 Ill. 225, 41 N. E. 753; McCullough v. Olds, 108 Cal. 529, 41 P. 420. See Hamilton v. Ogee, 10 Kan. App. 241, 62 Pac. 708, holding that a deed is void for uncertainty which attempts to describe land by metes and bounds without designating the section, township and range.

[4] Campbell v. Carruth, 32 Fla. 264, 13 So. 432. In Moss v. Shear, 30 Cal. 467, there is a discussion as to what may be supplied by construction.

[5] Montgomery v. Carlton, 56 Tex. 431.

[6] Montgomery v. Carlton, 56 Tex. 431; Edwards v. Bowden, 99 N. C. 80, 6 Am. St. Rep. 487. See, also, § 1015a, *ante*.

[7] Murray v. Hobson, 10 Colo. 66, 13 Pac. 921. In this case block 32 was construed to mean block 30.

divested nor his rights impaired.[8] If the starting point of a description is the corner of a subdivision according to the survey made by the United States, such corner becomes a monument and will control, notwithstanding the grantor, at the time of sale, by an actual survey fixed the stake at another point, and the lines were run accordingly.[9] Where the tract of land conveyed is described only by the name of the township or the subdivision of the township, and such tract is a subdivision according to the United States survey, the deed is considered as referring to the line of the survey made by the United States and the monuments then erected.[1]

§ 1032a. **Reliance on survey.**—Where the platter of town lots has set stakes, purchasers may locate their lines accordingly, and such lines cannot be unsettled by a subsequent survey. Notwithstanding errors in locating them, they must control, and the question is not whether they were correctly placed, but whether they were planted by authority, and, relying on them, persons have purchased lots and taken possession.[2] The direct testimony of witnesses who saw the corners located by the original survey, cannot be overcome by a new survey showing location of quarter-section corners.[3] When the lines were run upon the ground, the survey as it was actually made may be always shown.[4] An official survey will overcome a private one.[5] For the purpose of relocating lost corners by lines run by an official surveyor, a private survey of the ground, well-known marks and corners, and the field

[8] Widbur v. Washburn, 47 Cal. 67.

[9] Powers v. Jackson, 50 Cal. 429. If the calls in the description correspond with one another, they cannot be varied by parol evidence to show that they are not the calls in the survey as they were actually made: Johnson v. Archibald, 78 Tex. 96, 22 Am. St. Rep. 27.

[1] Powers v. Jackson, 50 Cal. 429.

[2] Le Compte v. Lueders, 90 Mich. 495, 30 Am. St. Rep. 450.

[3] Mills v. Penny, 74 Iowa, 172, 7 Am. St. Rep. 474.

[4] Johnson v. Archibald, 78 Tex. 96, 22 Am. St. Rep. 27.

[5] Billingsley v. Bates, 30 Ala. 376, 68 Am. Dec. 126.

notes and plat may be considered, although the private survey does not harmonize in every particular with the official survey.[6] A relocation of an original monument marking a corner that has been lost can only be made approximately by measurements from other corners.[7] In relocating the boundaries of a survey, topographical features of the country, and of a road, gulch, and houses described as monuments, will prevail over the specified courses of the boundary lines.[8] Where the land is described as a legal subdivision of surveyed land, and the location of the four corners is reasonably certain, but the quarter-section corners are lost, and there are more than six hundred and forty acres within the section, the division lines of the fractions of the section will be determined by a division *pro rata* of the lines of the section as they appear upon the ground.[9]

§ 1033. **Conflict between starting point and other calls.**—When a conflict arises between the starting point and other calls, the starting point, if it is fixed, certain, and notorious, will generally prevail. But if the other calls may as readily be ascertained, and are as little liable to mistake, they are entitled to as much consideration as the first. If they all agree, they control.[1]

§ 1034. **Running to line of another tract.**—Where the line of another tract is called for in the description in a deed as one of the boundaries of the land conveyed, the line must be run to such boundary line regardless of distance.[2] And this is true even if it be necessary to ascertain such line

[6] Billingsley v. Bates, 30 Ala. 376, 68 Am. Dec. 126.

[7] Anderson v. Peterson, 74 Iowa, 482.

[8] Tognazzini v. Morganti, 84 Cal. 159.

[9] Eshleman v. Malter, 101 Cal. 233; Miller v. Topeka Land Co., 44 Kan. 354.

[1] Walsh v. Hill, 38 Cal. 481.

[2] Cansler v. Fite, 5 Jones (N. C.), 424; Northrup v. Sumney, 27 Barb. 196; Whittelsey v. Kellogg, 28 Mo. 404; Bolton v. Lann, 16 Tex. 96.

itself by course and distance.[3] Where, in the description, the land is bounded on one side by the land of a third person, the true boundary line between the land conveyed and the land of such third person must be taken as the boundary line, and not the line as it was understood to exist at the time of the execution of the deed, if there is a variance between such two lines.[4] Where one of the boundaries given is "south to A and B's line," and they have no land in common, the boundary line must be run after reaching A's line until it comes to B's line.[5] A subsequent deed is not admissible in evidence for the purpose of showing the boundaries of a tract previously conveyed.[6] Where one of the calls in the descriptive clause is "thence running north to the rear of said" land, it may simply indicate the direction of the boundary, and does not necessarily mean that the property conveyed is bounded by the rear line of the lot referred to, but the work "to" may be construed as "towards."[7]

§ 1035. "Northerly," "due north," etc.—The term "northerly," when not controlled by monuments mentioned in the description, signifies due north.[8] The courses north, south, east, and west may, when controlled by other definite and certain descriptions, be read northerly, southerly, easterly,

[3] Cansler v. Fite, 5 Jones (N. C.) 424.

[4] Umbarger v. Chaboya, 49 Cal. 525; Cornell v. Jackson, 9 Met. 150.

[5] Osborne v. Anderson, 89 N. C. 261.

[6] Cutter v. Caruthers, 48 Cal. 178. In this case, a tract of land called the "McDougal tract," was intended by the parties to have for its southern boundary another tract called the "McKinstry tract." A deed conveying the "McKinstry tract," executed after the conveyance of the "McDougal tract," was held not to be admissible in evidence for the purpose of showing what lands the grantees of the "McDougal tract" supposed, at the time they received their conveyance, were held by the owners of the "McKinstry tract."

[7] Moran v. Lezotte, 54 Mich. 83, 19 N. W. 757.

[8] Bosworth v. Danzien, 25 Cal. 296; Brandt v. Ogden, 1 Johns. 156; Carrier v. Nelson, 96 Cal. 505, 31 Am. St. Rep. 239; Reed v. Tacoma Building etc. Assn., 2 Wash. 198, 26 Am. St. Rep. 851.

and westerly, if by so doing all the calls will be made consistent and harmonious.[9] But the terms "northerly" "northwesterly," etc., are only construed as "due north," and "due northwest," when, if this construction were not adopted, the deed would be void for want of certainty. Calls of this kind, however, must give way to visible monuments, or to any other description of a line which makes its location reasonably certain.[1] "Easterly," used alone, in its strict significance, and unmodified by other language, will be construed to mean due east. If its meaning is qualified by the use of other words, it means precisely what the words of qualification make it signify.[2] So where the word "north" in a description of property is clearly shown by the context to be a clerical error for the word "south" the grant will be so read.[3] A master having sold the property which was described in a judgment of foreclosure as the "south half" of a certain section executed a deed in which it was recited that he had sold the south half and then the deed proceeded that he, the said master, etc." ' did convey the "north" half of that section. The court held that the deed was operative to pass title to the south half and that the word "north" was presumptively a mistake which might be rejected.[4] While the court cannot include in the description land which is not, by a fair construction, included in the calls, it may correct an obvious error in the deed so as to render the calls consistent with each other and to per-

[9] Faris v. Phelan, 39 Cal. 612.

[1] Irwin v. Towne, 42 Cal. 326. This section was cited as authority in Martin v. Lloyd, 94 Cal. 195, 202, where the court said: "Assuming that 'N.,' as here used, stands for 'north,' and not for some other word expressing generally a northern direction, still, such a word means 'due north' only when that construction is necessary for certainty, or when there is nothing else to show that it was not used in that strict sense."

[2] Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573.

[3] Whitaker v. Poston, 120 Tenn. 207, 110 S. W. 1019.

[4] Cornell v. Green, 95 Fed. 334, 37 C. C. A. 85, affirming 88 Fed. 821.

fect the description.[5] A deed will not be vitiated because a term is used in the description which appears by the context to have been a mistake for another where the description would be completed by the substitution of the proper term.[6] If a description is otherwise complete and accurate, a false statement in it will not defeat the grant.[7] And if it appears that there is obvious omission in the description but the deed affords sufficient data to supply the omission, the defect will be cured by construction.[8]

§ 1036. Division lines by consent.—A boundary line may be established by adjoining landowners. When they so agree upon a boundary line, enter into possession, and improve the lands according to the line thus accepted, they will not afterward be allowed to claim that the line agreed upon is not the true one, although the bar of the statute of limitations has not attached.[9] But the proof should be clear, and slight acts from which the inference of an agreement might be drawn should not be considered conclusive.[1] A deed described

[5] Richardson v. Watts, 94 Me. 476, 48 Atl. 180.

[6] Sawyer etc. Lumber Co. v. Clark, 172 Mo. 588, 73 S. W. 137.

[7] Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917. But see McIntosh v. Marathon Land Co., 110 Wis. 296, 85 N. W. 976.

[8] Deal v. Cooper, 94 Mo. 62, 6 S. W. 707.

[9] McNamara v. Seaton, 82 Ill. 498; Orr v. Hadley, 36 N. H. 575; Cutler v. Callison, 72 Ill. 113; Ebert v. Wood, 1 Binn. 216, 2 Am. Dec. 436; Bolton v. Lann, 16 Tex. 96; Houston v. Sneed, 15 Tex. 307; Columbet v. Pacheco, 48 Cal. 395; Eaton v. Rice, 8 N. H. 378; Sneed v. Osborn, 25 Cal. 619; Sawyer v. Fellows, 6 N. H. 107, 25 Am. Dec. 452; Davis v. Judge, 46 Vt. 655; Foulke v. Stockdale, 40 Iowa, 99; Fahey v. Marsh, 40 Mich. 236; Camp v. Cochrane, 71 Ga. 865; Kile v. Tubbs, 23 Cal. 431; Bauer v. Gottmanhausen, 65 Ill. 499. See Crowell v. Maughs, 2 Gilm. 419, 43 Am. Dec. 62; Yates v. Shaw, 24 Ill. 367; Rockwell v. Adams, 7 Cowen, 761; Edwards v. White Co., 85 Ill. 390; Wakefield v. Ross, 5 Mason, 15; Piercy v. Crandall, 34 Cal. 334; Jackson v. Ogden, 7 Johns. 238; Vosburgh v. Teator, 32 N. Y. 561; Boyd's Lessee v. Graves, 4 Wheat. 513; Jackson v. Freer, 17 Johns. 29.

[1] McNamara v. Seaton, 82 Ill. 498, 500, per Craig, J. In Cutler v. Callison, 72 Ill. 113, 115, the court

the land conveyed as running back from a street eighty-five feet, more or less, and bounded in the rear by the grantor's land, which was a part of the same tract. The grantor, after the execution of the deed, but before he had sold any more of the land, prepared and placed on record a plan of the land in which the part conveyed was laid down as running to a length of eighty-eight feet from the street. It was held that the grantee took according to the plan, as the acts of the grantor were equivalent to the fixing of a line or monument.[2] A boundary line was described as running "northerly to land of M., thence southeasterly to M's land, thirty-eight rods and one-half to a stump and stones." Immediately after the execution of the deed, the parties went upon the land, the monuments at the northwesterly and the northeasterly corners were pointed out, and the distance between them was exactly thirty-eight rods and a half. But there was a small strip of land between this line and the land of M; still it was held that the monuments agreed upon were to govern, and that this strip of land did not pass by the deed.[3] And it may be observed that where the deed refers for its boundaries to monuments which at the time are not actually in existence, but are afterward erected by the parties, they will

said: "This principle proceeds upon the ground, not that title can pass by parol agreement, but that the extent of the ownership of the land of each has been agreed upon, settled, and finally determined: Crowell v. Maughs, 2 Gilm. 419, 43 Am. Dec. 62; Kip v. Norton, 12 Wend. 127, 27 Am. Dec. 120; McCormick v. Barnum, 10 Wend. 109; Vosburgh v. Teator, 32 N. Y. 561. The courts always look with favor upon the adjustment of controverted matters of this character by agreement of the parties in interest, and when an agreement to establish a boundary line is fairly and clearly made, and possession of the land held according to the line so agreed upon, no reason is perceived why such agreements should not be conclusive." An agent not authorized to agree upon a division line, but employed merely as a superintendent, cannot bind the owner by staking a line to show how far tenants of the land should plow: O'Hara v. O'Brien, 107 Cal. 309.

[2] Blaney v. Rice, 20 Pick. 62, 32 Am. Dec. 204.

[3] Frost v. Spaulding, 19 Pick. 445, 31 Am. Dec. 150.

be bound by such monuments in the same manner as if they had been erected before the execution of the deed.[4] An agreement between grantor and grantee as to a boundary line, must, in order to be effectual, be made while they own the lands on both sides of the line which they thus locate.[5] If a division fence is acquiesced in by the parties for the period of sixteen years, they are estopped from asserting the incorrectness of the location.[6] And although the deeds of both parties call for a straight line between admitted landmarks, and a division fence is crooked, yet if it has stood for twenty-one years, it will constitute the line between the adjoining owners.[7] When the description is so uncertain that a line may run in two different ways, and still not be inharmonious with the other calls of the deed, either line may be adopted by the parties. Both parties are concluded by the line when it is established.[8] As this question is not dependent upon the terms of the description used in the deed, it is only briefly referred to in passing.

§ 1037. **Line located by mistake.**—But where adjoining proprietors have made a mistake in the location of a

[4] Lerned v. Morrill, 2 N. H. 197; Blaney v. Rice, 20 Pick. 62, 32 Am. Dec. 204; Kennebec Purchase v. Tiffany, 1 Me. (1 Greenl.) 219, 10 Am. Dec. 60; Waterman v. Johnson, 13 Pick. 267. See Davis v. Rainsford, 17 Mass. 212.

[5] Sneed v. Osborn, 25 Cal. 619.

[6] Columbet v. Pacheco, 48 Cal. 395.

[7] Curry v. Raymond, 28 Pa. St. 149.

[8] Hastings v. Stark, 36 Cal. 122.

Adjoining landowners may become tenants in common in trees on a boundary line, and either may be enjoined from destroying them: Musch v. Burkhart, 83 Iowa, 301, 12 L.R.A. 484, 32 Am. St. Rep. 305. A tree, the trunk of which is on the boundary line between adjoining owners, is held in common: Dubois v. Beaver, 25 N. Y. 123, 82 Am. Dec. 326. But otherwise if exclusively on the land of one, though the roots and branches may reach beyond the boundary: Hoffman v. Armstrong, 48 N. Y. 201, 8 Am. Rep. 537; Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 645. A nuisance is not caused by a row of trees planted near a boundary line. Merely the land of an adjoining owner is thereby rendered unfit for

division line, it will not be held binding and conclusive upon them if, by disregarding it, no injustice will be done.[9] Where the boundaries are indefinite and uncertain, and they are run out and marked by the owner of the land, the presumption as against him is that this was correctly done; but he may overcome this presumption by proof of a mistake, and by showing that there is a material variance between the true lines and the lines as marked.[1] Where neither party intends to claim beyond the true line, possession, up to what is erroneously supposed to be the true dividing line between adjoining proprietors, will not work a disseisin in favor of either of any land occupied by him under such erroneous belief.[2] But, although a location of a boundary line may have been originally made under an agreement resulting from a mutual mistake of fact, still, an acquiescence for forty years in such practical location is conclusive.[3]

§ 1037a. **Further consideration of subject.**—It must be admitted that the decisions are not uniform on this subject, but we believe the weight of authority sustains the proposition we have stated. Whether the establishment of a boundary line depends upon the theory of an agreement by the parties to locate a dividing line, or on the theory that the continuous possession of a strip of land not included in the description of the deed constitutes adverse possession, yet the element of intent with which possession is taken and held must be material. If such possession is the result of mis-

a purpose for which he has made no attempt to use it: Grandona v. Lovdal, 78 Cal. 611, 12 Am. St. Rep. 121.

[9] Menkens v. Blumenthal, 27 Mo. 198.

[1] Cunningham v. Roberson's Lessee, 31 Tenn. (1 Swan.) 138. And see Gray v. Couvillon, 12 La. Ann. 730, where it is held that parties are not bound by a consent to boundaries which have been made under an apparent error, unless, perhaps, by a prescription of thirty years. And see Lemmon v. Hartsook, 80 Mo. 13.

[2] Houx v. Batteen, 68 Mo. 84.

[3] Baldwin v. Brown, 16 N. Y. 359. And see, also, Major's Heirs v. Rice, 57 Mo. 384.

take, without an intent on the part of the person in possession to encroach upon his neighbor, and hold more land than that to which he is entitled, such possession cannot be said to be adverse, until it is known where the true boundary line lies. Then the opportunity is presented for him to decide whether he will claim adversely, land which is not embraced with the description contained in his deed. The current of authority, in our opinion, justifies us in stating the rule to be that the location of a boundary line, made through mistake or ignorance of the true line, with no intention to claim beyond the true line, wherever it may be, will not bind the parties, so as to prevent them from showing the truth, and having the lines established as they were originally intended and, in justice, ought to be.[4] While this is undoubtedly the general rule, yet in many jurisdictions the principle prevails, that the question whether a line was located by mistake or not is immaterial, and that the possession beyond the true line, under a mistake as to its location, must be considered as adverse, and, if continued for the length of time prescribed by the statute of limitations, will extinguish the title of the

[4] Battner v. Baker, 108 Mo. 311, 32 Am. St. Rep. 606; Krider v. Milner, 99 Mo. 145, 17 Am. St. Rep. 549; Jacobs v. Moseley, 91 Mo. 457; Schad v. Sharp, 95 Mo. 574; Skinker v. Haagsma, 99 Mo. 209; Kunze v. Evans, 107 Mo. 487, 28 Am. St. Rep. 435; Finch v. Ullman, 105 Mo. 255, 24 Am. St. Rep. 383; Crawford v. Ahrnes, 103 Mo. 88; Houx v. Batteen, 68 Mo. 84; Tamm v. Kellogg, 49 Mo. 118; St. Louis University v. McKune, 28 Mo. 481; Keen v. Schnedler, 92 Mo. 516; Knowlton v. Smith, 36 Mo. 507, 88 Am. Dec. 152; McDonald v. Fox, 20 Nev. 364; Wood v. Willard, 37 Vt. 377, 86 Am. Dec. 716; Brown v. Gray, 3 Greenl. 126; Worcester v. Lord, 56 Me. 265, 96 Am. Dec. 546; Dow v. McKenney, 64 Me. 138; Brown v. Cockerell, 33 Ala. 38; Sartain v. Hamilton, 12 Tex. 219, 62 Am. Dec. 524; Grube v. Wells, 34 Iowa, 148; Burnell v. Russell, 39 Vt. 579, 94 Am. Dec. 358; Mills v. Penny, 74 Iowa, 172, 7 Am. St. Rep. 474: Gates v. Butler, 3 Humph. 447; Skinner v. Crawford, 54 Iowa, 119; Burnell v. Russell, 39 Vt. 579, 94 Am. Dec. 358; Howard v. Reedy, 29 Ga. 152, 74 Am. Dec. 58; Gilchrist v. McLaughlin, 7 Ired. 310; Sheils v. Haley, 61 Cal. 157; Breen v. Donnelly, 74 Cal. 304. This rule also applies to the pubic: State v. Welpton, 34 Iowa, 144.

owner.[5] In California, it is held that the possession of land, under a mistake as to the boundary line, will not defeat any claim to title founded on such possession, and it is said that the doctrine that such possession should be accompanied by a claim of title, is founded upon a fallacy.[6] The law in that State may be said to be that title to land may be acquired by the adverse possession of land for the statutory period within the limits of an inclosure, notwithstanding the land was so inclosed under a mistake as to its boundaries, where it is claimed that the fences were constructed, as a matter of fact, on the true line; but, if no claim was made that the fences were on the true line, but they were erected with the expectation of moving them to the true line when it should be ascertained, the possession is not adverse.[7] Where it is known

[5] Ramsey v. Glenny, 45 Minn. 401, 22 Am. St. Rep. 736; Canfield v. Clark, 17 Or. 473, 11 Am. St. Rep. 845; Tex v. Pflug, 24 Neb. 666, 8 Am. St. Rep. 231; French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680; Smith v. McKay, 30 Ohio St. 418; Metcalfe v. McCutcheon, 60 Miss. 145; Mode v. Long, 64 N. C. 433; Seymour v. Carli, 31 Minn. 81; Yetzer v. Thompson, 17 Ohio St. 130, 91 Am. Dec. 122; Swettenham v. Leary, 18 Hun, 287; Levy v. Yerga, 25 Neb. 764, 13 Am. St. Rep. 525; Erck v. Church, 87 Tenn. 575, 4 L.R.A. 641; Harn v. Smith, 79 Tex. 310, 23 Am. St. Rep. 340; Coleman v. Smith, 55 Tex. 259; Atwood v. Canrike, 86 Mich. 99; Hoffman v. White, 90 Ala. 354. In some states, where the rule prevails as announced in the text, the decisions are conflicting. Compare with the decisions cited in the prior note: Cole v. Parker, 70 Mo. 372; Handlan v. McManus, 100 Mo. 125, 18 Am. St. Rep. 533; Grimm v. Curley, 43 Cal. 250. The Supreme Court of Missouri, in a recent case, attempts to reconcile the conflicting decisions in that State by declaring that when adjoining landowners claim only to the true line, wherever that may be, they are not bound by the supposed line, but must conform to the true line when it is ascertained, but where a person has possession up to a fence, and claims to be the owner up to it this possession is adverse, although he may believe the fence to be on the true line. "The distinction between these rules," said the court, "lies in the fact whether the party claimed only to the true line, wherever that might be, or to the fence": Battner v. Baker, 108 Mo. 311, 32 Am. St. Rep. 606.

[6] Woodward v. Faris, 109 Cal. 17; Silvarer v. Hansen, 74 Cal. 584; Grimm v. Curley, 43 Cal. 250.

[7] Woodward v. Faris, 109 Cal. 17. But see, also, decisions cited in

by both parties that the line fixed is not the true line an agreement without consideration fixing the division line is ineffectual.[8] There must be an uncertainty as to the true line and some controversy concerning it which may be determined by the agreement.[9] The true boundary line should be in dispute and to some extent undefined and not actually known.[1]

§ 1038. Two descriptions in deed.—Where the deed contains two descriptions of the land conveyed equally explicit, but between which there is a repugnance, that description which the whole instrument shows best expresses the intention of the parties must control.[2] The court will look into the surrounding facts, and will adopt the description

previous notes, and compare O'Hara v. O'Brien, 107 Cal. 309.

[8] Lewis v. Ogrum, 149 Cal. 505, 10 L.R.A.(N.S.) 610, 87 Pac. 60. But the rule is recognized that if adjoining owners "in good faith agree upon, fix and establish a boundary line between their respective tracts of land, in which they acquiesce, and under which they occupy, for a period equal to that fixed by the statute of limitations, the line as thus established is binding upon them." Lewis v. Ogram, *supra;* White v. Spreckles, 75 Cal. 616, 17 Pac. 715; Cooper v. Vierra, 59 Cal. 283; Helm v. Wilson, 76 Cal. 485, 18 Pac. 604; Dierssen v. Nelson, 138 Cal. 398, 71 Pac. 456. An estoppel may exist: Cavanaugh v. Jackson, 91 Cal. 583, 27 Pac. 931.

[9] Hartung v. Witte, 59 Wis. 285, 18 N. W. 175.

[1] Farr v. Woolfolk, 118 Ga. 277, 45 S. E. 230; Miller v. McGlaun, 63 Ga. 436. Thaxter v. Inglis, 121 Cal. 593, 54 Pac. 86; Levy v. Maddox, 81 Tex. 210, 16 S. W. 877; Watrous v. Morrison, 33 Fla. 261, 14 So. 806, 39 Am. St. Rep. 139; Ernstring v. Gleason, 137 Mo. 594, 39 S. W. 70; Carstarphen v. Holt, 96 Ga. 703, 23 S. E. 904; Le Comte v. Freshwater, 56 W. Va. 336, 49 S. E. 238; Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026; Hills v. Ludwig, 46 Ohio St. 373, 24 N. E. 596; Galbraith v. Lunsford, 87 Tenn, 89, 1 L.R.A. 526, 9 S. W. 365; Lynch v. Egan, 67 Neb. 541, 93 N. W. 775.

[2] Moore v. Massini, 37 Cal. 432; Driscoll v. Green, 59 N. H. 101; Wade v. Deray, 50 Cal. 376; Raymond v. Coffey, 5 Or. 132. See Den v. Graham, 1 Dev. & B. 76, 27 Am. Dec. 226; Reamer v. Nesmith, 34 Cal. 624; Benedict v. Gaylord, 11 Conn. 332, 29 Am. Dec. 299; Wendell v. Jackson, 8 Wend. 183, 22 Am. Dec. 635; Moss v. Shear, 30 Cal. 467. For a case in which it was held that there was no repugnance in the descriptive clause of the

which is most definite and certain, and which, in the light of surrounding circumstances, can be said to effectuate most clearly the intention of the parties.[3] A description in a deed was: "All that certain lot of land situate in said city of Concord, on the north side of Chapel street, fifty feet; westerly by land of said Vail and late Samuel Frye, fifty feet; and easterly by land of said Vail, about ninety-eight feet, with the buildings thereon, intending to include only the land on which said buildings are situated, and the yard inclosed within the fence as now built." The question before the court was whether the particular description of the property conveyed was controlled and limited by the words "intending to include only the land on which said buildings are situated, and the yard inclosed within the fence as now built." The court held that, from the facts of the case, the second description being clearly erroneous, should not control.[4] "There is

dèed, see Castro v. Tennent, 44 Cal. 253. See, also, Vose v. Handy, 2 Greene, 322, 11 Am. Dec. 101.

[3] Wade v. Deray, 50 Cal. 376. Where land is described by metes and bounds, and the deed also states that it is all of a tract of land, described in another mode, effect will be given, if the two descriptions do not agree, to the larger and more comprehensive description. As a consequence, the deed will convey the land embraced in both descriptions: Lake Erie etc. R. R. Co. v. Whitham, 155 Ill. 514, 28 L.R.A. 612, 46 Am. St. Rep. 355.

[4] Driscoll v. Green, 59 N. H. 101. In this case, Mr. Justice Clark, in delivering the opinion of the court, said: "A deed is to be construed according to the intention of the parties as manifested by the entire instrument, although such construction may not comport with the language of a particular part of it: Allen v. Holton, 20 Pick. 458, 463; Worthington v. Hylyer, 4 Mass. 196; White v. Gay, 9 N. H. 126, 31 Am. Dec. 224; Johnson v. Simpson, 36 N. H. 91; Lane v. Thompson, 43 N. H. 320, 324; Richardson v. Palmer, 38 N. H. 212. Regarding the two descriptions as equally explicit and unambiguous, being inconsistent with each other, that description must control which best expresses the intention of the parties as manifested by the whole instrument. By the first description, the premises conveyed are bounded southerly by Chapel street. By the second description, limiting the premises to the land on which the buildings are situated and the yard inclosed within the fence, the plaintiff's lot, instead of extending to Chapel street, is sep-

but one principle applicable to questions of this sort. If there be but one description in the deed, that is to be strictly adhered to. If there be more than one, and they turn out upon evidence not to agree, that is to be adopted which is most certain. Course and distance from a given point is a certain description in itself, and therefore is never departed from, unless there be something else which proves that the course and distance stated in the deed were thus stated by mistake It has been held that a tree called for and found not corresponding to the course and distance establishes the mistake, and is itself the terminus. So, of the line of another tract of land. But if the tree be not found, nor its former situation identified, it is the same as if the call for it had been omitted; for there is then no guide but the course and distance." [5] "The true rule of construction, where the parts of a description in a deed are inconsistent with each other, is to give effect to those consistent and intelligible portions which carry out the intention of the parties, and reject what is repugnant thereto. If the instrument defines with convenient certainty what is intended to pass by it, a subsequent erroneous addi-

arated from it by a strip of land six feet and three inches in width, lying between the fence on the southerly side of the yard and the northerly line of Chapel street. This description excludes the plaintiff's lot and buildings entirely from the street, without even a right of passage way to it. Such could not have been the intention of the parties, and this description is manifestly erroneous as to the southerly line of the lot. It is equally incorrect when applied to the northerly line, as it leaves a strip of land between the northerly end of the stable and the Frye land, which is included in the first description, and which the grantor evidently intended to convey. The second description, therefore, being clearly erroneous as to the northerly and southerly lines of the lot, ought not to control the first description as to the easterly line. If there is an explicit and unambiguous grant of a thing, any exception or reservation which is manifestly contradictory will be rejected: Rutherford v. Tracy, 48 Mo. 325, 8 Am. Rep. 104; Herrick v. Hopkins, 23 Me. 217; Pike v. Munroe, 36 Me. 309, 58 Am. Dec. 751; Ela v. Card, 2 N. H. 175, 9 Am. Dec. 46."

[5] Ruffin, C. J., in Den v. Graham, 1 Dev. & B. 76, 27 Am. Dec. 226.

tion will not vitiate it."[6] In a deed, the land conveyed was described by fixed, known, and visible metes and bounds, as well as by corresponding courses and distances. A further description was also added, which bounded the land on its several sides by the lands of adjoining owners. Land included within the latter description was excluded by the former. An action of ejectment was brought against the grantee for the land not included in the former description, and the court decided that the apparent intention of the parties was not to convey different parcels of land by different descriptions, but to convey one piece, and that the first description in the deed, being more certain than the second, controlled the latter.[7] A description after naming a certain monument added, "thence running southerly by land improved by Gridley Putney to the road." A line running a little east of south would include the land improved by Putney in the granted premises. But a line running a little south of west, to the corner of the land improved by Putney, and thence along the line of this land a little east of south to the road, at a point almost south of the monument, would exclude such land from the granted premises. The court decided that it would adopt the latter construction as the true one.[8] Where a deed conveyed a tract of land described as "sixty acres of the west side of lot 6 of section 10, and lot 1, and S. W. ¼ of S. W. ¼ of section 11," and the three subdivisions thus mentioned constituted one body of land, lot 6 adjoining on the west each of the other

[6] Raymond v. Coffey, 5 Or. 132, 135, per Mosher, J. In this case the description was given by metes and bounds, to which was added the words, "being parts of sections twenty-five and thirty-six, in township four south, range three west"; it was claimed that these words constituted the particular description which should govern, and that the beginning stake could not be located outside of these sections. But the court held that these words should be treated as words of general description, and if inconsistent with the description by metes and bounds, should be rejected.

[7] Benedict v. Gaylord, 11 Conn. 332, 29 Am. Dec. 299.

[8] Bond v. Fay, 8 Allen, 212; s. c. 12 Allen, 86.

subdivisions, the court held that by this conveyance, sixty acres off the west side of this body of land formed of these three subdivisions were conveyed, and that the deed did not convey both such sixty acres, and also the two easterly subdivisions.[9] If the statement of the courses or boundaries is manifestly erroneous, the deed is not defeated when there remains a description sufficiently certain to locate the land.[1]

§ 1038a. Middle point of physical object intended.—Where any physical object or monument is designated as a boundary, the middle or central point of such boundary is implied in the absence of any qualifying term.[2] The courses and distances must yield to the actual line of a creek which is made the boundary of the land conveyed, the calls of the deed ascending the creek, and the line ascending the creek following the thread of the stream.[3] Where land is described as a subdivision according to a map of the block on file, and also by metes and bounds, the former description will prevail if there be a conflict.[4]

§ 1039. Repugnance between general and particular description.—Where there is a repugnance between a general and a particular description in a deed, the latter will control.[5] But whenever possible, the real intent is to be gath-

[9] Lovejoy v. Gaskill, 30 Minn. 137.

[1] Thompson v. Ela, 60 N. H. 562.

[2] Freeman v. Bellegarde, 108 Cal. 179, 49 Am. St. Rep. 76.

[3] Freeman v. Bellegarde, 108 Cal. 179, 49 Am. St. Rep. 76.

[4] Masterson v. Munro, 105 Cal. 431, 45 Am. St. Rep. 57.

[5] Sikes v. Shows, 74 Ala. 382; Hannibal & St. Joseph R. R. Co. v. Green, 68 Mo. 169; Woodman v. Lane, 7 N. H. 242; Gano v. Aldridge, 27 Ind. 294; Bratton v. Clawson, 3 Strob. 127; Thorndike v. Richards, 13 Me. 430; Bell v. Sawyer, 32 N. H. 72; McEowen v. Lewis, 26 N. J. L. (2 Dutch.) 451. See Nutting v. Herbert, 35 N. H. 121; Barney v. Miller, 18 Iowa, 460; Smith v. Strong, 14 Pick. 128; Brunswick Savings Inst. v. Crossman, 76 Me. 577; Lovejoy v. Lovett, 124 Mass. 270; Fenwick v. Gill, 38 Mo. 510; Evans v. Greene, 21 Mo. 170; Barnard v. Martin, 5 N.

ered from the whole description, including the general description as well as the particular.[6] In attempting to determine the intention of the parties from the whole instrument, we cannot say that a particular description in a deed is necessarily enlarged by a following general description, referring to and adopting the description of an earlier deed, even if the language employed by the grantor is "intending to convey the same and identical real estate conveyed to me by one," giving the name of such grantor, the date of the deed, and the book and page where recorded.[7] But where the description in the deed closes with a clause which clearly and unequivocally sums up the intention of the parties as to the particular property conveyed, such clause has a controlling effect upon all the antecedent phrases in the description. As for instance, such is the effect of a closing clause stating that "the premises hereby intended to be conveyed being the east half part of the farm whereon Johnson Babcock, now deceased, formerly

H. 536; Flagg v. Bean, 25 N. H. (5 Fost.) 49; Carter v. White, 101 N C. 30, 7 S. E. 473; Grandy v. Casey, 93 Mo. 595; Wharton v. Brick, 49 N. J. L. 289, 8 Atl. 529; Giulmartin v. Wood, 76 Ala. 204; Sikes v. Shows, 74 Ala. 382; Dana v. Middlesex Bank, 10 Met. 250; Whiting v. Dewey, 15 Pick. 428; Wright v. Mabry, 9 Yerg. 55; Fletcher v. Clark, 48 Vt. 211; Spiller v. Scribner, 36 Vt. 245; Cummings v. Black, 65 Vt. 76, 25 Atl. 906; Raymond v. Coffey, 5 Or. 132; Jones v. Pashby, 62 Mich. 614, 29 N. W. 374; Benedict v. Gaylord, 11 Conn. 332, 29 Am. Dec. 299; Barney v. Miller, 18 Iowa, 460; Waldin v. Smith, 76 Iowa, 652, 39 N. W. 82; Stafford v. King, 30 Tex. 257, 94 Am. Dec. 304; Cullers v. Platt, 81 Tex. 258, 16 S. W. 1003; Moore v. Griffin, 22 Me. 350; Thorndike v. Richards, 13 Me. 430; Howard v. Saule, 5 Mason, 410; Witt v. St. Paul etc. Ry. Co., 38 Minn. 122, 35 N. W. 862; Case v. Dexter, 106 N. Y. 548; Jones v. Smith, 73 N. Y. 205; Osteen v. Wynn, 131 Ga. 309, 62 S. E. 37 (citing text); Modlin v. Roanoke R. & Lumber Co., 145 N. C. 218, 58 S. E. 1075; Barksdale v. Barksdale, 92 Miss. 166, 45 So. 615; Tate v. Betts (Tex.) 97 S. W. 707; Shackleford v. Orris, 129 Ga. 791, 59 S. E. 772 (citing text.)

[6] Brunswick Savings Inst. v. Crossman, 76 Me. 577. See Summer v. Hill (Ala.) 47 So. 565; Stevenson v. Yoho (W. Va.) 59 S. E. 954; Dochterman v. Marshall (Miss.) 46 So. 542.

[7] Brunswick Savings Inst. v. Crosman, 76 Me. 577.

lived, in the town of Tully."[8] Still each case must in a measure be decided by itself. A deed described the land conveyed by metes and bounds, adding: "Being the same premises conveyed to me by Ezra Holden, by deed dated May 7, 1829, recorded with Middlesex deeds, book 315, page 120." It was contended that this language was intended as a general description of the land conveyed, and that, as in some respects the particular description was uncertain and indefinite, the general description should control. But the court observed: "This clause is entitled to some weight in determining the intention of the parties, but, in our opinion, it is not sufficient to overcome the inferences to be drawn from the other parts of the deed."[9] If both the repugnant descriptions are of equal authority, the one more favorable to the grantee must be adopted.[1]

§ **1040. Some illustrations.**—A deed described the land intended to be conveyed as: "A part of fractional section

[8] Ousby v. Jones, 73 N. Y. 621. See, also, Jones v. Pashby, 62 Mich. 614; Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406; Plummer v. Gould, 92 Mich. 1, 31 Am. St. Rep. 567, 52 N. W. 146; Ryan v. Wilson, 9 Mich. 262; Barney v. Miller, 18 Iowa, 460; Witt v. St. Paul etc. Ry. Co., 38 Minn. 122, 35 N. W. 862; Bent v. Rogers, 137 Mass. 192; Padduck v. Pardee, 1 Mich. 421; Sprague v. Snow, 4 Pick. 54; Moran v. Lezotte, 54 Mich. 83; Chapman v. Crooks, 41 Mich. 595. So where the deed recited, "The purpose and intent of this deed being to convey to the said second parties all and each of the right, title, claim, and interest, either in possession or expectancy, of the said first parties, of, in, and to the above-described premises, by virtue of certain deeds of conveyance," describing them, this general clause controls all the prior phrases of the description: Plummer v. Gould, 92 Mich. 1, 31 Am. St. Rep. 567. See to same effect, Padduck v. Pardee, 1 Mich. 421; Ryan v. Wilson, 9 Mich. 262; Chapman v. Crooks, 41 Mich. 595; Moran v. Lezotte, 54 Mich. 83; Jones v. Pashby, 62 Mich. 621; Witt v. St. Paul etc. Ry. Co., 38 Minn. 127; Barney v. Miller, 18 Iowa, 460; Sprague v. Snow, 4 Pick. 54; Bent v. Rogers, 137 Mass. 192; Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406.

[9] Lovejoy v. Lovett, 124 Mass. 270.

[1] Vance v. Fore, 24 Cal. 436; Hager v. Spect, 52 Cal. 579.

number 19, being the half of the west half of the northwest quarter of section number 29, in township number 7 south, of range 14 west, containing forty acres, and also a small fraction of land, for quantity beginning at the northwest corner of the aforesaid forty acres, thence running with the west line sixteen poles, thence running to the river, a north corner, supposed to contain four acres." The court observed of this description: "Though the lands are very awkwardly described, yet we think that it may be ascertained with sufficient certainty from the language, that the undivided half of the lands in controversy was intended to be conveyed. Some effect will, if possible, be given to the instrument, for it will not be intended that the parties meant it to be a nullity. It is a rule of construction that words of particular description will control more general terms of description when both cannot stand together. Applying that rule here, all that is said of 'fractional section number 19' must be rejected, as contradicting the following definite description of the lands in section 29. Of this last, the 'half of the west half of the northwest quarter' is conveyed. This is definite, except as to the 'half,' and the language in that respect cannot be effective to convey any particular half. But there is nothing which forbids a construction which will make it good for an undivided half, and this it may receive. It was, we think, therefore, not void for uncertainty." [2] Where the description in a deed taken alone would include an entire tract, the interest conveyed will be restricted to an undivided half, if there is a clause added to the description that the grantor meant to convey all the land that he purchased of

[2] Gano v. Aldridge, 27 Ind. 294. In this same case there was another deed made by the same grantor, in which the description was: "A certain tract of land in Posey county, lying on the Wabash river, with numbers as follows: The half of a fraction number 29 (its west half of the fraction), containing five acres, more or less, in township 7 south, of range 14 west." This description was held to be unintelligible, and without evidence *aliunde*, no effect could be given to it.

another, set forth in his deed recorded in a given book, if in that deed only an undivided half is conveyed.[3] So where a deed conveyed, several lots of land by number, and all of

[3] Flagg v. Bean, 25 N. H. (5 Fost.) 49. In this case the description was: "Three certain pieces or parcels of land, situate, etc., bounded S. E. by Bean's land and the cove, N. E. by Cocheco river, W. by Bean's land, land of Boyle and of Hurd, and the road," to which was added a clause, "meaning to convey all the land I purchased of S. D. Bryant, L. Bean, and A. Pinkham, referring to their deeds for particulars," and a further clause, "meaning to convey all the land set forth in said deed, and no more." To present to the reader the question before the court, and the construction placed upon the description, we take this extract from the language of Mr. Justice Bell, in delivering the opinion of the court: "The plaintiff contended that this deed conveyed to Bean the land *described* in the three deeds referred to, while the court instructed the jury that it conveyed to Bean only what those three deeds *conveyed* to Flagg. It is, of course, to be kept in mind that the only question presented to the jury was, whether this deed was procured by the defendant by a fraud practiced upon the plaintiff, by falsely reading to him the deed as conveying one undivided half of the land, when the deed had no such language. The court was presenting to the jury the actual state of the title of Flagg to the land, and the operation of the deed upon that interest, as ground for the jury to judge whether there was a fraud on the part of the defendant, or only very great ignorance on both sides, as to the actual situation of a very complicated title, and as to the effect of the deed upon it, from which they might infer that the deed was made in its present form merely by a gross blunder. The question, of course, was, What does this deed in fact convey? The language would convey a fee simple in all the land comprised within the boundaries set out in the deed, unless its meaning is limited to the land conveyed to the grantor in the three deeds referred to, by the clause 'meaning to convey,' etc. This expression is twice used, and if the language following this phrase in those instances was found in separate deeds, it would hardly be understood to convey the same meaning. In the first instance it is, 'meaning to convey all the land I purchased by deeds,' etc., and in the second, 'meaning to convey all the land set forth in said deeds and no more.' But the whole deed is to be construed together; and it seems to us to be equivalent to the expression, 'meaning to convey all the land I purchased of B., etc., set forth in their deeds, to which reference is made for particulars,' etc.; and such an expression would be limited to the land actually acquired or obtained of those persons by purchase. If the last of the expressions only was used, 'meaning to convey all the land set forth in

a named lot except fifty acres in the southeast corner followed by the words, "known as the Wooldridge plantation," the latter words are but matter of general description, and yield to the previous definite and particular description.[4] A description, "my homestead farm in Bath, aforesaid, that I now live on and improve, it being the same land conveyed to me and one John Martin, by one Caleb Bailey, by his deed of December 2, 1816, and the said Martin's half of which he conveyed to me by his deed of December, 19, 1825," will not include a parcel of adjoining land conveyed to the grantor by Caleb Bailey, in 1819, though occupied with the other as one farm. By reference to the deeds of 1816 and 1825, the grantor expressly declared what he understood his homestead farm to be.[5] A description was in this form: "My homestead farm in Sanbornton, and is the same land which was conveyed to me by the deeds of one George Whittier, and the deed of one Reuben Whittier. One of said deeds from George is dated October 30, 1825, containing about twenty acres, recorded lib. 111, fol. 594; the other of said George's deeds is dated June 12, 1810, recorded lib. 78, fol. 859, containing thirty acres. The deed from said Reuben is dated 25th December, 1815, recorded lib. 111, fol. 593, containing about seventeen and a half acres—all in lot No. 24, in the second division of lots in Sanbornton. For a more

those deeds,' etc., it would not be easy to contend that it was not the intention to convey a fee simple in all the lands described, if it were not that two of the deeds referred to describe 'one undivided half' of the land, whose boundaries are set forth; and it seems very clear that a deed which describes an entire tract of land by its boundaries, and then adds, meaning to convey all the land set forth in such a deed, and no more, must be limited to one-half of the land described, if that deed, upon referring to it, conveys an undivided half merely. But taking the two expressions together, we think the opinion expressed by the court below, that nothing passed by Flagg's deed to Bean but the estate which he acquired by the deds referred to, is correct."

[4] Osteen v. Wynn (Ga.) 62 S. E. 37 (citing text.)

[5] Barnard v. Martin, 5 N. H. 536.

particular description, reference may be had to said deeds; and the same is my homestead farm." The court held that this description did not include another tract used as a part of the homestead in common with those described by reference to the deed.[6] Where the land conveyed was described as a certain share of "about one hundred acres of land, be the same more or less, with the buildings thereon standing, situate in the town of Chelmsford, in the county of Middlesex, being the same estate on which the said Moses Cheever now lives, and which was conveyed by Benjamin Melvin and Joanna Melvin to Dr. Jacob Kittridge, by deed dated the twenty-fifth day of April, 1782," and the grantee, as lessee and otherwise, had previously occupied the farm for many years, although the deed to which reference was made did not include the whole farm, yet it was held that the title to the whole farm passed to the grantee.[7] Where the lot conveyed is described as "being twenty feet in front, and running back one hundred and ten feet," and it is shown that the lot has, in fact, a frontage of thirty feet, parol evidence is admissible to show that the portion sold, and intended to be conveyed, and of which the grantee took possession, was the portion having a frontage of twenty feet on the east side of the lot.[8] Defects in a description of a ditch may be disregarded, where it is described both in a deed and in an action to determine conflicting claims to water, by the same descriptive name and where there is a substantial concurrence in the general particulars as to its head and course and evidence was abundant to the effect that the ditch was generally known by this descriptive name, and there was no evidence showing that any other ditch in the county had the same name. "When property has a descriptive name, it may be conveyed

[6] Woodman v. Lane, 7 N. H. 241. In this case, the court examined several cases bearing upon the point in question.

[7] Melvin v. Proprietors of Locks, etc., 5 Met. 15, 38 Am. Dec. 384.

[8] Sikes v. Shows, 74 Ala. 382.

by that name, and defects in other parts of the description may be disregarded."[9] If a deed contains two descriptions, one general and the latter particular, and if the general is certain and the particular uncertain, the general description will prevail. Thus, if a tract of land to be excepted from a conveyance is described by name and also by a description in which the boundaries are uncertain, the intent of the parties, it is manifest, is to except the place actually named.[1] Where a deed conveyed an undivided two-thirds "of all the lands known by the name of the Rancho de San Vicente, lying and being in the county of Los Angeles and State of California; the lands of said rancho being known and described as follows," followed by a particular description by courses and distances, and this particular description if adopted, would have left out a large part of the rancho, the court held that the particular description was not intended to be used in the sense of restriction, but that the dominant idea in the mind of the grantor when the deed was made was the rancho as a whole, and not the particular lines by which it might be described and decided that the deed must be construed as conveying two-thirds of the whole rancho, however erroneous the particular description might be.[1a] A deed is not invalidated by the inadvertent use of the word "diameters" for "varas" where the description is of an entire league, designated by name, and the commencement corner is identified, as the error is a harmless one.[2]

§ 1041. **Particular description uncertain.**—There is an apparent exception to be noted in cases where a general description will prevail over a particular one. These are cases where the particular description by metes and bounds

[9] Murray v. Tulare Irrigation Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586.

[1] Martin v. Lloyd, 94 Cal. 195.

[1a] Haley v. Amestoy, 44 Cal. 132.

[2] Goodson v. Fitzgerald, 40 Tex. Civ. App. 619, 90 S. W. 898.

is so uncertain that it is impossible to ascertain by reference to such description the particular parcel of land granted by the deed.[3] But, as was aptly said by Mr. Justice Bigelow, this is not a case "of two inconsistent descriptions, in which the general must yield to the particular, but of an uncertain and impossible description, which must be controlled by an intelligible though general description."[4] In the case of a deed describing the land conveyed as "the whole lot No. 13, containing five hundred acres by lot or grant, be the same more or less, which lot was the original right of Thomas Wallingford," it appeared that the right of Wallingford was to only four hundred acres. The court held that the additional clause did not restrict the effect of the deed to the four hundred acres, but that the deed should be construed as embracing the whole of the lot.[5] Likewise in a case where land was described as "all the undivided two-thirds of all the lands known by the name of Rancho de San Vicente, situate in the county of Los Angeles, and State of California," and also by a particular description which was erroneous, the deed, notwithstanding the errors in the particular description, was held to convey two-thirds of the tract thus generally described.[6]

[3] Sawyer v. Kendall, 10 Cush. 241. See Bott v. Burnell, 11 Mass. 163; Martin v. Lloyd, 94 Cal. 195; Wade v. Deray, 50 Cal. 376; Rayburn v. Winant, 16 Or. 318, 18 Pac. Rep. 588; Barney v. Miller, 18 Iowa, 460; Jackson v. Loomis, 18 Johns. 81; Loomis v. Jackson, 19 Johns. 449; Johnson v. Simpson, 36 N. H. 91; Adams v. Alkire, 20 W. Va. 480; Hathaway v. Power, 6 Hill, 453; Jackson v. Clark, 7 Johns. 217; Credle v. Hays, 88 N. C. 321; Harkey v. Cain, 69 Tex. 146, 67 S. W. Rep. 637; Arambula v. Sullivan, 80 Tex. 615, 16 S. W. Rep. 436. In case of doubt courts incline to the description most favorable to the grantee: McBride v. Burns (Tex.) 88 S. W. 394.

[4] Sawyer v. Kendall, 10 Cush. 241.

[5] Ela v. Card, 2 N. H. 175, 9 Am. Dec. 46.

[6] Haley v. Amestoy, 44 Cal. 132. Where a piece of land has a well-known name, it may be described by that name: Haley v. Amestoy, 44 Cal. 132. See, also, Martin v. Lloyd, 94 Cal. 195, where it is held that the description of a place excepted by name shows an intention

§ 1042. **Parol evidence.**—If the language used in the descriptive clause is uncertain and doubtful, the practical construction given to the deed by the subsequent acts of the parties may be shown by parol evidence.[7] But where it is apparent from the face of the deed that the grantor intended to convey a certain parcel of land, parol evidence is not admissible to show that he intended to convey another or additional parcel, notwithstanding words of general description, taken alone, without comparison with the preceding particular description, might seem to indicate this intention.[8] Mr. Justice Hoar of Massachusetts, correctly states the rule: "Where the terms are used in a description which are clear and intelligible, the court will put a construction upon those terms, and parol evidence will not be admissible to control the legal effect of such description. But where any part of the description is inconsistent with the rest, and thus shown to be erroneous, it may be rejected, and, when the description given is uncertain and ambiguous, parol evidence will be admitted to show to what it truly applies."[9] But a description, in which one call is, "thence running easterly parallel with the southern line of said Antelope ranch, according to the survey of the same made by the United States surveyor general for said State, to said Antelope creek," cannot be considered repugnant or ambiguous. Hence, it cannot be shown by evidence *aliunde* that a straight line was intended parallel

to except the actual place named, and not to limit its actual boundaries by an uncertain description of them.

[7] Lovejoy v. Lovett, 124 Mass. 270. That extrinsic evidence is admissible where description is uncertain, see King v. Samuel, 7 Cal. App. 55, 93 Pac. 391. See, also, Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691. See Lanman v. Crocker, 97 Ind. 163, 49 Am. Rep. 437; Truett v. Adams, 66 Cal. 618

[8] Benedict v. Gaylord, 11 Conn. 332, 29 Am. Dec. 299.

[9] In Bond v. Fay, 12 Allen, 86, 88. And see, also, Waterman v. Johnson, 13 Pick. 261; Truett v. Adams, 66 Cal. 218; Hardin County v. Nona Mills Co. (Tex.) 112 S. W. 822; Hunton v. Moore, 139 N. C. 44, 51 S. E. 787; Glover v. Newsome (Ga.), 65 S. E. 64; Reynolds v. Lawrence (Ala.) 40 So. 576.

with the general course of the southern line of the property designated the "Antelope ranch." While "parallel lines" are straight lines, according to their mathematical definition, yet, in common language concerning boundaries, this term is frequently used to designate lines which are not actually straight, but are the photographs of each other. In questions affecting boundaries, these words are, in this sense, often used by courts.[1] So parol evidence is not admissible to control the description,[2] nor to correct a call in a deed except in an action to correct a mistake.[3]

§ 1043. Description applying to several tracts.—Where the description applies equally to several tracts, a latent ambiguity results, which may be explained by showing which one of the several tracts was claimed by the grantor.[4] An ambiguity is not created by the words "being the same land owned and occupied by me" inserted after the description by metes and bounds.[5] A grant is not enlarged or limited by a clause at the end of the description, "meaning and intending to convey the same premises conveyed to me."[6] If a deed made by an administrator conveys no title, to the grantee, the latter conveys nothing by executing a deed "conveying all my right, title and interest in the estate of A, purchased by me at administrator's sale."[7] Where a deed contains a specific description of the property conveyed and states that it is the same land conveyed to the grantor which covered a

[1] Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573. See, also, Hicks v. Coleman, 25 Cal. 143, 85 Am. Dec. 103.

[2] Foster v. Carlisle (Ala.) 48 So. 665.

[3] Hamilton v. Blackburn (Tex.) 95 S. W. 1094. See in this connection also, Modlin v. Roanoke R. & Lumber Co. (N. C.) 58 S. E. 1075.

[4] Clark v. Powers, 45 Ill. 283.

[5] Malette v. Wright, 120 Ga. 735, 48 S. E. 229.

[6] Smith v. Sweat, 90 Me. 528, 38 Atl. 554. See, also, Winn v. Cobot, 35 Mass. (18 Pick.) 553.

[7] O'Connor v. Vineyard, 91 Tex. 488, 44 S. W. 485.

tract of larger size and recites the conveyance to the grantee of "all the land conveyed to me by the deeds aforesaid except such portions thereof as I have heretofore sold," these words are to be construed not as altering the description or limiting the effect of the prior granting clause of the deed, but as being a reference merely to the claim of title under which the grantor holds.[8]

§ 1044. **Quantity of land enumerated.**—In the description of land it is usual, after the description by metes and bounds or subdivisions, to add a clause stating that the land described contained so many acres. But unless there is an express covenant that there is the quantity of land mentioned, the clause as to quantity is considered simply as a part of the description, and will be rejected if it is inconsistent with the actual area, when the same is capable of being ascertained by monuments and boundaries. The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description.[9] Neither party

[8] Dow v. Whitney, 147 Mass. 1, 16 N. E. 722.

[9] Stanley v. Green, 12 Cal. 148; Snow v. Chapman, 1 Root, 528; Ware v. Johnson, 66 Mo. 662; Dalton v. Rust, 22 Tex. 133; Wadhams v. Swan, 109 Ill. 46; Miller v. Bentley, 5 Sneed, 671; Armstrong v. Brownfield, 32 Kan. 116; Belden v. Seymour, 8 Conn. 19; Ufford v. Wilkins, 33 Iowa, 110; Field v. Columbet, 4 Saw. 523; Marshall v. Bompart, 18 Mo. 84; Clark v. Scammon, 62 Me. 47; Mann v. Pearson, 2 Johns. 37; Hall v. Mayhew, 15 Md. 551; Llewellyn v. Jersey, 11 Mees. & W. 183; Riddell v. Jackson, 14 La. Ann. 135; Commissioners v. Thompson, 4 McCord, 434; Jackson v. Defendorf, 1 Caines, 493; Wright v. Wright, 34 Ala. 194; Doe ex dem. Phillips v. Porter, 3 Ark. 18, 36 Am. Dec. 448; Powell v. Clark, 5 Mass. 355, 4 Am. Dec. 67; Chandler v. McCard, 38 Me. 564; Large v. Penn. 6 Serg. & R. 488; Pierce v. Faunce, 37 Me. 63; Jackson v. Barringer, 15 Johns. 471; Bratton v. Clawson, 3 Strob. 127; Allen v. Allen, 14 Me. 387; Dale v. Smith, 1 Del. Ch. 1, 12 Am. Dec. 64. See Mann v. Pearson, 2 Johns. 37; Hatch v. Garza, 22 Tex. 176; Smith v. Evans, 6 Binn. 102, 6 Am. Dec. 436; Jackson v. McConnell, 19 Wend. 175; Barksdale v. Toomer, Harp. 290; Smith v. Dodge, 2 N. H. 303; Jennings v. Monks, 4 Met. (Ky.) 103; Peay v. Briggs, 2 Mill.

has a remedy against the other for the excess or deficiency, unless the difference is so great as to afford a presumption of fraud.[1] Where an owner of a league of land, having sold off several tracts, executed a deed for the unsold balance, which described it as "all and singular a certain piece or parcel of land containing one thousand acres, situated and described as follows: "In Harris county, and on Buffalo bayou, adjoining the city of Houston, being the undivided part of the league granted to Allen C. Reynolds"—it was held that the deed conveyed title to the whole of the unsold balance, although in excess of the number of acres mentioned.[2]

§ 1045. Intention that quantity shall control.—But the language contained in the description may be such that it is evident that the parties intended to convey only a specified quantity of land, and in such case no more will pass. Thus a deed described a piece of land by boundaries and courses and distances, with this restriction: "Said tract to contain

98, 12 Am. Dec. 656; Jackson v. Sprague, Paine, 494; Perkins v. Webster, 2 N. H. 287; Kruse v. Scripps, 11 Ill. 98; Petts v. Gaw, 15 Pa. St. 218; Harris v. Hull, 70 Ga. 831; Luckett v. Scruggs, 73 Tex. 520; Doyle v. Mellen, 15 R. I. 523; Scott v. Pettigrew, 72 Tex. 321; Winans v. Cheney, 55 Cal. 567; Hess v. Cheney, 83 Ala. 251, 3 So. Rep. 791; Rand v. Cartwright, 82 Tex. 399, 18 S. W. Rep. 794; Case v. Dexter, 106 N. Y. 548; Thayer v. Finton, 108 N. Y. 394; Raymond v. Coffey, 5 Or. 132; Moran v. Lezotte, 54 Mich. 83, 19 N. W. Rep. 757; Benton v. Horsley, 71 Ga. 619; Andrew v. Watkins, 26 Fla. 390, 7 S. W. Rep. 876. And see Hasleton v. Dickinson, 51 Iowa, 244. See, also, Dashiel v. Harshman, 113 Ia. 283, 85 N. W. 85; Phillips v. Granite Co., 123 Ga. 830, 51 S. E. 666; Kendall v. Wells, 126 Ga. 343, 55 S. E. 41 (quoting text); Mayberry v. Beck, 71 Kan. 609, 81 Pac. 191; Jenkins v. Lumber Co., 120 La. 549, 45 So. 435; Duffield v. Spence (Tenn.) 51 S. W. 492. Description by metes and bounds controls one by quantity: Seeders v. Shaw, 200 Ill. 93, 65 N. E. 643; Phillips v. Granite Co., 123 Ga. 830, 51 S. E. 666.

[1] Wadhams v. Swan, 109 Ill. 46; Kendall v. Wells, 126 Ga. 343, 55 S. E. 41 (quoting text).

[2] Hunter v. Morse, 49 Tex. 219. See, also, Mayberry v. Beck, 71 Kan. 609, 81 Pac. 191; Larson v. Goettle, 103 Minn. 272, 114 N. W. 840.

just one acre, and the distances shall be so construed." The court considered that the intention was clearly expressed that the quantity should be one acre, and that the distance should be construed so as to circumscribe one acre and no more, holding that the parties might contract so as to suspend the application of recognized rules of construction to their deeds.[3] And where the other terms of the description are not sufficiently certain, the number of acres specified may be an essential part of the description,[4] and there are instances in which the specified quantity of land may be considered in corroboration of other proof.[5] If a contract at an agreed price per acre has been made for the sale of a tract of land, represented as containing a specified number of acres, and there is a deficiency in quantity, a court of equity, even after the execution of the deed consummating the contract of purchase, will abate the value of the deficiency at the agreed price per acre from the portion of the purchase money remaining unpaid.[6] But the quantity of land named in the deed will control only in the absence of monuments, courses and distance,[7] as the call for quantity is the less reliable and the one to which resort is to be had last. Still when no known

[3] Sanders v. Godding, 45 Iowa, 463.

[4] Hall v. Shotwell, 66 Cal. 379; Kirkland v. Way, 3 Rich. 4, 45 Am. Dec. 752; Hostetter v. Los Angeles T. Ry. Co., 108 Cal. 38; Ellis v. Harris, 106 N. C. 395; Moody v. Vondereau, 131 Ga. 521, 62 S. E. 821; Smith v. Owens, 63 W. Va. 60, 59 S. E. 762.

[5] McClintock v. Rogus, 11 Ill. 279. See, also, Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; White v. Gay, 9 N. H. 126, 31 Am. Dec. 224; Higinbotham v. Stoddard, 72 N. Y. 94; Slack v. Dawes, 3 Tex. Civ. App. 520; Moran v. Lezotte, 54 Mich. 83, 19 N. W. Rep. 757; Santa Clara M. Assn. v. Quicksilver M. Co., 8 Saw. 330, 17 Fed. Rep. 657; Baldwin v. Brown, 16 N. Y. 359; Bell v. Sawyer, 32 N. H. 72; Rioux v. Cormier, 75 Wis. 566, 44 N. W. Rep. 654. The language may be such as to make the quantity the controlling element in the description: Kendall v. Wells, 126 Ga. 343, 55 S. E. 41 (citing text).

[6] Thompson v. Catlett, 24 W. Va. 524.

[7] Silver Creek Cement Co. v. Union Lime & Cement Co., 138 Ind. 297, 35 N. E. 125, 37 N. E. 721.

and established boundaries are named as describing the land, and the deed contains no other description sufficiently certain to define the land intended to be conveyed the quantity of land mentioned may be used for the purpose of ascertaining the granted premises.[8] And it is proper to consider a correspondence of quantity given by a line with the quantity mentioned in the deed or in the approximation to such quantity as tending to establish the truth of such line.[9]

§ 1046. **Words "more or less."**—When land is described, and the quantity is stated with the qualification "more or less," these words are used as an approximate designation of the quantity contained within the boundaries, and do not refer to the state of the title.[1] Where a tract of land originally described as eight hundred acres, "more or less," was conveyed by several successive deeds, describing the land similarly, but with the omission of the words "more or less," and the last purchaser conveyed an undivided interest in it to three persons, in an aggregate of just eight hundred acres, and subsequently conveyed all his interest in the land, describing it as excess "more or less above the eight hundred acres heretofore conveyed by this vendor," it was held that the

[8] O'Brien v. Clark, 104 Md. 30, 64 Atl. 53.

[9] Western Min. & Mfg. Co. v. Peytona Cannel Coal Co., 8 W. Va. 406. See, also, Davis v. Commonwealth Land & Lumber Co., 141 Fed. 711; Stack v. Pepper, 119 N. C. 434, 25 S. E. 961; Clark v. Moore, 126 N. C. 1, 35 S. E. 125.

[1] Williamson v. Hall, 62 Mo. 405; Armstrong v. Brownfield, 32 Kan. 116, and cases cited; Howell v. Merrill, 30 Mich. 283; McCoun v. Delany, 3 Bibb. 46, 6 Am. Dec. 635; Clark v. Scammon, 62 Me. 47; Dale v. Smith, 1 Del. Ch. 1, 12 Am. Dec. 64; Oakes v. De Lancey, 133 N. Y. 227, 28 Am. St. Rep. 628; Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371; Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120; Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371; Triplett v. Allen, 26 Gratt. 721, 21 Am. Rep. 320; Stevens v. McKnight, 40 Ohio St. 341. The words ordinarily mean that the grantor does not warrant the precise quantity of land named in the conveyance: Kitzman v. Carl, et al., 133 Ia. 340, 12 A. & E. Ann. Cas. 296. See, also, Boddy v. Henry, 126 Ia. 31, 101 N. W. 447.

last grantee took any excess over the eight hundrd acres.[2] The word "about," used as qualifying the number of acres, means simply a near approximation to the number mentioned in the deed.[3] By the use of the words "more or less," it is understood that the parties assume the risk of a gain or a loss in the quantity of land estimated. But an inquiry into a fraud which may have been committed by either party is not precluded by the use of that term.[4]

[2] Troy v. Ellis, 60 Tex. 630.

[3] Stevens v. McKnight, 40 Ohio St. 341.

[4] McCoun v. Delany, 3 Bibb, 46, 6 Am. Dec. 635. See, also, Moore v. Harmon, 142 Ind. 555, 41 N. E. 599; Lane v. Parsons, 108 Ia. 241, 79 N. W. 61; Rathke v. Tyler (Ia.) 111 N. W. 435; Early v. Long, 89 Miss. 285, 42 So. 348; Hendricks v. Vivian, 118 Mo. App. 417, 94 S. W. 318; Foster v. Byrd, 119 Mo. App. 168, 96 S. W. 224; Watson v. Cline (Tex.) 42 S. W. 1037. These words "more or less" have been construed in Blaney v. Rice, 20 Pick. 62, 32 Am. Dec. 204; Phipps v. Tarpley, 24 Miss. 597; Tyson v. Hardesty, 29 Md. 305; Poague v. Allen, 3 Marsh. J. J. 421; Shipp v. Swan, 2 Bibb, 82; Sullivan v. Ferguson. 40 Mo. 79; Baynard v. Eddings, 2 Strob. 374; Hoffman v. Johnson, 1 Bland, 103; Brady v. Hennion, 2 Bosw. 528; Gentry v. Hamilton, 3 Ired. Eq. 376; Hunt v. Stull, 3 Md. Ch. 24; Nelson v. Matthews, 2 Hen. & M. 164, 3 Am. Dec. 620; Davis v. Sherman, 7 Gray, 291; Frederick v. Youngblood, 19 Ala. 680, 54 Am. Dec. 209. Where the sale, however, is by quantity as by acre and not in gross, it is said the words "more or less" are to be treated as words of safety or precaution merely, and intended to cover but slight and unimportant inaccuracies. Rathke v. Tyler (Ia.) 111 N. W. 435. See, also, Cardinal v. Hadley, 158 Mass. 352, 33 N. E. 575, 35 Am. St. Rep. 492; Bingham v. Madison, 103 Tenn. 358, 47 L.R.A. 267, 52 S. W. 1074. And a mutual mistake as to the location of boundary lines which are pointed by the vendor to the vendee is sufficient to set aside the contract, even though there was no actual fraud nor intentional misrepresentation, where the vendee gets only about half the land contracted for and less than half in value: Bigham v. Madison, 103 Tenn. 358, 47 L.R.A. 267, 52 S. W. 1074 (discussing the significance of the words "more or less" fully and citing many authorities relative to their construction).

CHAPTER XXX.

DEED SUBJECT TO MORTGAGE.

§ 1047. Purchase of equity of redemption merely.
1048. Mention of mortgage by way of description.
1049. Contract to take deed subject to mortgage.
1050. Deed to mortgagee subject to mortgage.
1051. Effect of deed from mortgagor to mortgagee as against intervening encumbrances.
1052. Presumption of deduction of amount of mortgage from consideration.
1053. Setting off mortgage against purchase money.
1053a. Benefit of collateral security.
1054. Sale of equity of redemption on execution.
1055. Parol evidence to show grantee did not assume mortgage.
1056. Purchaser becomes principal debtor.
1056a. Purchaser's title not divested by nonpayment.
1057. Extension of time.
1058. Release of grantee.
1059. Request of mortgagor to foreclose.
1060. View that relation of surety does not affect mortgagee.
§ 1061. Comments.
1062. Purchaser of a part of the land.
1063. Grantee's defense against mortgage.
1064. Part of consideration.
1065. Purchaser at execution sale.
1066. When grantee may show invalidity of mortgage.
1067. Intention of grantee to assume should be clear.
1068. Intention to be gathered from the whole deed.
1069. Contemporaneous agreement.
1070. Implying obligation on part of grantee.
1071. Grantee's liability for attorney's fee.
1072. Assumption of mortgage under contract of sale when deed made to another.
1073. Grantee's verbal promise to assume.
1074. Acceptance of deed.
1075. Mistake in deed.
1076. Acceptance by agent.
1077. Deed without grantee's knowledge.
1078. Grantee's implied promise to indemnify grantor.
1079. Extent of grantee's liability.

§ 1080. Release of covenant against encumbrances by grantee's subsequent assumption.
1081. When grantee is a married woman.
1082. Legislation in New York.
1083. Agreement for assumption in unusual place in deed.
1084. Verbal agreement that grantor should advance money.
1085. Fraudulent representations of grantor as to title.
1086. Mistake in description.
1087. Intermediate grant subject to first mortgage.
1088. Collusion of grantee with the mortgagee.
1089. Personal liability of grantor.
§ 1090. In Pennsylvania.
1091. Enforcing grantee's promise before payment by grantor.
1092. Discharge of mortgage by grantor.
1093. Release of covenant by grantor.
1094. Rights of grantor.
1095. Deed to tenants in common.
1096. Notice of rights of mortgagee from assumption clause in deed.
1097. Grantee's right to deduct mortgages.
1098. Grantee's purchase of outstanding title.
1099. Deed subject to two mortgages.

§ 1047. **Purchase of equity of redemption merely.**—A grantee does not become personally liable for the payment of the mortgage debt by taking a deed which is merely made subject to a mortgage, as to fasten such liability upon him the deed must contain language clearly importing the assumption of such an obligation. "The purchaser of mortgaged premises does not become personally liable for the debt secured, unless there is a special contract to pay such encumbrance." [1] "It is settled in this commonwealth," says Mr. Jus-

[1] Johnson v. Monell, 13 Iowa, 300, 303; Dunn v. Rodgers, 43 Ill. 260; Strong v. Converse, 8 Allen, 557, 85 Am. Dec. 732; Stebbins v. Hall, 29 Barb. 524; Walker v. Goldsmith, 7 Or. 161; Hull v. Alexander, 26 Iowa, 569; Comstock v. Hitt, 37 Ill. 542; Weed Sewing Machine Co. v. Emerson, 115 Mass. 554; Winans v. Wilkie, 41 Mich. 264; Drury v. Tremont Improvement Co., 13 Allen, 168; Fowler v. Fay, 62 Ill. 375; Moore's Appeal, 88 Pa. St. 450, 32 Am. Rep. 469; Bumgardner v. Allen, 6 Munf. 439; Murray v. Smith, 1 Duer, 412; Collins v. Rowe, 1 Abb. N. C. 97; Campbell v. Patterson, 58 Ind. 66; Tillotson v. Boyd, 4 Sand. 516; Tanquay v. Felthausen, 45 Wis. 30; Lewis v. Day, 53 Iowa, 575; Binsse v. Paige, 1 Keyes, 87, s. c. 1 Abb. N. Y. App.

tice Endicott, of the Supreme Court of Massachusetts, "that where land is conveyed in terms subject to a mortgage, the grantee does not undertake or become bound by the mere acceptance of the deed to pay the mortgage debt. In the absence of other evidence, the deed shows that he merely purchased the equity of redemption. He is, indeed, interested in its payment, because it is an encumbrance upon the land of which he is the owner; but he has entered into no obligation, express or implied, to pay it, and if he parts with his title he no longer has any interest in its payment." [2]

138; Winans v. Wilkie, 41 Mich. 264; Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213; Crawford v. Nimmons, 180 Ill. 143, 54 N. E. 209; Bristol Sav. Bank v. Stiger, 86 Ia. 344, 53 N. W. 265; Bank v. Holmes, 43 Colo. 154, 95 Pac. 314, 16 L.R.A.(N.S.) 470, 127 Am. St. Rep. 108.

[2] In Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659. In Merriam v. Moore, 90 Pa. St. 78, 80, Mr. Justice Paxson, in delivering the opinion of the court, said: "In recent cases some attempts have been made to define with as much precision as possible the mutual and dependent rights and duties of mortgagees, mortgagors, the grantees of mortgagors, and the alienees of such grantees. (1) A conveyance of land 'under and subject' to a mortgage executed by the grantor, creates, as between themselves, a covenant of indemnity to the grantor on the part of the grantee. (2) If the grantee alien by a deed containing the same 'under and subject' clause, without more, the alienee does not assume a liability to the mortgagee, or undertake to discharge the grantee's covenant of indemnity. (3) It is competent, however, for the mortgagee to show by adequate evidence that the alienee has taken upon himself not only the grantor's duty to indemnify the mortgagor, but a personal obligation to pay the mortgage debt. (4) In all cases arising before the act of 12th of June, 1878, this adequate evidence may consist of stipulations in the deed, of written articles outside its terms, or of a verbal contemporaneous agreement between the parties. And the fact of such an undertaking may be implied from circumstances attending and connected with the conveyance of the land: Moore's Appeal, 7 Norris, 450, 32 Am. Rep. 469; Samuel v. Peyton, 7 Norris, 465; and Thomas v. Wiltbank, 6 W. N. C. 477." And see, also, generally, Hall v. Mobile & Montgomery Ry. Co., 58 Ala. 10; Rourke v. Colton, 4 Bradw. (Ill.) 259; Lawrence v. Towle, 59 N. H. 28; McIntire v. Parks, 59 N. H. 258; Bennett v. Keehn, 57 Wis. 582; Ritchie v. McDuffie, 62 Iowa, 46; Guernsey v. Kendall, 55 Vt. 201; Andreas v. Hubbard, 50 Conn. 351; Wadsworth v. Lyon, 93 N. Y. 201, 45

§ 1048. Mention of mortgage by way of description.—A clause was inserted in a deed that it was made subject to a certain mortgage of a certain amount, recorded in a speci-

Am. Rep. 190; Clark v. Fontain, 135 Mass. 464; Bowen v. Beck, 94 N. Y. 86, 46 Am. Rep. 124; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Carnahan v. Tousey, 93 Ind. 561; Riley v. Rice, 40 Ohio St. 441; Welling v. Ryerson, 94 N. Y. 98; Squier v. Shepard, 38 N. J. Eq. 331; Bennett v. Bates, 94 N. Y. 354; Thompson v. Dearborn, 107 Ill. 87; Osborne v. Cabell, 77 Va. 462; Hall v. Morgan, 79 Mo. 47; Cooper v. Foss, 15 Neb. 515; George v. Andrews, 60 Md. 26, 45 Am. Rep. 706; Georgia Pacific R. R. Co. v. Walker, 61 Miss. 481; Johnson v. Walter, 60 Iowa, 315; Luney v. Mead, 60 Iowa, 469; Canfield v. Shear, 49 Mich. 313; Rapp v. Stoner, 104 Ill. 618; Woodbury v. Swan, 58 N. H. 380; Chedel v. Millard, 13 R. I. 461; Bowne v. Lynde, 91 N. Y. 92; Sparkman v. Gove, 44 N. J. L. 252; Mechanics' Savings Bank v. Goff, 13 R. I. 516; Meech v. Ensign, 49 Conn. 191, 44 Am. Rep. 225; Carter v. Holahan, 92 N. Y. 498; Hill v. Howell, 36 N. J. Eq. 25; Parker v. Jenks, 36 N. J. Eq. 398; Schrack v. Shriner, 100 Pa. St. 451; Willard v. Worsham, 76 Va. 392; Jones v. Higgins, 80 Ky. 409; Forgy v. Merryman, 14 Neb. 513; McConaghy's Estate, 13 Phila. 399; Twitchell v. Mears, 8 Biss. 211; Gaffney v. Hicks, 131 Mass. 124; Hayden v. Snow, 9 Biss. 511; Reed v. Paul, 131 Mass. 129; Cilley v. Fenton, 130 Mass. 323; Lake v. Tebbetts, 56 Cal. 481; Muhlig v. Fiske, 131 Mass. 110; Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199; State v. Citizens' Bank, 33 La. Ann. 705; Flagg v. Geltmacher, 98 Ill. 293; Bassett v. Bradley, 48 Conn. 224; Follansbee v. Johnson, 28 Minn. 311; Dunning v. Leavitt, 85 N. Y. 30, 39 Am. Rep. 617; Fireman's Ins. Co. v. Wilkinson, 35 N. J. Eq. 160; Hosmer v. Campbell, 98 Ill. 572; Albany City Savings Institution v. Burdick, 87 N. Y. 40; Manhattan Life Ins. Co. v. Crawford, 9 Abb. N. C. 365; Taylor v. Mayer, 93 Pa. St. 42; Gilbert v. Sanderson, 56 Iowa, 349, 41 Am. Rep. 103; Vreeland v. Van Blarcom, 35 N. J. Eq. 530; Laing v. Byrne, 34 N. J. Eq. 52; Moore's Estate, 12 Phila. 104; Mahoney v. Macknbin, 54 Md. 268; Jones v. Parks, 78 Ind. 537; Figart v. Halderman, 75 Ind. 565; Dirks v. Humbird, 54 Md. 399; Talburt v. Berkshire Life Ins. Co., 80 Ind. 434; Fenton v. Lord, 128 Mass. 466; Townsend Savings Bank v. Munson, 47 Conn. 390; Risk v. Hoffman, 69 Ind. 137; Erlinger v. Boul, 7 Ill. App. 40; Fitzgerald v. Barker, 70 Mo. 685; Lappen v. Gill, 129 Mass. 349; Cooledge v. Smith, 129 Mass. 554; Wharton v. Moore, 84 N. C. 479, 37 Am. Rep. 627; Judson v. Dada, 79 N. Y. 373; Zabriskie v. Salter, 80 N. Y. 555; Pardee v. Treat, 82 N. Y. 385; Fuller v. Lamar, 53 Iowa, 477; Hopkins v. Woolley, 81 N. Y. 77; Coles v. Appleby, 22 Hun, 72; Deyermand v. Chamberlin, 22 Hun, 110; Unger v. Smith, 44 Mich. 22; Hall v. Edwards, 43 Mich. 473;

fied book and page in the volumes of records. A covenant was also inserted that the premises "are free from all encumbrances except as aforesaid." Interest was due on the mortgage at the time of the execution of the conveyance, and the grantee was afterward, for the purpose of preventing a foreclosure of the mortgage, compelled to pay this interest. The court held that the principal and interest constituted a single encumbrance, which was excepted out of the grantor's covenant, taking the view that the mention in the deed of the mortgage, and the reference to the book and page of record, were only by way of description and identification of the mortgage, and implied no covenant on the grantor as to the amount due.[3] Accordingly, where a deed, after describing the land conveyed, recited that it was subject to an existing mortgage, and contained a covenant that it was free from incumbrances, it was

O'Neill v. Clark, 33 N. J. Eq. 444; Wharton v. Moore, 84 N. C. 479, 37 Am. Rep. 627; Merriman v. Moore, 90 Pa. St. 78; Scionneaux v. Waguespack, 32 La. Ann. 283; Medsker v. Parker, 70 Ind. 509; Layman v. Willard, 7 Ill. App. 183; Logan v. Smith, 70 Ind. 597; Klein v. Isaacs, 8 Mo. App. 568; Booth v. Connecticut Mut. Life Ins. Co., 43 Mich. 299; Strohauer v. Voltz, 42 Mich. 444; Urquhart v. Brayton, 12 R. I. 169; Delaware and Hudson Canal Co. v. Bonnell, 46 Conn. 9; Monarch Coal etc. Co. v. Hand, 99 Ill. App. 322 (aff'd in 197 Ill. 288, 64 N. E. 381) Landau v. Cottrill, 59 Mo. 308, 60 S. W. 64; McNaughton v. Burke, 63 Neb. 704, 89 N. W. 274.

[3] Shanahan v. Perry, 130 Mass. 460. In that case the clause referring to the mortgage was as follows: "This conveyance is made subject to a mortgage deed of thirty-five hundred dollars from said Mary E. Schofield to Seth Clarke, of Salisbury, recorded with Middlesex Deeds, South District, lib. 1421, fol. 64." A statement in a deed that it is made subject to a mortgage may give notice of the mortgage, but the recital must be sufficient to make it the duty of the purchaser to inquire and to lead to the discovery of the mortgage. Where the mortgage is not recorded, the recital must be sufficiently definite to put the purchaser in a way of discovering the unrecorded mortgage: McCrea v. Newman, 46 N. J. Eq. 473, 19 Atl. Rep. 198. When the deed does not sufficiently identify the mortgage, its identity may be shown by parol evidence: New York L. Ins. Co. v. Aitkin, 125 N. Y. 660; Dodge v. Porter, 18 Barb. 193; Jackson v. Clark, 7 Johns. 214; Loomis v. Jackson, 19 Johns. 449.

held that the land was sold subject to the mortgage, and the warranty referred to the estate thus qualified.[4]

§ 1049. **Contract to take deed subject to mortgage.**— Where a person enters into a contract for the purchase of a piece of real estate subject to a certain mortgage, he may refuse to accept a deed in which a clause is inserted, that he assumes the payment of such mortgage.[5] A agreed to sell and convey to B certain premises subject to certain mortgages thereon, and B assigned this contract to C. Subsequently A executed a deed to C, which contained a clause that C assumed and agreed to pay said mortgages. C, without knowing that the deed contained this clause, but supposing that it, in this matter followed the contract, accepted the deed and put it on record. This clause was inserted in the deed without the knowledge or consent of A. The court held that the insertion of this clause in the deed was a fraud upon B, and that the deed might be reformed by striking out this

[4] Johnson v. Nichols, 105 Ia. 122, 74 N. W. 750; Jones on Real Property, Sec. 855.

[5] Lewis v. Day, 53 Iowa, 575; Manhattan Life Ins. Co. v. Crawford, 9 Abb. N. C. 365. In the latter case the court held that a finding that the grantee accepted a deed and assumed the payment of a mortgage therein mentioned was not sustained by the evidence, and said: "The assumption clause in the mortgage is in direct contravention of the express terms of the agreement itself. The deed containing it, it is clear from the evidence, was not delivered to Mr. Crawford personally, and the fair inference from the testimony is that he knew nothing about the existence of the assumption clause until long after the deed had been recorded. To justify a court in imposing such an obligation, which it must be said is an unusual one in the purchase of property, very satisfactory evidence should be given; indeed, so satisfactory as to leave no doubt of its propriety; and when the deed containing it is placed on record, without having been exhibited to the grantee, the proof should be clear, positive, and beyond all question that it was authorized. Any other rule would place any citizen at the mercy of a mortgagor who chose to relieve himself of a burden which he did not wish to bear, and would become, in that way, a vehicle of great injustice and oppression."

clause.[6] The grantee is entitled to have the deed reformed in such a case unless an estoppel has arisen in favor of a third party. But it is held that where after the purchase of a mortgage, the premises are conveyed in accordance with a previous contract of this kind, subject to the mortgage, and the deed contains a clause by which the grantee assumes and covenants to pay such mortgage, the grantee is not estopped from insisting as against such purchaser of the mortgage that the covenant places no liability upon him.[7] A contract of purchase provided that the purchasers were to take the property subject to a mortgage, but in the deed given to them there was a clause stating that they assumed the payment of the mortgage. In a foreclosure suit, judgment on this covenant was rendered against them for a deficiency. They were unable to find the contract at the time they were made parties to the

[6] Kilmer v. Smith, 77 N. Y. 226, 33 Am. Rep. 613. Danforth, J., in delivering the opinion of the court, said: "The deed was to be drawn in pursuance of the contract, and to carry out the bargain therein expressed. It is plain that the deed goes much beyond the contract, and imposes upon the plaintiff an obligation not suggested or warranted by the terms of the agreement. It is also apparent from the contract that at the time of its execution both parties understood the difference between a conveyance, subject to a mortgage, and one with an agreement to assume and pay the mortgage. To warrant the imposition of such an obligation upon the plaintiff, required a new agreement, or at least an assent on his part. . . . The case is not to be regarded as one of mutual misunderstanding or mistake, but rather as a case where one party deliberately inserted in a deed, a covenant tending to his own advantage and another's prejudice, and the latter, in ignorance that the instrument contains the covenant, accepts it as in fulfillment of a contract which requires no such stipulation. The denial of relief in such a case would be at variance with long-established doctrines of courts of equity, and a reproach to the law itself: Story Eq. Jur. vol. 1, § 138c. It has therefore been held that the ignorant party is entitled to relief, notwithstanding the other acted advisedly and upon full information, for that being admitted, there is fraud: Welles v. Yates, 44 N. Y. 525; Botsford v. McLean, 45 Barb. 478; affirmed by Court of Appeals, May, 1870; Rider v. Powell, 28 N. Y. 310."

[7] Real Estate Trust Co. v. Balch, 45 N. Y. Sup. Ct. (13 Jones & S.) 528.

foreclosure suit, and not until some time after judgment did they discover by the deed that they were made to assume the mortgage, the deed having been drawn without their inspection. They permitted the foreclosure suit to go by default. The contract of purchase was afterward discovered, and the court held that they were entitled to ask to have the judgment opened, and to seek permission to come in and defend.[8]

§ 1050. **Deed to mortgagee subject to mortgage.**—A deed of the mortgaged premises to the mortgagee subject to the mortgage, merges the mortgage, and thus discharges the mortgage debt. A mortgagor executed a deed for a tract of land, which was subject to a mortgage, the grantee assuming and agreeing to pay the mortgage. Subsequently the grantee conveyed the land to the mortgagee by a deed, in which it was recited that the deed was subject to the mortgage. The court held that thereby a merger of the mortgage resulted, and that although the value of the land at the time of the execution of the last deed was less than the amount of the mortgage, still the mortgagee could not maintain an action against the mortgagor on the mortgage note.[9] Where the holder of the mortgage takes a conveyance of the mortgaged land, and afterwards conveys the land with full covenants, the mortgage is discharged by the merger.[1] But if it is the intention that the lien of the mortgage shall not merge in the legal title, it is said no merger occurs although the mortgagee becomes owner of the fee.[2]

[8] Trustees of the Northern Dispensary of New York v. Merriam, 59 Barb. 226. See, also, Waring v. Somborn, 82 N. Y. 604; Deyermand v. Chamberlin, 22 Hun, 110.

[9] Dickason v. Williams, 129 Mass. 182, 37 Am. Rep. 316. See, also, Wyatt-Bullard Lumber Co. v. Bourke, 55 Neb. 9, 75 N. W. 241; Ames v. Miller, 65 Neb. 204, 91 N. W. 250; Chase Nat. Bank v. Hastings, 20 Wash. 433, 55 Pac. 574 (where the grantee assigned the notes secured before their maturity).

[1] Pearson v. Bailey, 180 Mass. 229, 62 N. E. 265.

[2] Wickersham v. Reeves, 1 Ia. 413; Woodward v. Davis, 53 Ia. 694, 6 N. W. 74; Quimby v. Wil-

§ 1051. **Effect of deed from mortgagor to mortgagee as against intervening encumbrances.**—The technical doctrine of merger will not be applied where the intention or the just interests of the party demand that the encumbrance should still continue subsisting. A and B mortgaged certain lots which they held in severalty to C, to secure the payment of a note. C was indebted to D, and assigned to the latter the note and mortgage as collateral security for his indebtedness. Subsequently, A executed a mortgage upon his part of the same lots to E, to secure a debt due to E from A and B. Still later, A and B conveyed the lots to C by a warranty deed, which was expressed to be subject to the mortgage of E, but it contained no clause obligating the grantee to assume or discharge such mortgage. It was held that the first mortgage was not merged in the fee, by the deed from the mortgagors to C, so far as the rights of C were involved; and that, at a sale upon foreclosure, the sum due upon the mortgage to C, being the prior lien, should be paid first, and what remained after paying the first mortgage should be applied to the second, and the surplus remaining after the payment of both mortgages, if any, should be paid to C.[3] And where there is a purchase of the equity of redemption by the mortgagee, there is

liams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685. See, also, Bush v. Herring, 113 Ia. 158, 84 N. W. 1036. In Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145, it is said: "It is well settled that, at law, when a greater or lesser, or a legal and equitable estate coincide in the same person, the lesser, or the equitable estate, is immediately merged and annihilated: 15 Am. & Eng. Ency. of Law, 1st ed. 314. It is true that the question, whether or not a merger takes place in equity, depends upon the intention of the parties, and a variety of other circumstances: 15 Am. & Eng. of Law, 1st ed. 314. But 'a merger will be prevented by equity only, however, for the purpose of promoting substantial justice; it will not prevent a merger, where such prevention would result in carrying a fraud or other unconscientious wrong into effect.'"

[3] Fowler v. Fay, 62 Ill. 375. See, also, Hines v. Ward, 121 Cal. 115, 53 Pac. 427; Wyatt-Bullard Lumber Co. v. Bourke, 55 Neb. 9, 75 N. W. 241; Title Guarantee Co. v. Wrenn, 35 Ore. 62, 56 Pac. 271, 76

no merger unless no injustice results therefrom or such merger is the wish of the mortgagee.[4] But if the mortgaged premises are purchased by a senior mortgagee, and he undertakes to pay off a junior mortgage, deducting the amount of such mortgage from the price of the land, then the junior mortgage is entitled to priority over the senior.[5]

§ 1052. **Presumption of deduction of amount of mortgage from consideration.**—While, as a general proposition, the taking of a deed subject to a mortgage imposes no personal liability on the grantee, it raises the presumption that the grantee has purchased the property for what it was worth, less the amount of the encumbrances upon it. "The fair inference is, that the purchaser does not pay the vendor the full value of the property, but that the amount of the mortgage debt is reserved in his hands, as so much purchase money for the purpose of discharging the lien. In such case the land conveyed is as effectually charged with the amount of the mortgage as if the purchaser had expressly assumed its payment. As between the vendor and the purchaser of the equity of redemption, the land is the primary fund for the liquidation of the encumbrance."[6] A mortgage was made upon

Am. St. Rep. 454; Shattuck v. Belknap Bank, 63 Kan. 443, 65 Pac. 643; Fitch v. Applegate, 24 Wash. 26, 64 Pac. 147; Gilchrist v. Foxen, 95 Wis. 428, 70 N. W. 585; Moore v. Olive, 114 Ia. 650, 87 N. W. 720.

[4] See Gibbs v. Johnson, 104 Mich. 120, 62 N. W. 145; Keith v. Wheeler, 159 Mass. 161, 34 N. E. 174; Beacham v. Gurney, 91 Ia. 621, 60 N. W. 187 (holding merger took place where agreement was that mortgage should be satisfied).

[5] Fowler v. Fay, 62 Ill. 375. A mortgagor may obtain his personal release from the debt, and a payment made by the mortgagor for his release will not be treated as a payment in partial satisfaction of the mortgage: Osborn v. Williams, 82 Iowa, 456.

[6] Gayle v. Wilson, 30 Gratt. 166; s. c. 5 Reporter, 667, per Staples, J. To render the grantee personally liable, he must have assumed the mortgage debt; retaining the amount of the mortgage from the purchase price is not sufficient: Granger v. Roll (S. D., Apr. 3, 1895), 62 N. W. 970. Where the purchaser retains the amount of the mortgage debt from the con-

certain real estate to a bank, and afterward the mortgagors made an assignment for the benefit of their creditors. The bank obtained a decree of foreclosure, making the assignee a party to the suit. The assignee believing that he could not realize anything from the property, and desiring to enable the bank to obtain control of the property at a date earlier than could be done under the foreclosure proceedings, proposed to certain officers of the bank to offer the property at public sale, on condition that assurance be given to him that a sum would be bid sufficiently large to pay the expenses of the advertisement and sale. The bank accepted this proposal, and the property was accordingly advertised for sale, subject to the mortgage and decree held by the bank. One of the trustees, acting for the bank, bid twenty dollars at the sale, the property was sold to him, and the assignee executed a deed to him therefor. The bank paid the amount of the bid and the trustee to whom the deed was made executed a declaration of trust, stating that he held the property conveyed to him in trust for the bank. The property was afterward sold under the decree of foreclosure, leaving a deficiency of several thousand dollars. The bank thereupon gave the assignee notice that it claimed that the deficiency should be paid out of assets in his hands. On the petition of the assignee an order was made satisfying the decree, on the ground that the assignee, in his dealings with the bank, was authorized to suppose that it, by taking the deed to the property, would have no further claim against him.[7]

§ 1053. Setting off mortgage against purchase money. —In the absence of a special contract or some special circumstances attending the transaction, a purchaser who accepts

tract price he is presumed to have assumed payment of the mortgage: Bristol etc. Bank v. Stiger, 86 Ia. 344, 53 N. W. 265. See, also, in Re May, 218 Pa. 64, 67 Atl. 120; Siegel v. Borland, 191 Ill. 107, 60 N. E. 863.

[7] East Saginaw Sav. Bank v. Grant, 41 Mich. 101.

a deed without covenants takes the land charged with the mortgage debt, and cannot keep it alive by taking an assignment of it to himself, and claim the right to set it off against the balance of the purchase price he may still owe his grantor.[8]

§ 1053a. **Benefit of collateral security.**—A purchaser subject to a mortgage cannot claim the benefit of collateral security obtained by the mortgagee from the vendor after the execution of the mortgage, as the land is the primary fund for the payment of the debt, and the purchaser is not interested in other security afterward taken, but not constituting a part of the original transaction.[9] The purchaser will not be allowed to share in other securities held by the mortgagee.[1] Where a deed is made to a trustee reciting that he assumes a described mortgage, and he holds the title for the benefit of others who paid the consideration, each beneficiary, in case of a deficiency, is liable in proportion to his separate interest.[2]

§ 1054. **Sale of equity of redemption on execution.**—When the equity of redemption is sold on execution, the purchaser is subrogated to all the rights, and becomes subject to all the disabilities of the mortgagor. The purchaser of the equity of redemption takes the land with the paramount lien of the mortgage resting upon it, the mortgage continuing to be as valid and operative as a security as it did when the

[8] Atherton v. Toney, 43 Ind. 211; Bunch v. Grave, 111 Ind. 351. When a suit is brought upon a promissory note, given to secure the price of land which the payee had agreed to convey to the maker by a quitclaim deed, it is not a good answer that the land, after the execution of the note, had been sold to discharge a lien upon it, which existed at the time of making the note: Shuler v. Hardin, 25 Ind. 386. See, also, Dickason v. Williams, 129 Mass. 182, 37 Am Rep. 316; Wedge v. Moore, 6 Cush. 8, 10; Jumel v. Jumel, 7 Paige, 591; Spengler v. Snapp, 5 Leigh, 478; Eaton v. Simonds, 14 Pick. 98.

[9] Brewer v. Staples, 3 Sandf. Ch. 579.

[1] Stevens v. Church, 41 Conn. 369.

[2] Reynolds v. Dietz, 34 Neb. 265; Bear v. Koeningstein, 16 Neb. 65.

equity of redemption was in the mortgagor. The land is the primary fund for the payment of the mortgage debt, and the purchaser cannot compel the mortgagor to pay it off.[3] The purchaser cannot contest the validity of the mortgage, and hold the estate free from encumbrances by proving that the mortgage was fraudulent.[4] By taking the property subject to the mortgage, the purchaser is as much estopped to deny it as if there had been a recital to that effect in his deed.[5] The purchaser does not acquire any interest in other securities held by the mortgagee, and the principle as to marshaling securities does not apply to the case of a mortgagee and a subsequent purchaser of the equity of redemption.[6]

[3] Lovelace v. Webb, 62 Ala. 271; Russell v. Allen, 10 Paige, 249; Vanderkemp, v. Shelton, 11 Paige, 28. See, also, Heyer v. Prayn, 7 Paige, 470, 34 Am. Dec. 355; Funk v. Reynolds, 33 Ill. 495; Tice v. Annin, 2 Johns. Ch. 128; Stephens v. Church, 41 Conn. 369.

[4] Russell v. Dudley, 3 Met. 147; Lord v. Sill, 23 Conn. 319; Delaware and Hudson Canal Co. v. Bonnell, 46 Conn. 9; Waterman v. Curtis, 26 Conn. 241.

[5] Russell v. Dudley, 3 Met. 147. In that case Chief Justice Shaw said: "The purchase money must be understood to be the value of the estate, over and above the sum for which it is mortgaged. If he could afterward avoid that mortgage, and hold the whole estate, he might get it for a very inadequate consideration; he would get what the officer never intended to sell, to the manifest injury of the debtor and perhaps of the creditor. It would be injurious to the debtor, by taking the whole of his estate by force of a legal proceeding intended to convey to him the balance of the value of the estate, after paying the mortgage debt, leaving the debtor still personally liable for that debt. It would be injurious to the creditor if the actual proceeds of the sale should prove insufficient to pay the whole amount of his execution, as it would be giving to the purchaser the power of defeating the intermediate mortgage, which it is the privilege of the creditor alone to impeach for his own benefit; and which, if set aside, would leave the whole value of the estate to be applied to the satisfaction of the execution."

[6] Stevens v. Church, 41 Conn. 369. Where no attempt has been made to proceed against the mortgagee in a foreclosure proceeding, the general rule is that the obligation of the purchaser is not merged, and the mortgagee may proceed to collect the deficiency in another action: Washington Life Ins. Co. v. Marshall (56 Minn. 250), 67 N. W. 658; McRae v. Sul-

§ 1055. **Parol evidence to show grantee did not assume mortgage.**—When there is no fraud in the execution or delivery of a deed, a grantee who has accepted the deed by which he "assumes and agrees to pay" a certain mortgage on the premises, "and to save the grantor harmless therefrom," cannot show by parol evidence that he made no such agreement and did not know that these clauses had been inserted in the deed. By accepting the deed the grantee took upon himself the duty of performing the agreement contained in the deed according to its terms.[7] A deed was executed to a woman as grantee, without her authority or knowledge, at the direction of her husband, who had the deed recorded. The deed contained a recital that the land conveyed was subject to a mortgage, "which the grantee assumes and agrees to pay." Shortly after the registration of the deed she became aware that the land had been conveyed to her, and claimed to be its owner, but she never saw the deed itself, and knew nothing of what it contained until after the sale of the land by the mortgagee, when she repudiated the deed. It was held, however, that these facts would justify a finding that she had given her assent to the purchase, and also a ruling

livan (56 Minn. 266), 57 N. W. Rep. 659.

[7] Muhlig v. Fiske, 131 Mass. 110. "The defendant," said the court, "having, by the delivery which the jury have found, accepted the deed of conveyance, and thereby obtained the estate which he afterward conveyed to a third person, and so made himself liable to the burden which, by the terms of the deed, he had assumed, could not (no fraud in the execution or delivery of the deed being suggested) impair the legal effect of his own act by oral evidence that he had never agreed to assume and pay the mortgage, nor authorized nor knew of the insertion of such an agreement in the deed. Such evidence, except so far as it tended to show that there had been no delivery of the deed, was therefore rightly excluded, independently of any question of pleading: Coolidge v. Smith, 129 Mass. 554; Blyer v. Monholland, 2 Sand. Ch. 478." Parol evidence may be admissible to explain an ambiguity in a recital: N. Y. L. Ins. Co. v. Aitkin, 125 N. Y. 660, 26 N. E. 732, and to show the assumption of a mortgage: Miller v. Kennedy, 12 S. D. 478, 81 N. W. 906; Brosseau v. Lowry, 209 Ill. 405, 70 N. E. 901.

See § 1073 *post.*

that the recital in the deed bound her.[8] And it is held that unless there is some evidence to the contrary, proof of the record of a deed will raise the presumption that the title vested in the grantee, and that he became bound by a covenant in the deed to assume a mortgage.[9]

§ 1056. Purchaser on assuming mortgage is principal debtor.—If the grantee undertakes to pay the mortgage he becomes the principal debtor, and the mortgagor a surety merely.[1] The mortgagee may maintain a personal action

[8] Coolidge v. Smith, 129 Mass. 554.

[9] Lawrence v. Farley, 9 Abb. N. C. 371. See Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556; Spaulding v. Hallenbeck, 35 N. Y. 206; Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213. A covenant to pay a "mortgage" is a covenant to pay the debt which it secures: Hine v. Myrick, 60 Minn. 518, 62 N. W. 1125. That an agreement to pay mortgage may be shown by parol evidence of verbal contract if the evidence is clear, see Whicker v. Hushaw, 159 Ind. 1, 64 N. E. 460; Arnold v. Randall, 121 Wis. 462, 98 N. W. 239; Ordway v. Downey, 18 Wash. 412, 51 Pac. 1047, 63 Am. St. Rep. 892; Rolston v. Markham, 36 Ore. 112, 58 Pac. 1099. See also § 1073 *post.*

[1] Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327; Willson v. Burton, 52 Vt. 394; Rubens v. Prindle, 44 Barb. 336; Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130; Wales v. Sherwood, 52 How. Pr. 413; Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Flagg v. Geltmacher, 98 Ill. 293; Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213; Crenshaw v. Thackston, 14 S. C. 437; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Marsh v. Pike, 10 Paige, 596; Marshall v. Davies, 78 N. Y. 414; Mutual Life Ins. Co. v. Davies, 44 N. Y. Sup. Ct. 172; Johnson v. Zink, 52 Barb. 396; Cornell v. Prescott, 2 Barb. 16; Fleishhauer v. Doeliner, 9 Abb. N. C. 373; Comstock v. Drohan, 71 N. Y. 9; Ayers v. Dixon, 78 N. Y. 318; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556; Willard v. Woosham, 76 Va. 392; Boardman v. Larrabee, 51 Conn. 39; Alt v. Banholzer, 36 Minn. 57; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; George v. Andrews, 60 Md. 28, 45 Am. Rep. 706; Figart v. Halderman, 75 Ind. 564; Ellis v. Johnson, 96 Ind. 377; Palmeter v. Carey, 63 Wis. 426; Alvord v. Spring Valley Gold Co., 106 Cal. 547. And see Lawrence v. Fox, 20 N. Y. 268; Curtis v. Tyler, 9 Paige, 432; Miller v. Thompson, 34 Mich. 10. Scholten v. Barber, 217 Ill. 148, 75 N. E. 460; Warner v. Williams, 93 Md. 517, 49 Atl. 559; Regan v. Williams, 185 Mo. 620, 84 S. W. 959, 105 Am. St. Rep. 600; Nelson v. Brown, 140 Mo. 580, 41 S. W. 960,

against the grantee who has assumed to pay the mortgage without foreclosing the mortgage or joining the mortgagee

62 Am. St. Rep. 755; Wonderly v. Giessler, 118 Mo. App. 708, 93 S. W. 1130; Merriam v. Miles, 54 Neb. 566, 74 N. W. 861, 69 Am. St. Rep. 731; Stover v. Tompkins, 34 Neb. 465, 51 N. W. 1040; N. Y. L. Ins. Co. v. Casey, 178 N. Y. 381, 70 N. E. 916; Germania L. Ins. Co. v. Casey, 90 N. Y. Supp. 418, 98 App. Div. 88; aff'd 184 N. Y. 554, 76 N. E. 1095; Howard v. Robbins, 73 N. Y. Supp. 172, 67 App. Div. 245; Poe v. Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713; Moore v. Triplett, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882; Bank v. Snow, 197 Mass. 339, 83 N. E. 1099; Priddy v. Bank, 132 Mo. App. 279, 111 S. W. 865. A grantee is not personally liable for the mortgage debt where he purchases the land subject to the mortgage: Springer v. Foster, 27 Md. App. 15, 60 N. E. 720; Winans v. Welkie, 41 Mich. 264, 1 N. W. 1049; Farmers etc. Trust Co. v. Penn etc. Co. 103 Fed. 132, 56 L.R.A. 710, 43 C. C. A. 114; Board of Trustees v Piersol, 161 Mo. 270, 61 S. W. 811; Crawford v. Nimmons, 180 Ill. 143, 54 N. E. 209; Crane v. Hughes, 5 Kan. App. 100, 48 Pac. 865; Osborn v. Hall, 160 Ind. 153, 66 N. E. 457; Foster v. Bowles, 138 Cal. 346, 71 Pac. 494; Monarch Coal & M. Co. v. Hand, 197 Ill. 288, 64 N. E. 381; Hadley v. Clark, 8 Idaho, 497, 69 Pac. 319; Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659; McNaughton v. Burke, 63 Neb. 704, 89 N. W. 274; Frerking v. Thomas, 64 Neb. 193, 89 N. W. 1005; Schaeffer v. Schaeffer, 182 Pa. St. 598, 38 Atl. 474. But a grantee is personally liable when he assumes the payment of the mortgage indebtedness: Winans v. Wilkie, 41 Mich. 264, 1 N. W. 1049; Garnett v. Pierce, 74 Ill. App. 225; Ward v. De Oca, 120 Cal. 102, 52 Pac. 130; Colchester Sav. Bank v. Brown, 75 Conn. 69, 52 Atl. 316; Eggleston v. Morrison, 185 Ill. 577, 57 N. E. 775; Swisher v. Palmer, 106 Ill. App. 432; Blakeslee v. Hoit, 116 Ill. App. 83; Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260; Risk v. Hoffman, 69 Ind. 137; Santee v. Keefe, 127 Iowa, 128, 102 N. W. 803; Iowa Loan & Trust Co. v. Haller, 119 Iowa, 645, 93 N. W. 636; Munsell v. Beals, 5 Kan. App. 736, 46 Pac. 984; Shumway v. Hawley, 8 Kan. App. 861, 55 Pac. 352; Cumberland Nat. Bank v. St. Clair, 93 Me. 35, 44 Atl. 123; Jehle v. Brooks, 112 Mich. 131, 70 N. W. 440; Martin v. Humphrey, 58 Neb. 414, 78 N. W. 715: Young Mens Christian Ass'n v. Portland, 34 Or. 106, 55 Pac. 439, 75 Am. St. Rep. 568; McKay v. Ward, 20 Utah, 149, 46 L.R.A. 623, 57 Pac. 1024; Arnold v. Randall, 121 Wis. 462, 98 N. W. 239. Although the mortgagee is not a part to the contract of assumption, he may enforce it as made for his advantage: Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139; Roberts v. Fitzallen, 120 Cal. 482, 52 Pac. 818; Ward v. DeOca, 120 Cal. 102, 52 Pac. 130; Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868; Colchester Sav. Bank v. Brown,

as a defendant in the action.[2] An owner of real estate, who had given a trust deed to secure a loan, conveyed the property to another, subject to the encumbrance which the grantee in the deed agreed to assume. This grantee conveyed to another purchaser, and the latter to a third. It was held that the original mortgagor became simply a surety for the payment of the debt to the creditor, and had the right of paying the debt when it became due, without releasing the subsequent purchasers, each of whom became an original promisor for the payment of the debt as a condition on which he received title; and further, that after such payment the original mort-

75 Conn. 69, 52 Atl. 316; Boardman v. Larrabee, 51 Conn. 39; Stuyvesant v. Western Mort. etc. Co. 22 Colo. 28, 43 Pac. 144; Cooley v. Murray, 11 Colo. App. 241, 52 Pac. 1108; Whicker v. Hushaw, 159 Ind. 1, 64 N. E. 460; Hammons v. Bigelow, 115 Md. 363, 17 N. E. 192; Ayres v. Randall, 108 Md. 595, 9 N. E. 464; Cumberland Nat. Bank v. St. Clair, 93 Me. 35, 44 Atl. 123; Flint v. Winter Harbor Land Co. 89 Me. 420, 36 Atl. 634; Webber v. Lawrence, 118 Mich. 630, 77 N. W. 266; Corning v. Burton, 102 Mich. 86, 62 N. W. 1040; Fitzgerald v. Barker, 85 Mo. 13; Garneau v. Kendall, 61 Neb. 396, 85 N. W. 291; Wager v. Link, 150 N. Y. 549, 44 N. E. 1103; Windle v. Hughes, 40 Or. 1, 65 Pac. 1058; Bloon v. Crew Levick Co., 177 Pa. St. 606, 35 Atl. 871, 55 Am. St. Rep. 742. In Regan v. Williams, 185 Mo. 620, 84 S. W. 959, 105 Am. St. Rep. 600 the court says: "The sale of the land by the original mortgagor, Williams, to the Scott Investment Company, and the assumption of the incumbrance by the latter, converted said company into the principal debtor with reference to the encumbrance, and the defendant into a surety: Wayman v. Jones, 58 Mo. App. 313; Nelson v. Brown, 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960; Pratt v. Conway, 148 Mo. 291, 71 Am. St. Rep. 602, 49 S. W. 1028. Timothy Regan, who then held the note and knew all about the arrangement, was bound thereafter to recognize said parties in those capacities: Nelson v. Brown, 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960. In Nelson v. Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755, the court says: "'The rule seems to be that if the owner of real estate encumbered by a mortgage sells it, and his vendee, as part payment of the purchase price, assumes the payment of the mortgage debt, the vendee becomes the principal, and the vendor is as to such debt entitled to the same rights and remedies against the vendee, whether legal or equitable, that a surety may have against his principal.'"

[2] Burr v. Beers, 27 N. Y. 178, 80 A grantee assuming a mortgage is Am. Dec. 327.

gagor might become the purchaser at the trustee's sale.[3] But an agreement on the part of a vendee in an executory contract to assume and pay a mortgage upon the land as a part of the consideration, is simply an agreement to indemnify the vendor against a judgment for any deficiency that may result on a sale under the mortgage. The mortgagee cannot avail himself of the agreement, if the contract of sale is rescinded before the commencement of an action to foreclose the sale.[4]

§ 1056a. **Purchaser's title not divested by nonpayment.** —A deed containing an agreement that the grantee, as a part of the consideration, shall assume and pay a mortgage previously executed by the grantor, vests the title in the grantee, and the agreement to assume and pay the mortgage does not constitute a condition, a breach of which will cause the title to revest in the grantor. The grantee's title cannot be divested, or his right to the possession of the land conveyed be destroyed, by showing that he failed to pay the mortgage.[5] Where the grantee assumes the payment of the mortgage note, the holder of the note can enforce it against him in a personal action.[6] A deed executed by the grantee to another, in which the latter assumes the mortgage, will not release the former from his liability.[7]

[3] Flagg v. Geltmacher, 98 Ill. 293. charged with notice that the interest coupons attached to the principal note provide that the principal note should become due at an earlier date for default on payment of interest, although the mortgage fails to state that fact: Williams v. Moody, 95 Ga. 8, 22 S. E. 230. Where a vendee agrees "to take up" certain mortgages if the mortgagee will accept the money, he is obligated to pay the principal with interest to maturity, if demanded by the mortgagee, and an offer to pay the principal and interest accrued to the time of the offer is insufficient: Beverly v. Blackwood, 102 Cal. 83.

[4] Biddel v. Brizzolara, 64 Cal. 354.

[5] Martin v. Splivalo, 69 Cal. 611. See § 827, *ante*.

[6] Wayman v. Jones, 58 Mo. App. 313.

[7] Corning v. Burton, 102 Mich. 86, 62 N. W. 1040.

§ 1057. **Extension of time.**—If the purchaser has assumed the payment of the mortgage, and he and the mortgagee, by an agreement between themselves, in which the mortgagor does not join, extend the time for the payment of the mortgage, the rule in most of the States is that the mortgagor, occupying, as he does, the relation of a surety, is discharged from all liability upon the mortgage.[8] It is

[8] Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130; Metz v Todd, 36 Mich. 473; Christner v. Brown, 16 Iowa, 130; Neimcewicz v. Gahn, 3 Paige, 614; Gahn v. Neimcewicz, 11 Wend. 312. See also Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139; Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901; Franklin etc. Bank v. Cochrane, 182 Mass. 586, 61 L.R.A. 760, 66 N.E. 200; Pratt v. Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602; Merriam v. Miles, 54 Neb. 566, 74 N. W. 861, 69 Am. St. Rep. 731; Winslow v. Stoothoff, 93 N. Y. Supp. 335, 104 App. Div. 28; Ia. etc. Co. v. Schnose (S. D.) 103 N. W. 22; Miller v. Kennedy, 12 S. D. 478, 81 N. W. 906; Dillaway v. Peterson, 11 S. D. 210, 76 N. W. 925. In the first case the court said: "The mortgagee, after the conveyance by Davies, could not deal with the grantee of the equity of redemption, to the prejudice of his right of subrogation, without discharging Davies from liability for the debt, either wholy or *pro tanto*. If, for example, he had, pursuant to an agreement with Leslie, without the consent of Davies, satisfied or released the lien of the mortgage, it is plain that he would thereby, as to Davies, have discharged the debt, at least to the extent of the value of the land. The rule that a mortgagee is bound, in dealing with his security, and with the bond, to observe the equitable rights of third persons, of which he has notice, has been frequently recognized: Tice v. Annin, 2 Johns. Ch. 125; Halsey v. Reed, 9 Paige, 446; Stevens v. Cooper, 1 Johns. Ch. 425, 7 Am. Dec. 499; Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 Am. Dec. 478. And the doctrine that a surety is discharged by dealings between the creditor and the principal debtor, inconsistent with the rights of the surety, has been applied, although the creditor did not know, in the origin of the transaction, that one of the parties was a surety, and also when, by an arrangement between two original joint and principal debtors, one of them assumed the entire debt, and this was known to the creditor: Pooley v. Harradine, 7 El. & B. 431; Oriental Financial Corporation v. Overend, Gurney & Co. Law, R., 7 Ch. App. 142; Millerd v. Thorn, 56 N. Y. 402; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90. We think it must be held, upon the authorities, that the rights of the parties in this case are to be determined by the rules governing the relation of principal and surety, and that if the dealings between the mortgagee

said, however, that the extension, to so operate, must be granted after knowledge of the conveyance.[9]

§ 1058. **Release of grantee.**—In a case where the grantee in the deed thus becomes the principal debtor, the mortgagor cannot release him, without, at the same time, releasing the mortgagor who is the surety. A mortgage was executed containing a clause, by which the mortgagor had the privilege of requiring from the mortgagee a release of any portion of the mortgaged property, at any time, upon making certain enumerated payments. Subsequently the mortgagor executed a deed of the property subject to the mortgage, which the grantee assumed and agreed to pay. Afterward an agreement was made between the grantee and the holder of the mortgage, without the knowledge or consent of the mortgagor, for the abrogation of this clause, relating to the release of certain portions of the property upon the making of the specified payments. The holder of the mortgage had notice of the deed and its covenants. The mortgage was foreclosed, and it was sought to hold the original mortgagor liable for the deficiency; but it was held that, inasmuch as

and Leslie would have discharged Davies, if he had been originally bound as surety only, the action against him cannot be maintained: Halsey v. Reed, 9 Paige, 446; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327; Flower v. Lance, 59 N. Y. 603. That an agreement by the creditor with the principal debtor, extending the time for the payment of the debt, without the consent of the surety, discharges the latter, is established by numerous authorities, and the court will not enter into the question what injury the surety has sustained: Rees v. Berrington, 2 Ves. Jr. 540; Rathbone v. Warren, 10 Johns. 587; Miller v. McCan, 7 Paige, 452." See, also, Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667; Metz v. Todd, 36 Mich. 473; Home Nat. Bank v. Waterman, 134 Ill. 461; George v. Andrews, 60 Md. 26, 45 Am. Rep. 706; Union Life Ins. Co. v. Hanford, 143 U. S. 187, 36 L. ed. 118; Cheeton v. Brooks, 71 Md. 45; Travers v. Dorr, 60 Minn. 173, 62 N. W. 269. But see Ia. etc. Co. v. Haller, 119 Ia. 645, 93 N. W. 636; Denison University v. Manning, 65 Oh. St. 138, 61 N. E. 706; Bank v. Snow, 197 Mass. 339, 83 N. E. 1099.

[9] Norton v. Ins. Co., 74 Minn. 484, 77 N. W. 298, 539.

the mortgagor was a surety, the release of the privilege referred to relieved him from liability.[1] But the mortgagee may discharge the mortgagor from personal liability without affecting his lien upon the land, or his claim against the grantee, assuming the debt.[2]

§ 1059. **Request of mortgagor to foreclosure.**—If the mortgagor considered as a surety, request the mortgagee at the maturity of the mortgage debt, to foreclose the mortgage debt, on the ground that the value of the property will then satisfy the mortgage, but may depreciate in value, and the mortgagee neglects to comply with such request, the mortgagor will not be liable for a deficiency occasioned by such neglect.[3] But a request must be made. Mere neglect to proceed against the mortgagor will not discharge a person who has guaranteed the payment of a mortgage, although the value

[1] Paine v. Jones, 76 N. Y. 274. And see Mutual L. Ins. Co. v. Davies, 44 N. Y. Sup. Ct. 172.

[2] Tripp v. Vincent, 3 Barb. Ch. 613.

[3] Remsen v. Beekman, 25 N. Y. 552. Said the court: "In this case, when the primary fund for the payment of the debt was ample, when urged by the surety to collect it, and for years afterward, the creditor chose to let his loan lie, against the *quasi* surety's expressed wish, because he considered it an advantageous mortgage investment, until the fund primarily liable for the debt has depreciated to a sum less than one-third of such debt, it would be wholly inequitable to charge a deficiency upon the surety caused purely by the creditor's own conduct. The plaintiff refused to comply with the request of Beekman for the reason that he wished to continue the loan, showing by his conduct that he did not rely upon the surety. There would be no equity in allowing him to call upon the surety, when it is apparent that if he had complied with his request he would have secured his debt." See, also, Russell v. Weinberg, 2 Abb. N. C. 422. See Osborne v. Heyward, 57 N. Y. Supp. 542, 40 App. Div. 78, in which the court says: "The rule is settled that the neglect of the mortgagee to proceed to forclose the mortgage and collect his debt, when duly requested to do so, will relieve the mortgagor from liability for any subsequent deficiency, if it appears that the whole debt would have been collected out of the land by compliance with his request, but has become uncollectible therefrom on account of the delay."

of the land has depreciated to such an extent as to be insufficient to pay the debt.[4]

§ 1060. **View that relation of surety does not effect mortgagee.**—In some courts the rule prevails that, although the mortgagor becomes a surety as between him and the grantee when the latter assumes the payment of the mortgage, yet that this relation does not arise as to the creditor. "Upon principle," says Lewis, P. J., "it would seem that a clear distinction may be taken between a suretyship which is created with the express consent of the creditor—as in an original contract—and a suretyship which arises by operation of law in a later transaction, to which the creditor is not a party. In the former case the creditor is, by his own act, bound to recognize all the distinctive rights of the surety, whose obligation to him exists in no other capacity, from the beginning. He must, therefore, do nothing which may lessen the surety's recourse or chances for indemnification, in the event of his having to pay the debt. But, in the latter case, he has voluntarily assumed no such duty. It becomes a question, then, whether the law can cast it upon him without his consent, and thus, in effect, alter the terms of his original contract. He may, therefore, continue to hold the mortgagor as a principal debtor; and, while he so holds him, there can be no discharge of liability on the ground of indulgence to one who, for certain purposes not affecting the creditor, stands toward the original debtor in the relation of a principal to his surety." [5] In a case in Iowa, it is likewise held that the relation of the grantor and mortgagor remains unchanged, by the assumption of the mortgage debt on the

[4] Hurd v. Callahan, 9 Abb. N. C. 374.

[5] Connecticut Mut. Life Ins. Co. v. Mayer, 8 Mo. App. 18. The court criticise the case of Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130, and say: "The conclusion reached in this decision seems to stand alone. The weight of authority elsewhere is altogether the other way."

part of the grantee that both the grantor and grantee may, as to the mortgagee, be treated as principals, and that an extension of time by an agreement between the mortgagee and grantee will not alter this relation.[6] And the same rule prevails in New Jersey.[7]

§ 1061. **Comments.**—It seems unreasonable to change the relation existing between the mortgagor and mortgagee by a contract made by a purchaser with the mortgagor, to which the mortgagee is not a party. Between the mortgagor and the party assuming the payment of the mortgage, the relation of surety and principal may exist. But the rights of the mortgagee ought to be determined by the terms of his contract at the time of its execution, and these terms ought not, it seems to us, to be subsequently changed to his disadvantage without his consent. He cannot on any reasonable ground, in our opinion, be bound by any agreement which the mortgagor and the grantee may choose to make among themselves. Let their rights and duties to one another be what they may, the mortgagee should be entitled to have his personal remedy against the mortgagor, to the same extent as if the property had not been sold subject to the mortgage. To deny him this right may be in many cases to deny him the means of satisfying the indebtedness due to him, to take away a right which he originally had, and which he has not agreed to relinquish. We, therefore favor the view that the relation of suretyship should not affect or involve in its conesquences the mortgagee, so as to compel him to treat the mortgagor after the sale as he would have been compelled

[6] Corbett v. Waterman, 11 Iowa, 86.

[7] Huyler's Executors v. Atwood, 26 N. J. Eq. 504. And so in Michigan: Crawford v. Edwards, 33 Mich. 354. And see, also, Thompson v. Bertram, 14 Iowa, 476; Herbert v. Doussan, 8 La. Ann. 267; Waters v. Hubbard, 44 Conn. 340; James v. Day, 37 Iowa, 164; Fish v. Glover, 154 Ill. 86.

to deal with him had he originally assumed the relation of surety.

§ 1062. **Purchaser of a part of the land.**—An owner of land subject to a mortgage sold a part of it, the value of which was more than sufficient to pay the mortgage debt. A provision was inserted in the deed that the grantee should assume and pay the whole of the mortgage. Subsequently the owner conveyed the remaining part of the lot, with the understanding that the mortgage was to be paid by the former grantee, and afterward a new mortgage upon the portion of the lot first conveyed was taken by the mortgagee who had notice of these facts. Under these circumstances the court permitted the second grantee to maintain a bill to redeem the lot conveyed to him without contribution toward the debt secured by the first mortgage.[8] If the purchaser of a part of the land subject to a mortgage discharge it, he will be entitled to an account of the rents and profits, and to an assignment of the mortgage.[9] The purchasers of several parts of mortgaged property are obliged to contribute in proportion to the value of the parts respectively held by them, if the equities of such parties are equal.[1] As the grantees and all claiming under them undertake, when mortgaged lands are conveyed subject to a mortgage, that the land shall be the primary fund for the payment of such debt, the execution of a subsequent deed of a part of such land to the mortgagor

[8] Welch v. Beers, 8 Allen, 151. See, also, Iowa Loan and Trust Co. v. Mowery, 67 Iowa, 113; Hazlett v. Sinclair, 76 Ind. 488, 40 Am. Rep. 254; Miller v. Fasler, 42 Minn. 366; Johnson v. Walter, 60 Iowa, 315; Rugg v. Brainerd, 57 Vt. 364.

[9] Salem v. Edgerly, 33 N. H. 46; Champlin v. Williams, 9 Pa. St. 341.

[1] Salem v. Edgerly, 33 N. H. 46. Where the owner of land subject to a mortgage sells pieces successively, and the mortgagee releases the pieces last sold, if these pieces are of sufficient value to discharge the debt, such release, if the mortgagee had knowledge of the previous sales, will discharge the lien on the land previously sold: Turner v. Sharpneck, 164 Pa. St. 469, 44 Am. St. Rep. 624.

does not relieve the remainder for its proportionate liability for such debt.[2]

§ 1063. **Grantee's defense against mortgage.**—A grantee, who in his deed has assumed the payment of a mortgage, is not permitted to contest its validity. He cannot, for instance, allege that the mortgage which he has assumed is usurious.[3] "A vendee who accepts a conveyance of land subject to a mortgage thereon, and containing a covenant whereby such vendee assumes and agrees to pay said mortgage, is estopped from asserting that the obligation secured thereby is usurious. The whole title of such vendee rests upon the conveyance, and the continued existence of the mortgage, as an encumbrance, forms a part of it. The conveyance is evidence of title, and when proven, as such evidence, the existing mortgage and the asumption thereof is also proven. A grantee cannot be permitted to claim title 'both under and against the same deed; to insist upon its efficacy to confer a

[2] Weber v. Zeimet, 30 Wis. 283. See, also, Freeman v. Auld, 44 N. Y. 50.

[3] Bearce v. Barstow, 9 Mass. 45, 6 Am. Dec. 25; Root v. Wright, 21 Hun, 344; De Wolf v. Johnson, 10 Wheat. 367, 6 L. ed. 343; Ritter v. Phillips, 53 N. Y. 586; Frost v. Shaw, 10 Iowa, 491; Spinney v. Miller, 114 Ia. 210, 86 N. W. 317, 89 Am. St. Rep. 351; Scanlan v. Grimmer, 71 Minn. 351, 74 N. W. 146, 70 Am. St. Rep. 326. "The defense of usury," said the court in Cramer v. Lepper, 26 Ohio St. 59, 20 Am. Rep. 756, "is personal to the mortgagor, and cannot be set up by his grantee, who assumes in consideration of the grant to pay the claim of the mortgagee." See, also, Busby v. Finn, 1 Ohio St. 409; Hartley v. Harrison, 24 N. Y. 170; Shufelt v. Shufelt, 9 Paige, 137, 37 Am. Dec. 381; Barthet v. Elias, 2 Abb. N. C. 364; Sands v. Church, 6 N. Y. 347; Cope v. Wheeler, 41 N. Y. 303. And see Union Bank v. Bell, 14 Ohio St. 201; Green v. Kemp, 13 Mass. 515, 7 Am. Dec. 169; Morris v. Floyd, 5 Barb. 130, Cannot deny mortgage. See Alvord v. Gold Co., 106 Cal. 547, 40 Pac. 27; Hadley v. Clark, 8 Ida. 497, 69 Pac. 319; Lang v. Dietz, 191 Ill. 161, 60 N. E. 841; Goos v. Goos, 57 Neb. 294, 77 N. W. 687; Mitchell v. Nat'l etc. Ass'n (Tex.) 49 S. W. 624; Curry v. Lafon (Mo.) 113 S. W. 246; Herrin v. Abbe, 55 Fla. 769, 18 L.R.A.(N.S.) 907, 46 So. 183.

benefit, and repudiate a burden with which it has qualified it; to affirm a part and reject a part.' " [4] Nor can the grantee show that the amount assumed by him is not due upon the mortgage.[5] A pre-emptor of land borrowed a sum of money, and executed a mortgage on the land as security for the sum borrowed. After entering upon the land, he conveyed it by deed to a purchaser, subject to the mortgage, the purchaser agreeing to pay the mortgage as a part of the purchase price. This deed was duly recorded, and, subsequently, the grantee conveyed the premises to a second grantee, with a covenant

[4] Scanlan v. Grimmer (*supra*). See, also, Stuckey v. Middle States etc. Co., 61 W. Va. 74, 8 L.R.A. (N.S.) 814, 55 S. E. 996; Hiner v. Whitlow, 66 Ark. 121, 49 S. W. 353, 74 Am. St. Rep. 74; Anderson v. Oregon Mortgage Co., 8 Ida. 418, 69 Pac. 130; Smith v. McMillan, 46 W. Va. 577, 33 S. E. 283. So, also, where the assumption is a part of the consideration: Frost v. Pacific Sav. Co. 42 Ore. 44, 70 Pac. 814; Dickenson v. Bankers etc. Co. 93 Va. 498, 25 S. E. 548; Chenoweth v. Bld'g Ass'n, 59 W. Va. 653, 53 S. E. 559. "Where the grantee has received, as a part of the consideration, the benefit of the amounts claimed to be usurious, the law estops him to set up usury. But where such amount has not been deducted from the purchase price he is not estopped: Cobe v. Summers, 143 Mich. 117, 106 N. W. 707. See, also, Crawford v. Nimmons, 180 Ill. 143, 54 N. E. 209. Likewise a purchaser is not estopped to assert usury where his agreement is to pay "balance unpaid which may be found to be due." National etc. Ass'n v. Retzman, 69 Neb. 667, 96 N. W. 204. See, also, Erwin v. Morris, 137 N. C. 48, 49 S. E. 53; Washington etc. Ass'n v. Andrews, 95 Md. 696, 53 Atl. 573. That a married woman taking conveyance from her spendthrift husband for the purpose of placing property where he cannot fritter it away, is not estopped to show usurious character of mortgage on property, see First Nat'l Bank of Atwood v. Drew, 226 Ill. 622, 10 L.R.A.(N.S.) 857, 80 N. E. 1082.

[5] Kennedy v. Brown, 61 Ala. 296; Ritter v. Phillips, 53 N. Y. 586; Scarry v. Eldridge, 63 Ind. 44; Green v. Houston, 22 Kan. 35; Johnson v. Parmely, 14 Hun, 398; Crawford v. Edwards, 33 Mich. 354; Miller v. Thompson, 34 Mich. 10; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Millington v. Hill, 47 Ark. 301; McConihe v. Fales, 107 N. Y. 404; Bond v. Dolby, 17 Neb. 491; Skinner v. Reynick, 10 Neb. 323, 35 Am. Rep, 479; Koch v. Losch, 31 Neb. 625; Fitzgerald v. Barker, 85 Mo. 13; Alt v. Banholzer, 36 Minn. 57. See American Nat. Bank v. Klock, 58 Mo. App. 335.

that the premises were free from all encumbrances, except as shown by the records, and the second grantee agreed with the first to pay the mortgage as a part of the consideration. It was held that the second grantee, in an action to foreclose the mortgage by the mortgagee, was estopped from showing the invalidity of the mortgage under the pre-emption laws of Congress.[6] A husband and wife executed a mortgage upon their homestead without complying with the provisions of the statute as to the waiver of the homestead right. Afterward, they conveyed the premises by deed, subject to the mortgage, the amount of which formed a part of the purchase price. The grantee, having obtained the premises by assuming the payment of the mortgage, and thus admitting its validity, was held to be estopped in an action to foreclose by the mortgagee, from setting up, as a defense, the omission to release the right of homestead.[7] When the grantee accepts a deed binding him to pay a mortgage, he cannot show in a foreclosure suit, for the purpose of contradicting the deed, that it was agreed between him and his grantor that the consideration was to be paid partly by labor, and that he was to be released from the deed of trust.[8] The grantee, as long as he remains in the quiet and peaceful possession of the premises, cannot defend against the payment of the mortgage which he has assumed, because of a failure of title.[9] A grantee of

[6] Green v. Houston, 22 Kan. 35.

[7] Pidgeon v. Trustees of Schools, 44 Ill. 501.

[8] Klein v. Isaacs, 8 Mo. App. 568.

[9] Parkinson v. Sherman, 74 N. Y. 88, 30 Am. Rep. 268. Said Miller, J.: "It is held that where a grantee of mortgaged premises takes a deed of the same subject to the mortgage, and thereby assumes to pay the mortgage, he is estopped from contesting the consideration and validity of the mortgage: Freeman v. Auld, 44 N. Y. 50; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Ritter v. Phillips, 53 N. Y. 586; Shadbolt v. Bassett, 1 Lans. 121. The general rule is, that there must be an eviction before any relief can be granted, on the ground of a failure of title or consideration. So long as he remains in the peaceful and quiet possession of the premises, or until he surrenders possession of the same to a paramount title, the mortgagor or the purchaser who assumes the payment of the mortgage has no de-

property, expressly conveyed as subject to a mortgage, is estopped to assert the invalidity of the mortgage.[1]

§ 1064. **Part of consideration.**—The acceptance of a deed containing such a clause of assumption, is equivalent to a direction from the grantor to the grantee to pay the amount specified, as so much of the consideration, to the mortgagee. The grantee is liable for the amount he undertakes to pay, and cannot dispute the legal execution of the mortgage, or its amount as stated in the deed.[2] Although the grantee has not assumed the payment of the mortgage, yet when the deed has been made subject to the mortgage, and the amount has been deducted from the consideration, the grantee cannot contest the validity of the mortgage.[3] A mortgage was executed to A on land, which the mortgagor afterward sold, subject to the mortgage, to B, the grantee reserving from the purchase price sufficient to discharge it. But there was a prior mortgage on the same land to C, of which both A and B had no knowledge. When they learned of this prior mortgage, B gave A to understand that he would

fense to the same. But where the mortgage debt is not deducted from the consideration or is a part of it, the grantee may contest the validity of the mortgage: Sewing Machine Co. v. Emerson, 115 Mass. 554; Flanders v. Doyle, 16 Ill. App. 508; Purdy v. Coar, 109 N. Y. 448, 4 Am. St. Rep. 491; Bishop v. Felch, 7 Mich. 371; Baldwin v. Tuttle, 23 Iowa, 66; Wood v. Broadley, 76 Mo. 23, 43 Am. Rep. 754; Judson v. Dada, 79 N. Y. 373; Williams v. Thurlow, 31 Me. 392; Parker v. Jenks, 36 N. J. Eq. 398; Briggs v. Seymour, 17 Wis. 255; Thompson v. Morgan, 6 Minn. 292. His only remedy is at law on the covenants in the deed: Abbott v. Allen, 2 Johns. Ch. 519, 7 Am. Dec. 554; Bumpus v. Platner, 1 Johns. Ch. 213; Curtiss v. Bush, 39 Barb. 661."

[1] Foy v. Armstrong, 113 Ia. 629, 85 N. W. 753; Moulton v. Haskell, 50 Minn. 367, 52 N. W. 960.

[2] Miller v. Thompson, 34 Mich. 10. And see Ferris v. Crawford, 2 Denio, 595; Crawford v. Edwards, 33 Mich. 354; Haile v. Nichols, 16 Hun, 37.

[3] Freeman v. Auld, 44 N. Y. 50; s. c. 37 Barb. 587; Hardin v. Hyde, 40 Barb. 435. But see Hartley v. Tatham, 2 Abb. N. Y. App. 333; s. c. 10 Bosw. 273. See Foster v. Wightman, 123 Mass. 100.

pay it off. B, however, perimtted C to foreclose, and he, B, purchased the land at the foreclosure sale. It was held that A's mortgage was not extinguished by this foreclosure, and that he could enforce his lien against the land.[4] The fact that a deed was executed simply as a mortgage to secure a loan is not of itself a sufficient consideration for a promise by the grantee to assume and pay a prior mortgage.[5] It is not necessary where the grantee assumes the payment of a mortgage as a part of the consideration, that there should be a consideration coming from the mortgagee,[6] as the equity of redemption is a consideration for such promise.[7] If the deed states that it is made in consideration of a specified sum of money, the receipt of which is aknowledgel, and also contains a clause by which the grantee assumes and agrees

[4] Manwaring v. Powell, 40 Mich. 371. The court, per Cooley, J., said of the grantee in the deed: "It is true that, having like complainant been ignorant of the Wabeke mortgage when he bought of Moody, the hardship of being compelled to pay that mortgage is as great upon him as it would be upon complainant; but that was one of the risks he assumed in his purchase. He now owns the land; and had complainant paid and taken up the Wabeke mortgage, he would have been entitled to tack it to his own, and foreclose for both, while on the other hand, if Powell had paid and taken it up, he would have been entirely without remedy against any one, except as the covenants in his deed from Moody might have afforded indemnity. And we do not think that the circumstances that he bought in the land at the foreclosure sale can help him under the circumstances. We are convinced from the evidence that he had given complainant to understand that he should pay off the Wabeke mortgage; and, under the circumstances, he was not at liberty to buy in the land to complainant's prejudice. We have no occasion to decide whether or not he might have done so had there been no such understanding."

[5] Merriam v. Schmitt, 211 Ill. 263, 71 N. E. 986, affirming 101 Ill. App. 443.

[6] McKay v. Ward, 20 Utah, 149, 46 L.R.A. 623, 57 Pac. 1024.

[7] Steele v. Johnson, 96 Mo. App. 147, 69 S. W. 1065. See, also, on question of consideration: Redfearn v. Craig, 57 S. C. 534, 35 S. E. 1024; Garneau v. Kendall, 61 Neb. 396, 85 N. W. 291; Goos v. Goos, 57 Neb. 294, 77 N. W. 687; Cobb v. Fishel, 15 Colo. App. 384, 62 Pac. 625; Talburt v. Berkshire Life Ins. Co., 80 Ind. 434.

to pay a mortgage on the property conveyed, the law will presume that the agreement to assume the payment of the mortgage is a part of the consideration.[8] An undertaking to pay the mortgage is imported by a recital in a deed that it is made subject to a mortgage claim, the payment of which is a part of the consideration.[9] But where a deed is taken from an intermediate grantee, reciting the assumption of the mortgage as a part of the consideration, he is not estopped from proving as against the mortgagee, that the consideration was a different one.[1] Still, if the grantee assumes as part of the consideration a trust deed to secure the payment of notes, the fact that the notes were not signed by the maker of the trust deed but by another person does not impair the force of the contract on the part of the grantee to pay the encumbrance.[2] Although the deed may not mention the indebtedness, and although there may be no express or formal contract in relation to paying a mortgage indebtedness, yet if the grantee agrees to pay the indebtedness, as a part of the purchase price, he thereby assumes the payment of the mortgage.[3]

§ 1065. **Purchaser at execution sale.**—A purchaser at an execution sale of land which the owner had purchased under an agreement to pay and assume a mortgage upon it, succeeds to the rights of the owner, and is equally with him estopped from denying its validity.[4] A stockholder of a corporation obtained a judgment against it. There was a

[8] Cobb v. Fishel, 15 Colo. App. 384, 62 Pac. 625.

[9] Jager v. Vollinger, 174 Mass. 521, 55 N. E. 458.

[1] Logan v. Miller, 106 Iowa, 511, 76 N. W. 1005.

[2] Harts v. Emery, 184 Ill. 560, 56 N. E. 865, affirming 84 Ill. App. 317.

[3] Lowy v. Boenert, 110 Ill. App. 16; Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901. See, also, Featherstone v. Emerson, 45 Pac. 713, 14 Utah, 12; Schotte v. Meredith, 197 Pa. 496, 47 Atl. 844; Bragg v. Lamport, 96 Fed. 630, 38 C. C. A. 467.

[4] Kennedy v. Brown, 61 Ala. 296.

mortgage upon its property, of which he had knowledge. He caused to be sold under an execution issued by him his judgment, all the right, title, and interest of the corporation in and to the property that was mortgaged, "subject to whatever sum might be due upon the property by virtue of the mortgage." He bought the property at the sale for a very small sum, and it was held that he could not dispute the mortgage nor its validity.[5] But if there are two mortgages upon the land, the purchaser is not estopped under the statute in Massachusetts from contesting the validity of the second mortgage, where the sheriff sells on execution "all the right in equity" of the mortgagor to redeem the land from the mortgages, and conveys the same by his deed.[6]

§ 1066. **When grantee may show invalidity of mortgage.**—If no deduction is made from the purchase price on account of the encumbrance, the grantee may contest the validity of the mortgage, having, in this case, the same

[5] Conkling v. Secor Sewing Machine Co., 55 How. Pr. 269.

[6] Stebbins v. Miller, 12 Allen, 591. Said the court: "When a creditor seizes and sells on execution a debtor's equity in mortgaged real estate, that which he obtains is the entire right of redemption in the premises which the debtor had therein liable to be taken by creditors. There must be a mortgage to justify a sale on execution; since unencumbered real estate cannot be so sold, but is liable only to be appraised and set off. Therefore, it was held in Russell v. Dudley, 3 Met. 147, that in the case of an estate subject to a single mortgage, the purchaser of the equity at the sheriff's sale was estopped to deny its existence and validity; because he bought only an equity of redemption, and if there were no mortgage there could be no such equity; and by establishing the invalidity of the mortgage, he would necessarily establish the invalidity of his own deed and title. Where, however, there are more mortgages than one, so that the debtor's estate is an equity of redemption, which the statute authorizes to be sold on execution, if any of the apparent encumbrances do not really exist, if they are fraudulent and void, or, though once valid, have been fully paid, the purchaser is entitled to redeem from the real encumbrances, and to contest such as are apparent only: Gerrish v. Mace, 9 Gray, 235."

right as the mortgagor himself.[7] Where a deed contains a covenant of warranty, and recites that the premises are subject to a mortgage, but excepts the mortgage from the covenant, the grantee may dispute the validity of the mortgage against the holder.[8] If a person buys a tract of land with information from the grantor of the usurious character of a prior mortgage, and relies on being able to make that defense, he has the right to contest the validity of the mortgage on the ground of usury.[9] And it is held that the grantee under a quitclaim deed for one dollar may contest the mortgage of his grantor on the ground of usury, where there is no other evidence that the grantee had assumed the payment of the mortgage debt, or had agreed to have it paid out of the land.[1] A grantee taking a deed with covenants of warranty

[7] Maher v. Lanfrom, 86 Ill. 513; Flanders v. Doyle, 16 Ill. App. 508. See, also, Lanphier v. Desmond, 187 Ill. 370, 58 N. E. 343; Stough v. Lumber Co., 70 Kan. 713, 79 Pac. 737; Selby v. Sanford, 7 Kan. App. 781, 54 Pac. 17; Wilkinson v. Doyle, 16 Ill. App. 514. The mere acceptance of the deed does not create an estoppel: Welban v. Webster, 89 Minn. 177, 94 N. W. 550; Gray v. Freeman (Tex.) 84 S. W. 1105.

[8] Weed Sewing Machine Co. v. Emerson, 115 Mass. 554. See, also, Flanders v. Doyle, 16 Ill. App. 508; Baldwin v. Tuttle, 23 Iowa, 66; Judson v. Dada, 79 N. Y. 373; Parker v. Jenks, 36 N. J. Eq. 398; Purdy v. Coar, 109 N. Y. 448, 4 Am. St. Rep. 491; Williams v. Thurlow, 31 Me. 392; Wood v. Broadley, 76 Me. 23, 43 Am. Rep. 754; Briggs v. Seymour, 17 Wis. 255; Thompson v. Morgan, 6 Minn. 292; Cummins v. Wire, 6 N. J. Eq. 73.

[9] Newman v. Kershaw, 10 Wis. 333.

[1] Ludington v. Harris, 21 Wis. 239. The court, per Downer, J., said they were of the opinion, "both upon principle and authority, that a general conveyance of land on which there is a mortgage made by the grantor void for usury, gives to the grantee the right to set up the defense of usury; and that a quitclaim deed for the consideration of one dollar gives the same right to the grantee to avail himself of the defense of usury as any other could. The right to set up the defense by the grantee cannot be defeated by inadequacy of consideration, but only by showing an agreement on the part of the grantee, either to assume and pay the debt by the usurious mortgage, or that it should be paid out of the land. If the deed on its face conveys only the equity of redemption, or the land subject to the mortgage, then the

may prove a payment by the mortgagor, which decreases the amount of the encumbrance upon the land.[2]

§ 1067. **Intention of grantee to assume should be clear.** —To render the grantee personally liable to pay a mortgage upon the lands embraced in his deed, it should clearly appear that such was the intention of the parties. A mere statement in the deed that the conveyance is made subject to such mortgage is not sufficient to fix this liability upon him. To effect this result, the deed should contain some language clearly importing that an obligation is intended to be created by one party, and is knowingly assumed by the other, such as, "subject to payment of the mortgage," or that such mortgage "forms a part of the purchase money, which the grantee in the deed assumes to pay," or some other equivalent expres-

grantee, by accepting the deed, agrees that the mortgage debt shall be paid out of the land. And if it appeared by competent evidence that the land was sold to the grantee for a consideration exceeding the amount mentioned in the mortgage, and the mortgage debt was actually deducted from the consideration agreed to be paid by the grantee, this would, as to him, render the land liable to the payment of the usurious mortgage. But no agreement to pay or take the land subject to the usurious mortgage should be inferred from the mere inadequacy of the consideration, or from the premises being conveyed by a quitclaim deed. The authorities, we think, lead to the conclusion, that if the purchaser acquired the interest in the estate which the mortgagor would have had if the conveyance by him to the purchaser had not been made, then the grantee is in a position to avail himself of the defense."

[2] Williams v. Thurlow, 31 Me. 392. And see, also, as to the right of the grantee to contest the validity of a mortgage, Smith v. Cross, 16 Hun, 487; Pearsall v. Kingsland, 3 Edw. Ch. 195; Stevens' Institute v. Sheridan, 30 N. J. Eq. 23. Where a deed recites that it is subject to a mortgage given to secure the payment of specific bonded indebtedness, and contains a covenant to pay all of the present indebtedness "above specified," the specific language will not be controlled by any following general terms in which the grantee undertakes to perform all the "lawful obligations" of the grantor. The effect of the specific covenants is not limited to lawful obligations: Alvord v. Spring Valley Gold Co., 106 Cal. 547.

sion.[3] The grantee does not become personally liable to pay mortgages by accepting a deed, with full covenants, which recites a consideration of a certain amount, with a *habendum* clause, reciting that the grantee is to hold the land subject to four mortgages, which are described as amounting to a certain sum, which sum, it is stated, "has been estimated as a part of the consideration money in this conveyance, and has been deducted therefrom."[4] "Where the words inserted in the deed, and which it is claimed impose a legal obligation on the grantee to pay the existing encumbrances, are of doubtful meaning or ambiguous, evidence showing the value of the premises, or the agreed consideration therefor, and whether a sufficient, or any, part of the same was retained by the grantee for the purpose of paying the mortgage indebtedness,

[3] Stebbins v. Hall, 29 Barb. 524. Bacon, J., said: "Whenever a party is thus sought to be charged with a duty primarily resting upon another, it must arise either from his express assumption or from an obligation which the law implies, and casts upon him, from the words of his contract or the language of his acts. This conclusion, I think, is borne out by the whole current of the authorities to which we were referred on the argument, and some to which no allusion was made. I am aware that in several reported cases the marginal notes state in general terms, and sometimes without any qualification, that where a mortgagor sells the mortgaged premises subject to the mortgage, the purchaser is bound in equity to pay off the mortgage. But in nearly every case, perhaps in all, where such a liability has been expressed, could we be furnished with the exact language employed in the conveyance, we should probably find that something more was added than the mere statement that the deed was subject to the mortgage." The learned justice then proceeds to examine a number of authorities in support of the conclusions which he had stated. See, also, Walker v. Goldsmith, 7 Or. 161; Lewis v. Day, 53 Iowa, 575; Dunn v. Rodgers, 43 Ill. 260; Strong v. Converse, 8 Allen, 557, 85 Am. Dec. 732; Foster v. Atwater, 42 Conn. 244; Tillotson v. Boyd, 4 Sand. 516; Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Moore's Appeal, 88 Pa. St. 450, 32 Am. Rep. 469; Drury v. Tremont Improvement Co., 13 Allen, 168; Fowler v. Fay, 62 Ill. 375; Comstock v. Hitt, 37 Ill. 542; Winans v. Wilkie, 41 Mich. 264.

[4] Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213. See, also, Lang v. Caldwell, 13 Mont. 458, 34 Pac. Rep. 957.

would be material as aids in the construction thereof."[5] A covenant to pay the mortgage is a covenant that the grantee will pay the debt secured thereby.[6] The grantee's assent to assume the mortgage must appear in some manner.[7] It is competent to show by oral testimony the assumption of the mortgage by the grantee,[8] and the assumption of course may be by a separate written contract.[9] If the deed contains an assumption clause, but the grantee never saw the deed and did not know this fact at the time of his conveyance to another in accordance with a prior agreement, a ratification of the promise to assume is not effected by such conveyance.[1] Evidence of the value of the property or of the consideration agreed upon is admissible when it is doubtful whether a deed binds the grantee to pay existing incumbrances.[2] But while a mortgage debt may be assumed by the grantee, without a statement to that effect in the deed, it must appear from the evidence that such assumption was actually made.[3] Where

[5] Winans v. Wilkie, 41 Mich. 264, 266, per Marston, J. A covenant against encumbrances was followed by the language: "Except a mortgage of $2,170, and one interest mortgage of $195, both mortgages given to C, which mortgages of said second party accept and agree to pay." It was held that this language, entirely unexplained by other evidence, was insufficient to show that the grantee assumed the mortgages: Hopper v. Calhoun, 52 Kan. 703, 39 Am. St. Rep. 363. But it might have been shown by proper pleadings and evidence that the mistake was due to the scrivener: Hopkins v. Calhoun, 52 Kan. 703, 39 Am. St. Rep. 363. Where there are no other words to show an assumption of a mortgage than that the land is purchased "subject to" a mortgage, the vendee will not be personally charged with its payment: Walker v. Goodsill, 54 Mo. App. 651.

[6] Hine v. Myrick, 60 Minn. 518, 62 N. W. 1125.

[7] Boisot v. Chandler, 82 Ill. App. 261.

[8] Bossingham v. Syck, 118 Iowa, 192, 91 N. W. 1047; Ordway v. Downey, 18 Wash. 412, 51 Pac. 1047; Bensieck v. Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422.

[9] Wyatt v. Dufrene, 106 Ill. App. 214.

[1] Schmitt v. Merriman, 211 Ill. 263, 71 N. E. 986, affirming 101 Ill. App. 443.

[2] Winans v. Wilkie, 41 Mich. 264, 1 N. W. 1049.

[3] Assets Realization Co. v. Heiden, 215 Ill. 9, 74 N. E. 56.

suit is brought by the mortgagee and the grantee claims that the clause to assume was inserted in the deed fraudulently and without his knowledge, the fact that he, for ten months after notice of the fraud failed to disaffirm, will estop him from setting up the fraud.[4] Such a clause binds the grantee, although the deed containing it was executed by his agent, where the deed is accepted and placed on record with knowledge of its contents.[5] So, where a deed is taken by an agent without the knowledge or authority of the grantee, but the grantee subsequently executes a deed of the property covenanting that he is the owner of the property and he knew of the clause assuming the mortgage and paid interest on the debt secured, he will be estopped from asserting that he did not assume the mortgage.[6] If it is sought to prove by parol evidence that the grantee assumed the payment of a mortgage, such evidence should be clear and conclusive.[7]

§ 1068. **Intention to be gathered from the whole deed.** —In arriving at the intention of the parties to the deed as to the assumption of a mortgage, the whole instrument must be examined, and any part which is repugnant to or inconsistent with the intent of the whole deed, as is manifested to a certainty by other parts, must be rejected or modified so as to conform to such intent. Thus A agreed to convey to B certain premises, and B directed A to execute the deed to C. A, in compliance with this direction, executed a deed of the property to C, and delivered it to B for C. The deed conveyed the land "subject to a certain mortgage made by A, which said mortgage the party hereto of the *first*

[4] Sutter v. Rose, 169 Ill. 66, 48 N. E. 411, affirming 64 Ill. App. 263.

[5] Gage v. Cameron, 212 Ill. 146, 72 N. E. 204.

[6] Ver Planck v. Lee, 19 Wash. 492, 53 Pac. 724.

[7] Ordway v. Downey, 18 Wash. 412, 51 Pac. 1047. In this case the only evidence was that of the grantor and the grantee and the evidence was contradictory.

part assumes and agrees to pay as part of the consideration hereinbefore expressed." Subsequently C conveyed by deed this property to D, who assumed and agreed to pay such mortgage as a part of the consideration. It was held that B was C's agent for the purpose of accepting the deed, and C was bound to perform any agreement contained therein, and the word "first" in the clause of assumption was construed to read and mean "second," by which construction an agreement was constituted on the part of the grantee to pay the encumbrance.[8]

§ 1069. **Contemporaneous agreement.**—A clause absolute in its terms in the deed binding the grantee to pay a mortgage may be modified by a contemporaneous agreement. An owner of land conveyed it by deed, subject to two mortgages. The deed contained this clause: "Both of which mortgages, and the notes secured thereby, and the interest thereon, the said grantee, by the acceptance of this deed, assumes and agrees to pay, and save me and my legal representatives forever harmless therefrom, the same forming part of the consideration of this deed." At the same time at which this deed was executed the grantee agreed in writing under seal with the grantor to save the latter harmless from certain notes aggregating a certain sum, and to convey to the grantor, by good and sufficient deeds, at any time within one year, upon the payment of that sum, the land embraced in his deed, free from all encumbrances, except the mortgages mentioned in such deed. Afterward, and with-

[8] Fairchilds v. Lynch, 42 N. Y. Sup. Ct. (10 Jones & S.) 265. Said the court (p. 278): "There was plainly a mistake of the pen. There is no ambiguity in the words, but there is a mistake. The manifest intent was that whoever was to pay the consideration agreed to pay the mortgage. Theresa Lynch was to pay it, and she was, by an error that happens often in speech, in writing, and in printing, designated as the party of the first part. There is no doubt as to who was meant to be designated."

in the year, the land was sold under a power of sale contained in the second mortgage for an amount less than the mortgage. It was held that the duty imposed upon the grantee must be construed in connection with the terms of the agreement of reconveyance, and that the grantor could not maintain an action brought within the year against the grantee for the balance due on the second mortgage.[9]

§ 1070. **Implying obligation on part of grantee.**— Doubtful or ambiguous expressions will not ordinarily be sufficient to make the grantee personally liable, as the language used in the deed is that of the grantor. The law will not imply an obligation on his part where such is not clearly the intention of the parties. A and B exchanged lands, the land conveyed by A being subject to two mortgages, one of ten thousand dollars, and the other of five thousand dollars. The deed described the land and specified mortgages, and condeed described the land and specified mortgages, and contained this clause: "The above-described property is alone to be holden for the payment of both the above debts." The covenant against encumbrances, inserted in the deed, excepted "the above mortgages of fifteen thousand dollars, which are a part consideration of this deed." A was afterward compelled to pay the second mortgage, and brought suit against B to recover the amount paid, but the court held that the clause which we have quoted could not be given the construction that B assumed a personal obligation to pay the mortgages.[1]

[9] Gaffney v. Hicks, 124 Mass. 301. The agreement to assume is an original undertaking, and may be contained either in the deed, in a separate writing, or rest in parol: Moore v. Booker, 4 N. Dak. 543, 62 N. W. Rep. 607.

[1] Hubbard v. Ensign, 46 Conn. 576. Carpenter, J., who delivered the opinion of the court, said: "In considering this question it is important to ascertain the intentions of the parties. In this, as in other transactions, when that is discovered, effect will be given to it if it can be done consistently with the rules of law. We are looking now for evidence of that intention in the language of the deed. In interpreting that language, we are to

§ 1071. **Grantee's liability for attorney's fee.**—A grantee who, in the deed, has assumed the payment of a mortgage which contains a covenant that a reasonable attorney's fee shall be paid in case of foreclosure of the mortgage, becomes personally liable for the payment of the attorney's fee in the event of foreclosure. By assuming the mortgage he assumes all its incidents.[2]

§ 1072. **Assumption of mortgage under contract of sale, when deed made to another.**—The agreement to assume the mortgage may be contained in an instrument separate from the deed. A person entered into a written contract for the purchase of a piece of real estate, agreeing to pay therefor, partly in cash and partly by assuming the payment of a mortgage on the premises. By the purchaser's request, the deed was made to his wife. The agreement of the vendee

place ourselves in the position of the parties as nearly as may be. The parties have agreed upon the terms of an exchange, and have come together to execute deeds and other writings to carry their agreement into effect. One thing agreed upon is, that the defendant should personally obligate himself to pay the two mortgages amounting to fifteen thousand dollars, and the scrivener is instructed to incorporate that agreement in the deed. We expect him to write in plain, unambiguous language substantially as follows: 'The grantee, by accepting this deed, agrees to pay both said mortgages, and indemnify and save the grantor harmless.' That expresses the intention of the parties fully, and leaves no room for question or doubt. That is a natural, obvious, and easy thing to do. But instead of that, he writes: 'The above-described property is alone to be holden for the payment of both of the above debts.' Is it to be supposed that any intelligent man, especially if he had the advice of an able and astute lawyer, would accept that as an evidence of such an agreement? In this connection, it must be borne in mind that the deed is his instrument, is being prepared under his instructions, and, assuming such a contract to have been made, he will have no difficulty in having it inserted in clear and intelligible language. The fact that he did not do so, but, in lieu thereof, had a clause inserted that will bear another meaning equally well, if not better, is pretty conclusive evidence that no such agreement was in fact made."

[2] Johnson v. Harder, 45 Iowa, 677.

under the contract of purchase, to assume the mortgage it was held, inured to the benefit of the owner of the mortgage, and the fact that the deed, at the vendee's request, was made to his wife, did not affect his liability.[3]

§ 1073. **Grantee's verbal promise to assume.**—It is not necessary that the promise of the grantee to assume the payment of an encumbrance as a part of the consideration for which the deed is made, should be in writing. A verbal promise to do so is valid, and equity will enforce it either at the instance of the grantor or the holder of the mortgage.[4] A promise on the part of the grantor, made at the time of the delivery of a deed by him, to pay an assessment upon the property when due, if the grantee will accept the deed and pay the purchase money, is valid and binding, an agreement of this character not being merged in the deed, nor affected by the statute of frauds.[5] The consideration of a deed may

[3] Pike v. Seiter, 15 Hun (22 N. Y. Sup. Ct.), 402.

[4] Lamb v. Tucker, 42 Iowa, 118; Bolles v. Beach, 2 Zab. (22 N. J. L.) 680, 53 Am. Dec. 263; Putney v. Farnham, 27 Wis. 187; Merriman v. Moore, 90 Pa. St. 78; Wilson v. King, 23 N. J. Eq. 150; Tuttle v. Armstead, 53 Conn. 175; Wright v. Briggs, 99 Ind. 563; Groce v. Jenkins, 28 S. C. 172; Indiana Yearly Meetings v. Haines, 47 Ohio St. 423; Burnham v. Dorr, 72 Me. 198. See Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901; Lang v. Dietz, 191 Ill. 161, 60 N. E. 841; Brossingham v. Syck, 118 Ia. 192, 91 N. W. 1047; Moore v. Booker, 4 N. D. 543, 62 N. W. 607; Ordway v. Downey, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892 (quoting text).

[5] Remington v. Palmer, 62 N. Y. 31. Miller, J., speaking for the court, said: "It is said that all agreements preceding the delivery of the deed were merged in the same. This position is not a sound one, for while all prior agreements may be merged in the deed when executed, it by no means follows that before the contract is fulfilled by delivery and acceptance of the deed, that condition may not be made which are obligatory upon the parties. The deed being ready for delivery, and the plaintiffs ready to pay the money, they had a perfect right to exact, as a condition for fulfilling the contract, that the defendant should pay the assessment when it became due. This is not contradicting a written agreement by parol, but evidence of the terms upon which the money was paid and the conveyance delivered. As

always be inquired into, and an agreement to pay a mortgage is independent of the contract contained in the deed. It is in addition to the terms of the contract as embraced in the deed, and does not vary or contradict them.[6] As a question of proof, it has been held that the grantee's denial, under oath, that he assumed the mortgage, corroborated by the testimony of the scrivener, the consideration expressed in the deed, and the omission of a clause of assumption in it, will not be overcome by the testimony of two witnesses that the grantee admitted the assumption after the sale.[7] "Such a promise is not within the statute of frauds, because it is a promise implied by law from the acceptance of the deed, and because it is a promise to pay the promisee's own debt to another person."[8] "A parol agreement by the grantee, at

the agreement in regard to the consideration was made after the deed was executed and before delivery, there could be no merger of this agreement in the deed: Murdock v. Gilchrist, 52 N. Y. 242. It is urged that this agreement by Harris was void within the statute of frauds, because it related to lands and was not in writing. The agreement was executed and carried into effect by the payment of the money, and hence the defendant became liable to pay the assessment. He had reaped the benefit of the contract, and he cannot thus claim that he is not bound to pay what he agreed to pay because the agreement was not in writing. The statute of frauds has no application to an executed agreement, and is no defense in an action brought to recover the money which the party is bound by the contract to pay. Nor can it be said, I think, that the agreement was partially in writing and partially by parol, and therefore it is inoperative. This is, no doubt, the true rule in cases where there is a contract which by the statute of frauds is required to be in writing: Wright v. Weeks, 25 N. Y. 153. But where there is no written contract, and, as in this case, where a deed was delivered and the money paid under an agreement to pay an assessment when due, neither the rule referred to nor the statute of frauds has any application."

[6] See Barker v. Bradley, 42 N. Y. 316, 1 Am. Rep. 521; Murray v. Smith, 1 Duer, 413; Bowen v. Kurtz, 37 Iowa, 239; Taintor v. Hemmingway, 18 Hun (25 N. Y. Sup. Ct.), 458.

[7] Conover v. Brown, 29 N. J. Eq. 510.

[8] Locke v. Homer, 131 Mass. 93, 102, 41 Am. Rep. 199, per Gray, J. See, also, Alger v. Scoville, 1 Gray, 391; Huborn v. Park, 116 Mass. 541: Goodwin v. Gilbert, 9 Mass. 510; Pike v. Brown, 7 Cush.

the time of taking a deed of conveyance to real estate, that he will assume the mortgage indebtedness upon the property as a part of the consideration of the conveyance, may be enforced in equity by the mortgagee." [9] "A promise by the purchaser of lands that are subject to a mortgage to assume and pay off the incumbrance as a part of the consideration or purchase price is not required to be in writing, because it is not a promise to pay the debt of another, but it is a promise to pay to a third party the debt the grantee owes to the grantor. The fact that in thus paying his own debt the grantee incidentally discharges the debt of his grantor does not bring the promise within the statute of frauds." [1]

§ 1074. **Acceptance of deed.**—A grantee by accepting a deed which provides that he shall assume a mortgage, is as much bound as he would be if he had executed a special contract for that purpose. "The principle is well settled, that where one, by deed-poll, grants land and conveys any

133. In the case last cited the court said: "It was insisted that this promise, if it existed at all, was a promise to pay the debt of another, and so void by the statute of frauds, if not made in writing; also that it concerned real estate, and so was void under another clause of the same statute. We think neither objection tenable. Although the consideration of this promise was a conveyance of real estate, it was a consideration past and executed, and the promise remained a simple obligation to pay money. As to the other objection, that it was a promise to pay the debt of another, the substance of the contract with the plaintiff was on a consideration, moving from him, to pay his debt, for his benefit, and to exonerate him, and was no less a direct promperformance of it, it would satisfy ise to the plaintiff, because, in the a debt due to another." Where the deed recites the existence of a mortgage merely, a subsequent oral promise without consideration, made by the grantee to pay the mortgage, is insufficient to establish an agreement binding on him: Green v. Hall, 45 Neb. 89, 63 N. W. Rep. 119.

[9] Herrin v. Able, 55 Fla. 769, 18 L.R.A.(N.S.) 907, 46 So. 183; Wilson v. King, 23 N. J. Eq. 150; Wright v. Briggs, 99 Ind. 563; Lamb v. Tucker, 42 Ia. 118; Jones, Mortg. sec. 741, et seq; Pom. Eq. Jur. 1206.

[1] Herrin v. Abbe (supra), West v. Granger, 46 Fla. 257, 35 So. 91; Craft v. Kendrick, 39 Fla. 90, 21 So. 803.

right, title, or interest in real estate to another, and where there is any money to be paid by the grantee to the grantor, or any other debt or duty to be performed by the grantee to the grantor, or for his use and benefit, and the grantee accepts the deed and enters on the estate, the grantee becomes bound to make such payment, or perform such duty, and not having sealed the instrument he is not bound by it as a deed; but, it being a duty, the law implies a promise to perform it, upon which promise, in case of failure, *assumpsit* will lie." [2] "Such an undertaking is a contract in writing, and the statute of limitation does not begin to run upon such a contract until the execution of the deed. Nor is it material that this contract is not signed by the grantee. The acceptance of the deed makes it a contract in writing binding upon the grantee, just as the acceptance by a lessee of a lease in writing signed by only the lessor makes it a written contract binding upon such lessee; and suit can be instituted upon it, and the same rights maintained, as though it were also signed by the grantee." [3] A executed a deed-

[2] Pike v. Brown, 7 Cush. 133, per Shaw, C. J; Gaffney v. Hicks, 131 Mass. 124; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Braman v. Dowse, 12 Cush. 227; Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199; Crawford v. Edwards, 33 Mich. 354; Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Finley v. Simpson, 2 Zab. (22 N. J. L.) 311, 53 Am. Dec. 252; Huyler v. Atwood, 26 N. J. Eq. 504; Fairchild v. Lynch, 46 N. Y. Sup. Ct. 1; Taylor v. Whitmore, 35 Mich. 97; Urquhart v. Brayton, 12 R. I. 169; Spaulding v. Hallenbeck, 35 N. Y. 204; Bishop v. Douglass, 25 Wis. 696; Dickason v. Williams, 129 Mass. 182, 37 Am. Rep. 316; Wales v. Sherwood, 1 Abb. N. C. 101; Klein v. Isaacs, 8 Mo. App. 568; Unger v. Smith, 44 Mich. 22; Miller v. Thompson, 34 Mich. 10; Carley v. Fox, 38 Mich. 388; Higman v. Stewart, 38 Mich. 523; Patton v. Gove, 44 N. J. L. 252. See, also, Hadley v. Clark, 8 Ida. 497, 69 Pac. 319; Beeson v. Green, 103 Iowa, 406, 72 N. W. 555; Windle v. Hughes, 40 Or. 1, 65 Pac. 1058; Connor v. Jones (S. D.) 72 N. W. 463.

[3] Schmucker v. Sibert, 18 Kan. 104, 111, 26 Am. Rep. 765; Ricard v. Sanderson, 41 N. Y. 179; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556.

poll to B, and he, B, subsequently executed a deed to C, in which it was recited that the property was the same that was conveyed by A to B. A brought an action against B on a contract contained in their deed, and it was held that the deed executed by B to C was admissible to prove the acceptance by B of the deed from A.[4] Where a grantee accepts a deed inter partes, by which an estate is conveyed, the deed, in legal effect, is the deed of both parties. If the deed contains a stipulation that the grantee will assume and pay a debt secured by a mortgage on the property conveyed, for the payment of which the grantor is personally responsible, such stipulation becomes a contract by the grantee with the grantor to pay the mortgage debt. This is especially so, where the debt secured by the mortgage is computed as a part of the consideration price and the contract being with the grantor for his indemnity, the obligation inures in equity for the benefit of the mortgagee and he is entitled to enforcement against the grantee, so far as the unpaid part of the mortgage debt remains due after the application thereon of the proceeds of the mortgaged estate.[5]

§ 1075. Mistake in deed.—If the scrivener by mistake inserts a clause in the deed binding the grantee to assume a mortgage, where neither of the parties intended to place this liability upon the grantee, and did not know of the insertion of this clause, the mortgagee cannot avail himself of it.[6]

[4] Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199. This agreement of assumption inures to the benefit of the mortgagee: Thompson v. Bertram, 14 Iowa, 476; Corbett v. Waterman, 11 Iowa, 86; Lennig's Estate, 52 Pa. St. 135, 138; Hoff's Appeal, 24 Pa. St. 200; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327; Blyer v. Monholland, 2 Sand. Ch. 478; Converse v. Cook, 8 Vt. 164; Halsey v. Reed, 9 Paige, 446; King v. Whitely, 10 Paige, 465; Curtis v. Tyler, 9 Paige, 432.

[5] Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577.

[6] Stevens' Institute of Technology v. Sheridan, 30 N. J. Eq. 23. Relief may be granted where the assumption clause is inserted through fraud or mutual mistake if relief is properly and seasonably sought:

§ 1076. **Acceptance by agent.**—If the agent has power to accept the deed for the principal, the same rule as to assumption, of course, applies. The grantee named in the deed is bound by an acceptance on the part of an agent duly constituted with power to accept the deed for his principal.[7]

§ 1077. **Deed without grantee's knowledge.**—The reason that a grantee is bound by accepting the deed is, that he cannot accept the benefit without at the same time accepting the burden. If he retains the deed and acquires the title, he takes it subject to such restrictions, and on such conditions, as the grantor has seen fit to impose. But if the deed is made without the grantee's knowledge or consent, he naturally cannot be held bound by an obligation which the grantor desired to impose, but which the grantee never agreed to assume. In such a case the grantee is not bound by a clause of assumption, when he repudiates the deed as soon as he learns of its existence.[8]

§ 1078. **Grantee's implied promise to indemnify grantor.**—Notwithstanding that the grantee has not made any

Logan v. Miller, 106 Ia. 511, 76 N. W. 1005; Jones v. Wilson, 6 Ariz. 125, 53 Pac. 583; Bogart v. Phillips, 112 Mich. 697, 71 N. W. 320; Clifford v. Minor, 76 Minn. 12, 78 N. W. 861; Southern etc. Ass'n v. Winans, 24 Tex. Civ. App. 544, 60 S. W. 825; Hull v. Vining, 17 Wash. 352, 49 Pac. 537.

[7] Fairchild v. Lynch, 42 N. Y. Sup. Ct. 265.

[8] Stevens' Institute of Technology v. Sheridan, 30 N. J. Eq. 23; Cordts v. Hargrave, 29 N. J. Eq. 446; Culver v. Badger, 29 N. J. Eq. 74. Where a purchaser took a deed in the name of another without his knowledge, the deed containing a stipulation that the grantee assumed the mortgage, and the latter when informed of the facts procured a release from the vendor, it was held that he was not liable on the covenant to the mortgagee, who had not accepted it before its release, and who had in the meantime become entitled to no equities: Gold v. Ogden, 61 Minn. 88, 63 N. W. Rep. 266. Grantee must have knowledge of assumption clause. See Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986. Grantee must repudiate promptly upon discovery of the clause. See Ver Planck v. Lee, 19 Wash. 492.

agreement to pay a mortgage upon the property, yet if the mortgage forms a part of the consideration for which the land is purchased, the law implies a promise, from the nature of the transaction, on the part of the grantee to indemnify the grantor. "It may be laid down as a general rule that a purchaser who buys, subject to a subsisting mortgage, and the mortgage debt forms a part of the price or consideration which he is to pay, and which he accordingly assumes, and he takes his deed subject to the mortgage and enters into the possession of the premises, is, in equity, bound to indemnity his grantor against the mortgage debt, although he enters into no bond or express covenant to that effect; and if he should leave his grantor to pay off the mortgage, it appears to me that he would be personally liable in an action at law by his grantor for the money so paid. It is true, he may not be liable personally to the mortgagee without something passing between them. If there should have been an express promise to the mortgagee, by the purchaser, to pay the debt, I do not see why there would not be sufficient consideration to support such a promise." [9]

[9] The Vice-Chancellor in Dorr v. Peters, 3 Edw. Ch. 132; Klapworth v. Dressler, 2 Beasl. (13 N. J. Eq.) 62, 78 Am. Dec. 69; Cornell v. Prescott, 2 Barb. 16; Stevenson v. Black, 1 N. J. Eq. (Sax.) 338; Townsend v. Ward, 27 Conn. 610; Flagg v. Thurber, 14 Barb. 196; Moore's Appeal, 88 Pa. St. 450, 32 Am. Rep. 469; Marsh v. Pike, 1 Sand. Ch. 210; Thompson v. Thompson, 4 Ohio St. 333; Blyer v. Monholland, 2 Sand. Ch. 478; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650; Scott v. Featherston, 5 La. Ann. 306; Wood v. Smith, 51 Iowa, 156; Hartshorne v. Hartshorne, 2 N J. Eq. (1 Green) 349; Schlatre v. Greaud, 19 La Ann. 125; Ferns v. Crawford, 2 Denio, 595.

In Thompson v. Thompson, 4 Ohio St. 333, 349; Thurman, C. J., says: "It seems to be a well-settled principle that the purchaser of encumbered estate, if he agree to take it subject to the encumbrance, and an abatement is made in the price on that account, is bound to indemnify his grantor against the encumbrance, whether he expressly promise to do so or not, a promise to that effect being implied from the nature of the transaction: Tweddell v. Tweddell, 2 Brown Ch. 154, margin; Woods v. Huntingford, 3 Ves. Jr. (Sumner's ed.) 132, margin; Waring v. Ward, 7 Ves. Jr.

§ 1079. Extent of grantee's liability.—The grantee's liability in the case mentioned in the preceding section does not extend beyond the value of the property. He may, whenever he pleases, surrender the property in satisfaction of the encumbrance. "If he would retain and enjoy the premises, then he must pay off the encumbrance, and unite the legal title with his equitable interest. He may, therefore, safely be said to be liable to the extent of the value of the premises, and not beyond it. He takes them, it is true, *cum onere,* but may relinquish them *cum onere.*" [1]

§ 1080. Release of covenant against encumbrances by grantee's subsequent assumption.—A deed may be made subject to a mortgage, and may contain a general covenant against all encumbrances except the specified mortgage, and though the consideration expressed in the deed may be simply the value of the equity of redemption, still, if a part of the true consideration was that the grantee should pay the mortgage debt, it becomes his duty, as between him and his grantor, so to discharge it. A portion of a large lot of land subject to a mortgage was conveyed by the owner, who executed a deed with covenants of warranty against the mortgage. The grantee, some time afterward, made an offer for the purchase of the residue, at a specified price, and in his offer agreed to

(Sumner's ed.) 337, margin; Earl of Oxford v. Lady Rodney, 14 Ves. Jr. (Sumner's ed.) 423, margin." See, also, in this connection, in Re May 218 Pa. 64, 67 Atl. 120.

[1] Tichenor v. Dodd, 3 Green Ch. (4 N. J. Eq.) 446, 454. In Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650, 655, it was said: "If the purchaser buys the mere equity of redemption, he is liable to the extent of the lands purchased and no farther, and he will be discharged on releasing the lands." And see, also, Mount v. Van Ness, 33 N. J. Eq. 262; Cumberland v. Codrington, 3 Johns. Ch. 229, 8 Am. Dec. 492. Where the grantor was not liable for the mortgage, the recital in a deed that the land is subject to a mortgage, which the grantee assumes and agrees to pay as a part of the purchase price, will not make the grantee personally liable for the mortgage debt: Carrier v. United States Paper Co., 73 Hun, 287.

assume the debt secured by the mortgage, and to pay the remainder in money. On the aceptance of this offer the owner executed a deed, which conveyed the land subject to the mortgage, and named an amount as consideration which was simply the value of the equity of redemption. This second deed also contained a covenant against encumbrances, except the mortgage we allude to. Under these circumstances, it became the duty of the grantee to pay the mortgage debt, and the grantor was released from the covenant contained in his first deed against the mortgage.[2]

§ 1081. **When grantee is a married woman.**—By the statutes of many, if not most of the States, as incidental to her right to acquire property and hold it for her sole and separate use, a married woman may buy property upon credit, and enter into a valid obligation to pay the purchase price. When, therefore, as a grantee in a deed, she assumes and agrees to pay a mortgage upon the property, she is personally liable for the mortgage debt.[3] "The law, in giving married women the right to acquire and hold land, did not intend that their capacity to make contracts to secure the purchase money should be so limited and restricted that they could get the land without paying for it. Whether they secure

[2] Drury v. Tremont Improvement Co., 13 Allen, 168. When the deed is made subject to a mortgage and the amount is deducted from the purchase price, with the understanding that the grantee shall pay it, the mortgage should be made an exception in the covenants, else it may be said that the grantor covenanted against the encumbrance, and thereby it became his duty to pay it: Estabrook v. Smith, 6 Gray, 572, 66 Am. Dec. 445. That the encumbrance was intended to be excepted from the operation of the covenants cannot be shown by oral evidence, because such evidence would vary the terms of the deed: Spurr v. Andrew, 6 Allen, 420. See Harlow v. Thomas, 15 Pick. 66.

[3] Cashman v. Henry, 75 N. Y. 103, 31 Am. Rep. 437; Huyler v. Atwood, 26 N. J. Eq. 504, s. c. 28 N. J. Eq. 275; Vrooman v. Turner, 8 Hun, 78, s. c. 69 N. Y. 280, 25 Am. Rep. 195; Ballin v. Dillaye, 37 N. Y. 35. But see Kitchell v. Mudgett, 37 Mich. 81.

the payment of the purchase money by bond and mortgage, note, or contract to assume the payment of a mortgage, it is a contract they have a capacity to make, and must be enforced."[4] But if the deed is made to a married woman without her consent and is never delivered to her, she is not bound by a clause in the deed in which it is recited that she assumes the payment of a mortgage upon the property described in the deed.[5]

§ 1082. **Legislation in New York.**—In New York, the common-law restrictions placed upon the power of a married woman to purchase property, and to bind hereslf by agreements, have, by statute, been very greatly if not entirely removed. The court of appeals of that State, in a well considered case, reviews the legislation upon the subject of the capacity of a married woman to bind herself by contract, and particularly with reference to her power to assume the payment of a mortgage, by accepting a deed in which she is named as grantee, and in the language of Mr. Justice Andrews, who delivered the opinion of the court, say: "It will be observed that these statutes confer upon a married woman the broadest and most comprehensive powers over her separate real and personal property. Her power of disposition is absolute and unqualified. She may sell or give it away. She may enter into any contract in respect to her separate real property 'with the same effect and in all respects as if she were unmarried,' and this court has held that, as incident to her separate ownership, she is liable for torts committed in its management, and for the fraud of her agent in dealing with third persons in respect to it.[6] She may engage in business and incur the most dangerous, and even ruinous, liabil-

[4] Huyler v. Atwood, 26 N. J. Eq. 504, 506, per the Vice-Chancellor.

[5] Culver v. Badger, 29 N. J. Eq. 74.

[6] Citing Rowe v. Smith, 45 N. Y. 230; Baum v. Mullen, 47 N. Y. 557.

ities in its prosecution, and they will be enforced against her to the same extent as if she was unmarried. She is no longer regarded as under the tutelage of the court, but the new legislation assumes that she is capable of managing her own interests. . . . The conclusion is that under the statutes as they now exist, a married woman, as incident to her right to acquire real and personal property by purchase, and hold it to her sole and separate use, may purchase property upon credit, and bind herself by an executory contract to pay the consideration money, and that her bond, note, or other engagement given and entered into to secure the payment of the purchase price of property acquired and held for her separate use, may be enforced against her in the same manner and to the same extent as if she was a *feme sole*, and that her liability does not depend upon the proof or existence of special circumstances, but is governed by the ordinary rules which determine the liability of persons *sui juris* upon their contracts." [7]

§ 1083. **Agreement for assumption in unusual place in deed.**—A clause binding the grantee to pay a mortgage was not written in its usual place in the deed, at the end of the description of the property, but was contained among the covenants, a part of the deed where such a clause is very seldom found. The grantee examined the deed and expressed his satisfaction with it, but was not aware that it contained this clause. It was not a part of the agreement for the purchase of the property that the grantee should personally assume the payment of the mortgage. At the end of the description of the property there was a statement that the property was conveyed subject to the mortgage, but no language importing that the grantee assumed its payment. When

[7] Cashman v. Henry, 75 N. Y. 103, 31 Am. Rep. 437. See Ballin v. Dillaye, 37 N. Y. 35. But see Yale v. Dederer, 18 N. Y. 265, 72 Am. Dec. 503, 22 N. Y. 450, 78 Am. Dec. 216.

he subsequently discovered that his deed contained this clause, he went to the agent of the grantor through whom he had purchased the property and complained of it, and then declared to him that he would not be bound by it, and soon afterward he made the same declaration to the grantor. He offered to surrender the deed on a return of the consideration, and on the grantor stating that he was unable to make the return, he offered to surrender the deed for a small sum, which offer the grantor refused to accept. The mortgagee was not allowed to derive any advantage from the clause of assumption.[8]

§ 1084. **Verbal agreement that grantor should advance money.**—A verbal agreement inconsistent with the terms of the deed cannot be enforced. A and B made an exchange of certain real estate. In the deed from A to B, a clause was inserted that the deed was subject to a mortgage described in the deed, "which said mortgage the said party of the second part hereby agrees to pay." B paid the amount of the mortgage, and brought an action against A to recover the amount so paid, in accordance with the contract under which the exchange was made, by which it was claimed that A, the grantor, agreed to furnish the money to pay the mortgage. But the alleged verbal agreement was held to be inconsistent with the terms of the deed, and the grantee was not allowd to recover upon it against the grantor.[9]

§ 1085. **Fraudulent representations of grantor as to title.**—If the grantor had no title to the property, and the grantee was induced to take a deed, and to assume the payment of a mortgage by the false and fraudulent representations of the grantor as to his title, these matters con-

[8] Bull v. Titsworth, 29 N. J. Eq. 73.

[9] Unger v. Smith, 44 Mich. 22.

stitute a good defense in an action by the mortgagee against the grantee, to recover the amount of the mortgage.[1]

§ 1086. **Mistake in description.**—If the premises are not correctly described in the deed, a grantee who has accepted a deed by which he assumes the payment of a mortgage, cannot free himslf from liability on the ground that by reason of the mistake he acquired no legal title, where by virtue of his deed he obtained possession of the proper property, and the right to have the error rectified, but instead of taking the proper course to accomplish this, allowed the premises to be fraudulently conveyed and delivered to a third person, for the purpose of cutting off the mortgage.[2]

§ 1087. **Intermediate grant subject to first mortgage.**—In the absence of any stipulation in the deed that the grantee shall assume and pay a mortgage, a statement in the deed from an intermediate holder of a part of the premises covered by a mortgage, that the grant is subject to such mortgage, will not cause the mortgage to be a specific charge upon the portion conveyed by such deed, so as to affect the equities existing between second and third mortgagees upon other portion of the encumbered premises.[3]

[1] Benedict v. Hunt, 32 Iowa, 27.

[2] Crawford v. Edwards, 33 Mich. 354. And see Comstock v. Smith, 26 Mich. 306.

[3] Slater v. Breese, 36 Mich. 77. "The language," said the court, "neither expressed nor implied any assumption by the grantees of the payment of the mortgage in suit, nor any intention that the particular interest granted should be considered as charged thereafter with the whole amount of the old mortgage, in preference to the other property, and there was nothing in the situation of Spaulding or Mrs. Smith to influence them to desire anything of that kind. They were not original mortgagors, but intermediate holders of a portion of the mortgaged premises, and were never liable except in respect to the land. The only reasonable supposition is that the real purpose of the statement in the deeds was to except the named encumbrances from the covenants."

§ 1088. **Collusion of grantee with mortgagee.**—Where the grantee takes the land subject to a mortgage, but does not enter into a personal covenant to pay the encumbrance, the grantor thus remaining liable for a deficiency after a foreclosure sale, and where the grantee by collusion with the mortgagee purchases at a foreclosure sale the land for a sum much below its real value, and less than the amount of the mortgage, the sale may, on the motion of the grantor, be set aside, if this be necessary for the protection of his interests, and the grantor may avail himself of the legal liability for the deficiency of this collusion as an equitable defense.[4]

§ 1089. **Personal liability of grantor.**—If the grantor was not personally liable to pay the debt, the mortgagee, it is held in some of the States, cannot take advantage of an assumption to pay his mortgage contained in a deed to a subsequent grantee, on the ground that the mortgagee's right to relief does not depend upon any original equity existing in himself, but upon the right of the mortgagor against his grantee, to which right the mortgagee succeeds, and that when the grantor was not himself liable he does not become a surety, and that it is necessary that he should be a surety to enable the mortgagee to avail himself of the agreement between the surety and principal.[5] In cases of this kind it is

[4] Cleveland v. Southard, 25 Wis. 479.

[5] Norwood v. De Hart, 30 N. J. Eq. 412; King v. Whitely, 10 Paige, 465; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650; Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Mount v. Van Ness, 33 N. J. Eq. 262; Crowell v. Currier, 27 N. J. Eq. 152. See Johnson v. Harder, 45 Iowa, 677; Anthony v. Herman, 14 Kan. 494; Ream v. Jack, 44 Iowa, 325; Rogers v. Heron, 92 Ill. 583. See also, in this connection, Ward v. De Oca, 120 Cal. 102, 52 Pac. 130; Williams v. Van Geison, 79 N. Y. Supp. 95, 76 App. Div. 592; Young Men's Christian Ass'n v. Croft, 34 Or. 106, 55 Pac. 439, 75 Am. St. Rep. 568, in which it is held that a grantee of mortgaged premises who agrees to pay the mortgage debt is not personally answerable therefor if his immediate grantor was not personally bound. See, also, to the

considered that the grantee does not become personally liable through the grantor to the holder of the mortgage to pay the debt to him. It results as a general rule, therefore, that a prior mortgagee cannot enforce any personal liability upon a subsequent mortgagee where the agreement to assume a mortgage is contained in a mortgage.[6] This rule is not changed by the fact that the assumption of the prior mortgage is contained in an absolute deed intended as a mortgage.[7] In several of the States a mortgagee may enforce the promise of a grantee to assume the payment of a mortgage as if it had been made to him directly.[8] But notwithstanding

same effect: Kramer v. Gardner, 104 Minn. 370, 22 L.R.A.(N.S.) 492, 116 N. W. 925, and note; Bonhoff v. Wiehorst, 108 N. Y. Supp. 437, 57 Misc. 456; Howard v. Robbins, 73 N. Y. Supp. 172, 67 App. Div. 245, aff'd in 170 N. Y. 498, 63 N. E. 530; Biddle v. Pugh, 59 N. J. Eq. 480, 45 Atl. 626. And see, Clement v. Willett, 105 Minn. 267, 17 L.R.A. (N.S.) 1094, 117 N. W. 491, 127 Am. St. Rep. 562; Ross v. Kennison, 38 Iowa, 396.

[6] Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440.

[7] Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440; Gaffney v. Hicks, 131 Mass. 124; Arnaud v. Grigg, 29 N. J. Eq. 482. But see Ricard v. Sanderson, 41 N. Y. 179.

[8] Thorp v. Keokuk Coal Co., 48 N. Y. 253; Lawrence v. Fox, 20 N. Y. 268; Campbell v. Smith, 8 Hun, 6. The doctrine that when a person makes a promise for the benefit of a third person, though at one time questioned, now generally prevails: Lamb v. Tucker, 42 Iowa, 118; Bassett v. Hughes, 43 Wis. 319; Miller v. Winchell, 70 N. Y. 437; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327. See, also, Ross v. Kennison, 38 Iowa, 396; Moses v. Dallas Dist. Ct., 12 Iowa, 139; Hand v. Kennedy, 83 N. Y. 149; Corbett v. Waterman, 11 Iowa, 86; Fitzgerald v. Barker, 70 Mo. 685; Heim v. Vogel, 69 Mo. 529; Center v. McQuesten, 18 Kan. 480; McDowell v. Laev, 35 Wis. 171; Scott v. Gill, 19 Iowa, 187. The rule is laid down in Enos v. Sanger, 96 Wis. 150, 37 L.R.A. 862, 70 N. W. 1069, 65 Am. St. Rep. 38, as follows: "Where a grantee in the conveyance to him, assumes and agrees to pay the debt of a third person as part of the consideration for his purchase, there is no necessity for any consideration to pass from such third person or his creditor to such grantee to support such agreement; a portion of the consideration for the purchase being left in such grantee's hands, appropriated by the grantor to the payment of the debt which such grantee agrees to pay in consideration of the conveyance and of such appropriation of the purchase money, he cannot be heard

this rule, it is necessary that the grantee be personally liable upon the mortgage, which the grantee has assumed, to enable the holder of the mortgage to enforce the liability of the grantee upon his covenant.[9]

§ 1090. **In Pennsylvania.**—It is held that although the grantor may not be personally liable, yet if the grantee assume the payment of a mortgage, the mortgagee may enforce this liability against him. A conveyed land to B "under the subject" to the payment of a mortgage to C. The deed under which A held contained no clause that it was "under and subject" to a mortgage. C brought an action against B to recover the amount of the mortgage, and offered to prove that B, when he accepted the deed from A, made an express agreement that he would assume the payment of the mortgage, and that the mortgage formed part of the consideration. The lower court held that because the grantor was under no obligation to pay the mortgage, his grantee was not liable upon his promise. But the supreme court said: "This was clearly error. The consideration was the price of the land. It was nothing to Cochran's vendees what the former did with the purchase money. He saw proper to apply a portion of it to the payment of the mortgages, which bound the land conveyed, although they imposed no personal liability upon him. A vendor may direct how the purchase money shall be paid. He may reserve it to himself, donate it to a public charity, or may make such other disposition of it as may best meet his views, and if his vendee agrees

to object to the performance of his contract because his grantor was not liable for such debt. When the grantor makes such an appropriation, and the grantee, for a sufficient consideration, promises to pay the amount so appropriated to the creditor of such third person, such grantee thereby becomes liable to such creditor; and such liability rests solely on such consideration and such promise."

[9] Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195. See Real Estate Trust Co. v. Balch, 45 N. Y. Sup. Ct. 528.

to pay it according to such directions, he cannot set up as a defense that his vendor was under no duty to apply it in such manner." [1]

§ 1091. **Enforcing grantee's promise before payment by grantor.**—When the grantee has assumed the payment of a mortgage, the grantor may maintain an action on this promise without first having paid the debt which the grantee assumed and agreed to pay.[2] Mr. Justice Day says that the

[1] Merriman v. Moore, 90 Pa. St. 78, per Paxon, J., See, also, in this connection, Marble etc. Bank v. Mesarvey, 101 Ia. 285, 70 N. W. 198; Crane v. Stinde, 156 Mo. 262, 55 S. W. 863, 55 S. W. 907; Hare v. Murphy, 45 Neb. 809, 29 L.R.A. 851, 64 N. W. 211; McGregor v. Bldg. etc. Ass'n (Neb.) 99 N. W. 509; McKay v. Ward, 20 Utah, 149, 46 L.R.A. 623, 57 Pac. 1024; Enos v. Sanger, 96 Wis. 150, 37 L.R.A. 862, 70 N. W. 1069, 65 Am. St. Rep. 38. For cases that, as a general principle, a promise by one to pay the debt of another cannot be directly enforced by the creditor, see Mellen v. Whipple, 1 Gray, 317; Prentice v. Brimhall, 123 Mass. 291; Second Nat. Bank v. Grand Lodge, 98 U. S. 123, 25 L. ed. 75; Gautzert v. Hoge, 73 Ill. 30; Crowell v. Currier, 27 N. J. Eq. 152; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650; Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1; Coffin v. Adams, 131 Mass. 133; Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199; Pettee v. Peppard, 120 Mass. 522; Brewer v. Dyer, 7 Cush. 337; Bohanan v. Pope, 42 Me. 93; Motley v. Manufacturers' Ins. Co., 29 Me. 337, 50 Am. Dec. 591; Klapworth v. Dressler, 13 N. J. Eq. 62, 78 Am. Dec. 69; Stuart v. Worden, 42 Mich. 154; Booth v. Connecticut Mut. Life Ins. Co., 43 Mich. 299; Unger v. Smith, 44 Mich. 22; Higman v. Stewart, 38 Mich. 513; Hicks v. McGarry, 38 Mich. 667. For cases *contra*, see Merriam v. Moore, 90 Pa. St. 78; Urquhart v. Brayton, 12 R. I. 169. And see, also, Justice v. Tallman, 86 Pa. St. 147; Hoff's Appeal, 24 Pa. St. 200; Townsend v. Long, 77 Pa. St. 143, 18 Am. Rep. 438.

[2] Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199; Brewer v. Worthington, 10 Allen, 329; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Foster v. Atwater, 42 Conn. 244; Wilson v. Stilwell, 9 Ohio St. 467, 75 Am. Dec. 477; Valentine v. Wheeler, 122 Mass. 566; Stout v. Folger, 34 Iowa, 71, 11 Am. Rep. 138; Gregory v. Hartley, 6 Neb. 356; Snyder v. Summers, 1 Lea (Tenn.), 534, 27 Am. Rep. 778; Gaffney v. Hicks, 124 Mass. 301; Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659; Cilley v. Fenton, 130 Mass. 323. And see Braman v. Dowse, 12 Cush. 227; Belloni v. Freeborn, 63 N. Y. 683; Lathrop

following doctrines will be found to underlie the authorities: "That if a condition or promise be only to indemnify and save harmless a party from some consequence, no action can be maintained until actual damage has been sustained by the plaintiff. But if the covenant or promise be to perform some act for the plaintiff's benefit, as well as to indemnify and save him harmless from the consequences of nonperformance, the neglect to perform that act is a breach of contract, and will give an immediate right of action."[3] In a case in Maine, A mortgaged a tract of land to B, and subsequently conveyed the same land to C by a deed of warranty, thus acknowledging that the consideration was paid. A received C's note and mortgage for part of the consideration, and left the balance in the hands of C, who promised to pay the same to B, and take up A's note and mortgage. C, however, neglected to do this, and the note and mortgage to B remained unpaid. The court declared, however, that as the note and mortgage had not been taken up, A could not recover the money placed in the hands of C, but only nominal damages.[4]

§ 1092. **Discharge of mortgage by grantor.**—Where a grantee of land subject to a mortgage takes a bond from the grantor that the latter will keep the former harmless from a second mortgage, and will cause it to be assigned to him within six months, the grantee is entitled upon a failure to receive such assignment within six months, to maintain an action, even after the foreclosure of the first mortgage, and, in case the property is not worth more than the aggregate of the two mortgages, to recover the difference between the

v. Atwood, 21 Conn. 117. See, also, Kreling v. Kreling, 118 Cal. 413, 50 Pac. 546; Stichter v. Cox, 52 Neb. 532, 72 N. W. 848; Collander v. Edmison, 8 S. D. 81, 65 N. W. 425.

[3] In Stout v. Folger, 34 Iowa, 71, 74, 11 Am. Rep. 138.

[4] Burbank v. Gould, 15 Me. 118.

value of the land and the amount due on the first mortgage.[5] Where the grantor has executed a warranty deed, and has covenanted to pay off a mortgage upon the land conveyed, he cannot, by allowing the mortgage to be foreclosed and redeeming the land, take the title to himself. A conveyed to B a portion of a lot on which there was a mortgage, and then permitted the mortgage to be foreclosed upon the whole lot, and entered into a collusive arrangement with C for the purpose of defrauding B. The lot was bid in by C, and he refused to release to B, except upon compliance with certain terms. The court held that C should be treated as holding the portion purchased by B, as trustee for B's benefit, and, so far as B was concerned, as A's mortgagee.[6] A grantee under a deed with covenants of seisin and warranty, executed a mortgage for the purchase money to his grantor by a deed containing the same covenants. The grantee was evicted by force of a paramount title. He was allowed to maintain an action against his grantor on the latter's covenant of seisin, and it was held that the covenants of the mortgagor did not operate as a rebutter.[7]

§ 1093. **Release of covenant by grantor.**—Two opposite views prevail as to the power of the grantor to deprive a mortgagee of the stipulation made by a grantee to assume a mortgage. Where the covenant is considered one of indemnity only, of which the mortgagee may take advantage by a species of equitable subrogation, the parties to the covenant may at any time before a bill for foreclosure is filed, discharge the liability by a reconveyance, and as there is then no longer any contract of indemnity, there can be no right to which the mortgagee can be subrogated.[8] And this may

[5] Coombs v. Jenkins, 16 Gray, 153. See Wilcox v. Musche, 39 Mich. 101.

[6] Huxley v. Rice, 40 Mich. 73. See Colby v. Cato, 47 Ala. 247.

[7] Sumner v. Barnard, 12 Met. 459.

[8] Youngs v. Trustees of Public Schools, 31 N. J. Eq. 290; Crowell v. Hospital of St. Barnabas, 27 N.

be done under this view by a simple release.[9] But on the other hand, in other courts, the promise is regarded as irrevocable, and it is held that where the deed to the grantee is absolute, he incurs an absolute obligation for its payment by assuming it, and that without the consent of the mortgagee, the grantor cannot release this obligation.[1]

§ 1094. **Rights of grantor.**—If the grantor is compelled to pay the amount of a mortgage which the grantee has assumed and agreed to pay, he may recover the amount so paid from the grantee.[2] The grantor may have the mortgage assigned to himself and foreclose it, and sue for the deficiency as well as sue on the agreement.[3] A mortgagor who in a case of this kind is forced to pay the mortgage, is subrogated to the benefit of the security, and becomes an equitable assignee of it.[4] The grantor is entitled to recover as damages

J. Eq. 650; Laing v. Byrne, 34 N. J. Eq. 52.

[9] Youngs v. Trustees of Public Schools, 31 N. J. Eq. 290; Trustees for Support of Public Schools v. Anderson, 30 N. J. Eq. 366. See, also, Gold v. Odgen, 61 Minn. 88, 63 N. W. 266.

[1] Douglass v. Wells, 18 Hun, 88; Campbell v. Smith, 71 N. Y. 26, 27 Am. Rep. 5; Hartley v. Harrison, 24 N. Y. 170; Kelly v. Roberts, 40 N. Y. 432; Bassett v. Hughes, 43 Wis. 319; Whiting v. Gearty, 14 Hun, 498; Flagg v. Munger, 9 N. Y. 483. See, also, Judson v. Dada, 79 N. Y. 373; Durham v. Bischof, 47 Ind. 211. See, also, Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652. Cannot release after adoption of contract by mortgagee. See Gibson v. Hambleton, 52 Neb. 601, 72 N. W. 1033; Field v. Thistle, 58 N. J. Eq. 339, 43 Atl. 1072.

[2] Wood v. Smith, 51 Iowa, 156; Lappen v. Gill, 129 Mass. 349. See, also, Haas v. Dudley, 30 Or. 355, 48 Pac. 168; Devine v. Mortgage Co., (Tex.) 48 S. W. 585; In re May, 218 Pa. 64, 67 Atl. 120.

[3] Braman v. Dowse, 12 Cush. 227; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Strohauer v. Voltz, 42 Mich. 444; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650; Jewett v. Draper, 6 Allen, 434; Bolles v. Beach, 22 N. J. L. 680, 53 Am. Dec. 263; Mills v. Watson, 1 Sweeny, 374. See, also, Bank v. Snow, 197 Mass. 339, 83 N. E. 1099.

[4] Ayers v. Dixon, 78 N. Y. 318; Kinnear v. Lowell, 34 Me. 299; Risk v. Hoffman, 69 Ind. 137; Baker v. Terrell, 8 Minn. 195. See, also, Rubens v. Prindle, 44 Barb. 336; Marsh v. Pike, 1 Sand. Ch. 210; Cornell v. Prescott, 2 Barb.

the amount of the mortgage, and the interest due thereon,[5] or the amount which he has paid where he has discharged it before commencing his action.[6]

§ 1095. **Deed to tenants in common.**—If the grantees assuming the payment of a mortgage are tenants in common, they are jointly liable for a breach of the agreement. Thus, three grantees were held to be jointly liable under a deed which conveyed land to them, one-half to one and the other half to the other two, the *habendum* being in the same form, and the deed stating that the land was subject to the mortgage, which "the said grantees are to assume and pay."[7] A and B were each the owners of an undivided one-half of a tract of land. A mortgaged his interest in the land to C, and subsequently, with his cotenant B, conveyed the land to D and E, D receiving two-thirds and E one-third, by two separate deeds, in each of which the grantee agreed to assume and pay the mortgage. After the mortgage became due, A commenced suit against D and E for foreclosure, and it was held that it was not necessary for him to first pay off the mortgage before bringing his suit, and that the assumption of the mortgage by D and E did not extend it over the whole tract of land, nor was it equivalent to an understanding that it should be a part of the purchase money so as to entitle the grantors to claim a vendor's lien on the whole tract.[8]

16; Marshall v. Davies, 78 N. Y. 414.

[5] Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199. See Cilley v. Fenton, 130 Mass. 123.

[6] Toun v. Wood, 37 Ill. 512. See Hall v. Way, 47 Conn. 467; Elmer v. Welch, 47 Conn. 46.

[7] Fenton v. Lord, 128 Mass. 466. Where property is covered by an indivisible mortgage, the voluntary partition of it, and a subsequent execution of a mortgage on one part, will not prevent the enforcement of the mortgage as against that part: Groves v. Sentell, 153 U. S. 465.

[8] Abell v. Coons, 7 Cal. 105, 68 Am. Dec. 229. Where a purchaser of a half interest in land agrees to pay half of the mortgage debt resting on it, he is not entitled to a release of his half interest on tendering the amount of one-half of the debt: Ward v. Green (Tex. Civ. App., Dec. 5, 1894), 28 S. W.

§ 1096. **Notice of rights of mortgagee from assumption clause in deed.**—A statement contained in a deed which is duly recorded, that the deed is made subject to a mortgage held by a third person, is, it seems, constructive notice to all persons claiming under such deed of the rights of the holder of the mortgage referred to.[9]

§ 1097. **Grantee's right to deduct mortgages.**—A grantee who has received a deed, and has executed a mortgage upon the same property to secure the payment of the purchase money, may pay off encumbrances upon the land, the existence of which he knew at the time he made the contract, and may deduct the amount so paid from the amount due upon the mortgage made by him.[1]

§ 1098. **Grantee's purchase of outstanding title.**—If, subsequently to the execution of the mortgage, the grantee from the mortgagor purchases a paramount title outstanding in a third person, the mortgagee cannot claim the benefit of this purchase, nor will it operate as a confirmation of his title.[2]

§ 1099. **Deeds subject to two mortgages.**—When there are two mortgages upon the property, and the grantee, at the time of the purchase, agrees with the mortgagor to pay the mortgages, and retains a part of the consideration money for that purpose, and enters into possession, he is not permitted, by taking a conveyance from the first mortgagee, to set it up against the second mortgagee, notwithstanding the mortgagor deceived him as to the amount due.[3]

Rep. 574. A purchaser of a half interest subject to a mortgage, one-half of which he assumes, is liable on a deficiency judgment after foreclosure only to the extent of half the mortgage debt, after deducting half of the price for which the land sold: Blass v. Terry, 87 Hun, 563.

[9] Campbell v. Vedder, 1 Abb. N. Y. App. 295; Crofut v. Wood, 3 Hun, 571.

[1] Wolbert v. Lucas, 10 Pa. St. 73, 49 Am. Dec. 578.

[2] Knox v. Easton, 38 Ala. 345.

[3] Converse v. Cook, 8 Vt. 164.

CHAPTER XXXI.

DEED WHEN A MORTGAGE.

§ 1100. In general.
1101. Rule at law.
1102. Requirements as to time of execution.
1103. Deed and defeasance may be shown by parol evidence to be parts of same transaction.
1104. Condition in deed construed as lien.
1105. Cancellation of defeasance.
1106. Transfer of absolute title.
1107. Waiver of right of redemption.
1108. Confidential relations.
1109. Notice given by recording.
1110. Conditional sale or mortgage.
1111. Purchase money mortgage by married woman.
111a. Same by natural guardian of minors.
1112. Absolute deed as considered in equity when executed as security for money.
1113. Administrators' and judicial sales.
1114. Third person disputing character of instrument.
1115. Whenever debt exists, transaction is a mortgage.
1116. Voluntary deed and agreement for mortgage.
§ 1117. Absolute deed made upon application for loan.
1118. Presumption of loan.
1119. Sale may have been made.
1120. Delivery of deed in payment of debt.
1120a. Note for deficiency after payment of a pre-existing debt.
1121. Purchase of mortgaged premises by mortgagee.
1122. Liability for taxes.
1123. Comments.
1124. Third person as purchaser.
1125. Agreement to reconvey showing absolute sale.
1126. Agreement that grantee may sell.
1127. Surplus after sale.
1128. Agreement that grantee may buy.
1129. Where no note is given.
1130. Quitclaim deed.
1131. Continued possession of grantor.
1132. Payment of interest.
1133. Inadequacy of price.
1134. Character of transaction fixed in beginning.
1135. Sale and resale.
1136. Parol evidence.
1137. Declarations of party as evidence.
1138. Effect of delay in seeking relief.

§ 1139. Judgment creditor may show that debtor's deed is a mortgage.
1140. Sheriff's deed.
1141. Absolute owner as to third parties.
1142. Notice in bankruptcy proceedings.
1143. Payment of debt.
§ 1144. Parol evidence to show a mortgage a conditional sale.
1145. Proof of other conditions.
1146. Time for redemption.
1147. Presumption in doubtful cases.
1147a. Trend of authority.

§ 1100. **In general.**—An absolute deed in form may not in reality be such, because there exists either a written agreement for a reconveyance, or a parol understanding that it was made solely as security for a debt. On the issue as to whether a deed was intended as a conveyance or a security, the intention of the parties is the infallible test, such intention to be gathered from all the surrounding circumstances.[1] The law will declare the transaction as it really is. But equity will consider an absolute deed a mortgage, when at law it would not be so treated. Hence, there will be found a difference between the rules of law and equity as to the character of the instrument.

§ 1101. **Rule at law.**—At law, to constitute a mortgage, the grantor himself, and not a third person, must be entitled to the benefit of a defeasance.[2] But this is not the

[1] Reavis v. Reavis, 103 Fed. 813; Miller v. Miller, 101 Md. 600, 61 Atl. 210; Saunders v. Ayres, 63 Neb. 271, 88 N. W. 526; Luesenhof v. Einsfeld, 93 App. Div. 68, 87 N. Y. S. 268, reversed 184 N. Y. 590, 77 N. E. 1191; Weiseham v. Hocker, 7 Okla. 250, 54 Pac. 464; Rubo v. Bennett, 85 Ill. App. 473; Gillespie v. Hughes, 86 Ill. App. 202; Johnson v. Prosperity Loan & Bldg. Ass'n, 94 Ill. App. 260; Howat v. Howat, 101 Ill. App. 158; In re Schmidt, 114 La. 78, 38 So. 26; Flynn v. Holmes, 145 Mich. 606, 11 L.R.A.(N.S.) 209, 108 N. W. 685, 13 Detroit Leg. N. 448; Boork v. Beasley, 138 Mo. 455, 40 S. W. 101; Chance v. Jennings, 159 Mo. 544, 61 S. W. 177; Harrison v. Mowry, 47 So. 724; Beidleman v. Koch, 85 N. E. 977; Elliott v. Bozo-Rit, 97 Pac. 632; Brown v. Bank of Sumter, 55 S. C. 51, 32 S. E. 816; Sadler v. Taylor, 49 W. Va. 104, 38 S. E. 583.

[2] Treat v. Strickland, 23 Me. 234; Stephenson v. Thompson, 13 Ill.

rule in equity, and the defeasance may be in favor of some person other than the grantor, and the transaction will be a mortgage.[3] It is not necessary that there be an express provision avoiding the deed upon the performance of the condition. If the instrument itself supplies the evidence that it was intended to secure the payment of a debt or the performance of an obligation, it is a mortgage.[4] When, at the time of the execution of an absolute conveyance a separate defeasance or agreement to reconvey is also executed, the transaction, at law, will constitute a mortgage.[5] Where the

186; Bickford v. Daniels, 2 N. H. 71; Payne v. Patterson, 77 Pa. St. 134; Warren v. Lovis, 53 Me. 463; Shaw v. Erskine, 43 Me. 371; Pennsylvania Life Ins. Co. v. Austin, 42 Pa. St. 257; Marvin v. Titsworth, 10 Wis. 320; Carr v. Rising, 62 Ill. 14; Magnusson v. Johnson, 73 Ill. 156; Micou v. Ashurst, 55 Ala. 607; Hill v. Grant, 46 N. Y. 496; Flagg v. Mann, 14 Pick. 467, 479; Low v. Henry, 9 Cal. 538; Beebe v. Wisconsin etc. Co., 117 Wis. 328, 93 N. W. 1103.

[3] Reigard v. McNeil, 38 Ill. 400; Stinchfield v. Milliken, 71 Me. 567; Sahler v. Signer, 37 Barb. 329; s. c. 44 Barb. 606; Umfreville v. Keeler, 1 Thomp. & C. 486; Weed v. Stevenson, Clarke Ch. 166; Barton v. May, 3 Sand. Ch. 450; Spicer v. Hunter, 144 Abb. Pr. 4; McBurney v. Wellman, 42 Barb. 390; Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696; Jeffrey v. Hursh, 58 Mich. 246, 25 N. W. 176; 27 N. W. 7; Martin v. Pond, 30 Fed. 15; Lindsay v. Matthews, 17 Fla. 575; First Nat. Bank v. Ashmead, 23 Fla. 379, 2 So. 657. See, also, Robinson v. Robinson, 9 Gray, 447, 69 Am. Dec. 301; Chase v. Peck, 21 N. Y. 581; Balduff v. Griswold, 9 Okla. 438, 60 Pac. 223; Fisk v. Steward, 24 Minn. 97; Robinson v. Lincoln Sav. Bank, 85 Tenn. 363, 3 S. W. 656; Thacker v. Morris, 52 W. Va. 220, 43 S. E. 141, 94 Am. St. Rep. 928; Clark v. Seagraves, 186 Mass. 430, 71 N. E. 813.

[4] Lanfair v. Lanfair, 18 Pick. 299; Steel v. Steel, 4 Allen, 417; Adams v. Stevens, 49 Me. 362; Oldham v. Halley, 2 Marsh. J. J. 113; Taylor v. Weld, 5 Mass. 109; Scott v. McFarland, 13 Mass. 309; Austin v. Downer, 25 Vt. 558. See, also, Ferguson v. Miller, 4 Cal. 97; Whitcomb v. Sutherland, 18 Ill. 578; Goddard v. Coe, 55 Me. 385; Nugent v. Riley, 1 Met. 117, 35 Am. Dec. 355; Kent v. Allbrittain, 5 Miss. (4 How.) 317; Perkins v. Dibble, 10 Ohio, 433, 36 Am. Dec. 97; Whitney v. French, 25 Vt. 663; Skinner v. Cox, 15 N. C. 59; Baker v. Firemens Fund Ins. Co., 79 Cal. 34, 21 Pac. 357; Johnson v. Prosperity Law & Bldg. Ass'n, 94 Ill. App. 260; Renton v. Gibson, 148 Cal. 650, 84 Pac. 186; Iodence v. Peters, 64 Neb. 425, 89 N. W. 1041.

[5] Shaw v. Erskine, 43 Me. 371; Warren v. Lovis, 53 Me. 463;

deed and defeasance have been executed and delivered at the same time and form parts of one transaction, the courts have universally considered them as constituting a legal mort-

Clement v. Bennett, 70 Me. 207; Mills v. Darling, 43 Me. 565; Umbenhower v. Miller, 101 Pa. St. 71; Blaney v. Bearce, 2 Me. 132; Decker v. Leonard, 6 Lans. 264; Bayley v. Bailey, 5 Gray, 505; Nicolls v. McDonald, 101 Pa. St. 514; Murphy v. Caley, 1 Allen, 107; Judd v. Flint, 4 Gray, 557; Lane v. Shears, 1 Wend. 433; Clark v. Henry, 2 Cow. 324; Peterson v. Clark, 15 Johns. 205; Henry v. Davis, 7 Johns Ch. 40; Hall v. Van Cleve, 11 N. Y. Leg. Obs. 281; Brown v. Dean, 3 Wend. 208; Weed v. Stevenson, Clarke Ch. 166; Lanahan v. Sears, 102 U. S. 318, 26 L. ed. 180; Dow v. Chamberlin, 5 McLean, 281; Baxter v. Dear, 24 Tex. 17, 76 Am. Dec. 89; Hammonds v. Hopkins, 3 Yerg. 525; Caruthers v. Hunt, 18 Iowa, 576; Enos v. Sutherland, 11 Mich. 538; Freeman v. Baldwin, 13 Ala. 246; Sims v. Gaines, 64 Ala. 392; Marshall v. Stewart, 17 Ohio, 356; Reynolds v. Scott, Brayt. 75; Clark v. Lyon, 46 Ga. 202; Walker v. Tiffin Min. Co., 2 Colo. 89; Friedley v. Hamilton, 17 Serg. & R. 70, 17 Am. Dec. 638; Manufacturers & Mechanics' Bank v. Bank of Pennsylvania, 7 Watts & S. 335, 42 Am. Dec. 240; Guthrie v. Kahle, 46 Pa. St. 331; Jaques v. Weeks, 7 Watts, 261; Johnston v. Gray, 16 Serg. & R. 361, 16 Am. Dec. 577; Houser v. Lamont, 55 Pa. St. 311, 93 Am. Dec. 755; Kerr v. Gilmore, 6 Watts, 405; Colwell v. Woods, 3 Watts, 188, 27 Am. Dec. 345; Stoever v. Stoever, 9 Serg. & R. 434; Plato v. Roe, 14 Wis. 453; Second Ward Bank v. Upmann, 12 Wis. 499; Knowlton v. Walker, 13 Wis. 264; Brinkman v. Jones, 44 Wis. 498; Sharkey v. Sharkey, 47 Mo. 543; Copeland v. Yoakum, 38 Mo. 349; Preschbaker v. Feaman, 32 Ill. 475; Ewart v. Walling, 42 Ill. 453; Crassen v. Swoveland, 22 Ind. 427; Harbison v. Lemon, 3 Blackf. 51, 23 Am. Dec. 376; Watkins v. Gregory, 6 Blackf. 113; Mason v. Hearne, 1 Busb. Eq. 88; Robinson v. Willoughby, 65 N. C. 520; Ogden v. Grant, 6 Dana, 473; Edrington v. Harper, 3 Marsh. J. J. 353, 20 Am. Dec. 145; Honore v. Hutchings, 8 Bush, 687; Archambau v. Green, 21 Minn. 520; Benton v. Nicoll, 24 Minn. 221; Hill v. Edwards, 11 Minn. 22; Bunker v. Barron, 79 Me. 62, 1 Am. St. Rep. 282, 8 Atl. 253; Snow v. Pressey, 82 Me. 552, 20 Atl. 78; Stowe v. Merrill, 77 Me. 550; Knight v. Dyer, 57 Me. 174, 99 Am. Dec. 765; Cosby v. Buchanan, 81 Ala. 574, 1 So. 898; Rogers v. Jones, 92 Cal. 80, 28 Pac. 97; Smith v. Smith, 80 Cal. 323; Malone v. Roy, 94 Cal. 341, 29 Pac. 712; Gaither v. Clarke, 67 Md. 18, 8 Atl. 740; Short v. Caldwell, 155 Mass. 57, 28 N. E. 1124; Gunn's Appeal, 55 Conn. 149, 10 Atl. 498; Morrison v. Markham, 78 Ga. 161, 1 S. E. 425; Jackson v. Lynch, 129 Ill. 72, 22 N. E. 246; Kelley v. Lachman, 2 Idaho, 1111, 29 Pac. 849; Radford v. Folsom, 58 Iowa, 473, 12 N. W. 536; Short v. Caldwell, 155 Mass.

gage. Thus, in legal effect, a lease in which the lessor acknowledges the receipt in advance of the stipulated rent of the leased premises during the terms, and in which the lessee agrees to reconvey upon the payment of the sum advanced as rent and interest thereon, is a mortgage.[6] The law presumes a legal mortgage from the fact that the conveyance and defeasance are executed or agreed upon at the same time.[7] If, however, the grantee had no knowledge of the execution of the deed, a defeasance made by him upon being informed of it is sufficient.[8] At law, to constitute a mortgage, an agreement for reconveyance, even though it is made simultaneously with the deed, must be under seal, or of as high a nature as the deed itself.[8] If the agreement is not under seal, the transaction will be treated as a mortgage

57, 20 Atl. 78; Clark v. Landon, 90 Mich. 83, 51 N. W. 357; Ferris v. Wilcox, 51 Mich. 105, 47 Am. Rep. 551; Martin v. Pond, 30 Fed. 15; Butman v. James, 34 Minn. 547, 27 N. W. 66; Moores v. Wills, 69 Tex. 109, 5 S. W. 675; Connolly v. Giddings, 24 Neb. 131, 37 N. W. 939. See Sims v. Gaines, 64 Ala. 392; Barthell v. Syverson, 54 Iowa, 160; Brush v. Peterson, 54 Iowa, 243; Lewis v. Small, 71 Me. 552; Copeland v. Yoakum's Adm'r, 38 Mo. 349; Essex County Nat. Bank v. Harrison, 57 N. J. Eq. 91, 40 Atl. 209; Kerr v. Gilmore, 6 Watts, 405; Thacker v. Morris, 52 W. Va. 220, 43 S. E. 141, 94 Am. St. Rep. 928; Kyle v. Hamilton, 136 Cal. xix., 68 Pac. 484; Johnson v. Prosperity Loan & Bldg. Ass'n, 94 Ill. App. 260; Reilly v. Cullen, 159 Mo. 322, 60 S. W. 126; Porter v. White, 128 N. C. 42, 38 S. E. 24.

[6] Nugent v. Riley, 1 Met. 117, 35 Am. Dec. 355. See, also, Scott v. McFarland, 13 Mass. 308; Lanfair v. Lanfair, 18 Pick. 299; Erskine v. Townsend, 2 Mass. 493, 3 Am. Dec. 71; Taylor v. Weld, 5 Mass. 109; Newhall v. Burt, 7 Pick. 157; Stocking v. Fairchild, 5 Pick. 181; Eaton v. Whiting, 3 Pick. 484; Clark v. Woodruff, 9 Mich. 83, 51 N. W. 357.

[7] Wilson v. Shoenberger, 31 Pa. St. 295; Reitenbaugh v. Ludwick, 31 Pa. St. 131; Clark v. Woodruff, 90 Mich. 83, 51 N. W. 357; Waters v. Crabtree, 105 N. C. 394, 11 S. E. 240; Jeffrey v. Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7; Kyle v. Hamilton, 135 Cal. 19, 68 Pac. 484; Johnson v. Prosperity Loan & Bldg. Ass'n, 94 Ill. App. 260.

[8] Harrison v. Phillips Academy, 12 Mass. 456.

[8] Jewett v. Bailey, 5 Me. 87; French v. Sturdivant, 8 Me. 246; Warren v. Lovis, 53 Me. 463; Murphy v. Calley, 1 Allen, 107; Flint v. Sheldon, 13 Mass. 443, 7 Am. Dec. 162; Kelleran v. Brown, 4

only by a court of equity.[1] A defeasance, to have the effect of transforming an absolute deed into a mortgage, must be unqualified and absolute in its provisions for reconveyance. Where the instrument allows the grantee an election between a reconveyance and the payment of a sum of money, he has the option of considering the fee absolute.[2]

Mass. 443; Flagg v. Mann, 14 Pick. 467; Scituate v. Hanover, 16 Pick. 222; Cutler v. Dickinson, 8 Pick. 386. And see Runlet v. Otis, 2 N. H. 167; Harrison v. Phillips Academy, 12 Mass. 456; Miller v. Quick, 158 Mo. 495, 59 S. W. 955; Huston v. Regn, 184 Pa. St. 419, 39Atl. 208; Crotzer v. Bittenhender, 199 Pa. 504, 49 Atl. 266; Lohrer v. Russell, 207 Pa. 105, 56 Atl. 333; Rockwell's Estate, 29 Pa. Super. Ct. 28.

[1] Eaton v. Green, 22 Pick. 526; Flagg v. Mann, 14 Pick. 467; Cutler v. Brown, 8 Pick. 386.

[2] Fuller v. Pratt, 10 Me. 197. Equity will treat a deed which has been given and accepted as security for the payment of a debt, or the performance of some act as a mortgage. Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Russell v. Southard, 12 How. 139, 13 L. ed. 927; Cooper v. Whitney, 3 Hill (N. Y.) 95; Odell v. Montross, 68 N. Y. 499; Matter of Holmes, 79 N. Y. App. Div. 264, 79 N. Y. Supp. 592; Kerrigan v. Fielding, 47 N. Y. App. Div. 246, 62 N. Y. Supp. 115; Kyle v. Hamilton (1902) 68 Pac. 484; Bettis v. Townsend, 61 Cal. 333; Combs v. Hawes (1885) 8 Pac. 597; Broughton v. Vasquez, 73 Cal. 325, 11 Pac. 806, 14 Pac. 885; Moisant v. McPhee, 92 Cal. 76, 28 Pac. 46; Locke v. Moulton, 96 Cal. 21, 30 Pac. 957; Ahern v. McCarthy, 107 Cal. 382, 40 Pac. 482; Adams v. Hopkins (1902) 69 Pac. 228; French v. Burns, 35 Conn. 359; Sheldon v. Bradley, 37 Conn. 324; Angell v. Jewett, 58 Ill. App. 596; Bernhard v. Bruner, 65 Ill. App. 641; Howat v. Howat, 101 Ill. App. 158; Wilson v. Rehm, 117 Ill. App. 473; Delahay v. McConnel, 5 Ill. 156; Bishop v. Williams, 18 Ill. 101; Tillson v. Moulton, 23 Ill. 648; De Wolf v. Strader, 26 Ill. 225, 79 Am. Dec. 371; Shaver v. Woodward, 28 Ill. 277; Shays v. Norton, 48 Ill. 100; Hallesy v. Jackson, 66 Ill. 139; Westlake v. Horton, 85 Ill. 228; Pearson v. Pearson, 131 Ill. 464, 23 N. E. 418; Keithley v. Wood, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; Graham v. Graham, 55 Ind. 23; Hanlon v. Doherty, 109 Ind. 37, 9 N. E. 782; Ashton v. Shepherd, 120 Ind. 69, 22 N. E. 98; Grapes v. Grapes, 106 Iowa, 316, 76 N. W. 796; Richardson v. Barrick, 16 Iowa, 407; Holiday v. Arthur, 25 Iowa, 19; Wilson v. Patrick, 34 Iowa, 362; Johnson v. Smith, 39 Iowa, 549; New York Piano Forte Co. v. Mueller, 42 Iowa, 467; Otto v. Doty, 61 Iowa, 23, 15 N. W. 578; Dunton v. McCook, 93 Iowa, 258, 61 N. W. 977. Davis v. Starks, 6 Ky. L. Rep. 442; Oberdorfer v. White, 78 S. W. 436, 25 Ky. L. Rep. 1629; Garvin v. Vincent, 87 S. W. 804, 27 Ky. L. Rep.

§ 1102. Requirement as to time of execution.—At law the delivery of the deed and defeasance should be made at the same time, but it is of no consequence that they bear

1076; Wolf v. Wolf, 12 La. Ann. 529; Ware v. Morris, 23 La. Ann. 665; In re Schmidt, 114 La. 78, 38 So. 26; Libby v. Clark, 88 Me. 32, 33 Atl. 657; Howe v. Russell, 36 Me. 115; Reed v. Reed, 75 Me. 264; Westminster Bank v. Whyte, 1 Md. Ch. 536; Thompson v. Banks, 2 Md. Ch. 430, 3 Md. Ch. 138; Dougherty v. McColgan, 6 Gill & J. 275; Artz v. Grove, 21 Md. 456; Brown v. Reilly, 72 Md. 489, 20 Atl. 239; Bodwell v. Webster, 13 Pick 411; Parks v. Hall, 2 Pick. 206; McDonough v. Squire, 111 Mass. 217; Wadsworth v. Loranger, Harr. 113; Emerson v. Atwater, 7 Mich. 12; Cowles v. Marble, 37 Mich. 158; Hurst v. Beaver, 50 Mich. 612, 16 N. W. 165; McMillan v. Bissell, 63 Mich. 66, 29 N. W. 737; Stahl v. Dehn, 72 Mich. 645, 40 N. W. 922; Sibley v. Ross, 88 Mich. 315, 50 N. W. 379; Darling v. Darling, 123 Mich. 307, 82 N. W. 48; Flynn v. Holmes, 145 Mich. 606, 108 N. W. 685; Phoenix v. Gardner, 13 Minn. 430; Holton v. Meighen, 15 Minn. 69; Everest v. Ferris, 16 Minn. 26; Madigan v. Mead, 31 Minn. 94, 16 N. W. 539; Littlewort v. Davis, 50 Miss. 403; Wilson v. Drumrite, 21 Mo. 325; Turner v. Kerr, 44 Mo. 429; O'Neill v. Cappelle, 62 Mo. 202; Schradski v. Albright, 93 Mo. 42, 5 S. W. 807; Morrison v. Jones, 31 Mont. 154, 77 Pac. 507; Eisman v. Gallagher, 24 Neb. 79, 37 N. W. 941; Tower v. Fetz, 26 Neb. 706, 42 N. W. 884, 18 Am. St. Rep. 795; Kemp v. Small, 32 Neb. 318, 49 N. W. 169; Bingham v. Thompson, 4 Nev. 224; Vanderhaize v. Hugues, 13 N. J. Eq. 244; Clark v. Condit, 18 N. J. Eq. 358; Phillips v. Hulsizer, 20 N. J. Eq., 308; Van Keuren v. McLaughlin, 21 N. J. Eq. 163; Crane v. Decamp, 21 N. J. Eq. 414; Judge v. Reese, 24 N. J. Eq. 387; Platt v. McClong (Ch. 1901) 49 Atl. 1125; Miami Exporting Co. v. U. S. Bank, Wright, 249; Cotterell v. Long, 20 Ohio, 464; Yingling v. Redwine, 20 Okla. 64, 69 Pac. 810; Adair v. Adair, 22 Oreg. 115, 29 Pac. 193; Winton v. Mott, 4 Luz. Leg. Reg. 71; Perry v. Perry, 31 Leg. Int. 372; Pattison v. Horn, 1 Grant. 301; Cole v. Bolard, 22 Pac. St. 431; Todd v. Campbell, 32 Pac. St. 250; Nichols v. Reynolds, 1 R. I. 30, 36 Am. Dec. 238; Yarbrough v. Newell, 10 Yerg. 376; Hinson v. Partee, 11 Humphr. 587; Lapowski v. Smith, 1 Tex. Civ. App. 391, 20 S. W. 957; Butler v. Carter (Tex. Civ. App. 1900) 58 S. W. 632; Hamilton v. Flume, 2 Tex. Unrep. Cas. 694; Mann v. Falcon, 25 Tex. 271; Loving v. Milliken, 59 Tex. 423; McCamant v. Roberts, 80 Tex. 316, 15 S. W. 580, 1054; Catlin v. Chittenden, Brayt. 163; Bigelow v. Topliff, 25 Vt. 273, 60 Am. Dec. 264; Chowning v. Cox, 1 Rand. 306, 10 Am. Dec. 530; Plummer v. Ilse, 41 Wash. 5, 82 Pac. 1009, 111 Am. St. Rep. 997, 2 L.R.A.(N.S.) 627; Klinck v. Price, 4 W. Va. 4, 6 Am. Rep. 268; Zane v. Fink, 18 W. Va. 693; Hoffman v.

different dates.[3] All that is essential is that they become operative at the same time, and are parts of the same transaction.[4] And where there is a variance in the dates, it may be shown by parol evidence that they were delivered at the same time.[5] Where a deed was dated on July 20th, and a bond for a reconveyance was dated July 30th, and both were acknowledged on the 31st of July, the two instruments were held to have been executed concurrently as parts of the same transaction.[6] If there is a verbal agreement for a subsequent defeasance at the time of the execution of the deed, operation is given to the defeasance by considering it is as relating back to the deed.[7] But if it is delivered to a third person to hold as

Ryan, 21 W. Va. 415; McIlory v. Hawke, 5 Grant Ch. (U. C.) 516; See 35 Cent. Dig. tit. "Mortgages" § 60; Campbell v. Worthington, 6 Vt. 448; Houser v. Lamont, 55 Pa. St. 311, 93 Am. Dec. 755; Lance's Appeal, 112 Pa. St. 456, 4 Atl. 375; Roddy v. Brick, 42 N. J. Eq. 218, 6 Atl. 806; Smith v. Sackett, 15 Ill. 528; Tantor v. Keys, 43 Ill. 332; McDonald v. Kellogg, 30 Kan. 170, 2 Pac. 507.

[3] Kelly v. Thompson, 7 Watts, 401; Haines v. Thomson, 70 Pa. St. 434; Cotton v. McKee, 68 Me. 486; Kelleran v. Brown, 4 Mass. 443; Harrison v. Phillips Academy, 12 Mass. 456. Requirements as to time see 1102; Kyle v. Hamilton, 136 Cal. xix., 68 Pac. 484; Copeland U. Yoakum's Adm'r, 38 Mo. 349; Essex County Nat. Bank v. Harrison, 57 N. J. Eq. 91, 40 Atl. 209; Kerr v. Gilmore, 6 Watts, 405; Johnson v. Prosperity Loan & Building Ass'n, 94 Ill. App. 260; Miller v. Quick, 158 Mo. 495, 59 S. W. 955; Reilly v. Cullen, 159 Mo. 322, 60 S. W. 126; Huston v. Regn, 184 Pa. St. 419, 39 Atl. 208; Crotzer v. Bittenbender, 199 Pa. 504, 49 Atl. 266; Kelton v. Brown, 39 S. W. 541; Turner v. Cochran, 30 Tex. Civ. App. 549, 70 S. W. 1024; Jordan v. Warner's Estate, 107 Wis. 539, 83 N. W. 946; Adams v. Hopkins, 69 Pac. 228; Nat. Bank of Columbus v. Tenn. Coal, Iron & R. Co., 62 Ohio St. 564, 57 N. E. 450.

[4] Bennock v. Whipple, 12 Me. 346, 28 Am. Dec. 186; McLaughlin v. Shepherd, 32 Me. 153, 52 Am. Dec. 646; Waters v. Crabtree, 105 N. C. 394, 11 S. E. 240.

[5] Brown v. Holyoke, 53 Me. 9.

[6] Lentz v. Martin, 75 Ind. 228.

[7] Lovering v. Fogg, 18 Pick. 540. See, also, Scott v. Henry, 13 Ark. 112; Pearson v. Dancy, 144 Ala. 427, 39 So. 474. But see *contra*, Lund v. Lund, 1 N. H. 39, 8 Am. Dec. 29; Waters v. Crabtree, 105 N. C. 394, 11 S. E. 240, 1 So. Rep. 898; Cosby v. Buchanan, 81 Ala. 574. Where there has been a reconveyance and a second deed executed between the same parties, there may be a redelivery of the

an escrow until the discharge of the indebtedness, it is not considered as executed and delivered at the same time as the deed, nor as forming part of the same transaction, and a mortgage is not thereby created.[8] Where an absolute deed and an agreement for reconveyance on condition that the money advanced was to be repaid in a specified time, were placed in the hands of a third person, with instructions to deliver them both to the grantee if the repayment was not made in the time limited, and it not being so made, they were delivered at the grantor's direction to the grantee, it was held that upon the delivery of the deed the grantee took an absolute fee.[9] When the deed and agreement to reconvey are free from ambiguity, their construction and legal effect are matters of law for the court to determine.[1] Even at law, if there is a separate contemporaneous agreement in writing to reconvey the premises upon the payment of the debt, a deed absolute upon its face, but intended as security for the payment of such money, is a mortgage.[2]

§ 1103. **Deed and defeasance may be shown by parol evidence to be parts of same transaction.**—That the parties intended by the execution of the deed and defeasance to create a mortgage, may be shown by parol evidence. Such evidence is received to show their connection with each other, that they were agreed upon at one time and are in fact one contract, and not to vary or contradict the written instruments.[3] The loss or destruction of the defeasance occasioned

same defeasance: McIntier v. Shaw, 6 Allen, 83. See Judd v. Flint, 4 Gray, 557.

[8] Bodwell v. Webster, 13 Pick. 411. But see Carey v. Rawson, 8 Mass. 159; Exton v. Scott, 6 Sim. 31.

[9] Glendenning v. Johnston, 33 Wis. 347. See Henley v. Hotaling, 41 Cal. 22, 28; Leggett v. Edwards, Hopk. Ch. 530.

[1] Keith v. Catchings, 64 Ga. 473.

[2] Teal v. Walker, 111 U. S. 242, 28 L. ed. 415.

[3] Reitenbaugh v. Ludwick, 31 Pa. St. 131, 138; Preschbaker v. Feaman, 32 Ill. 475; Kelly v. Thompson, 7 Watts, 401; Wilson v.

by fraud or mistake may also be shown by evidence of this character.[4] When it appears that the transaction was originally a sale, and it is claimed that its character has been changed, the burden of proof to establish this is upon the grantor.[5] A mortgage is conclusively presumed from the circumstance that the deed and defeasance bear the same date, and parol evidence is inadmissible to show a different understanding between the parties for the purpose of converting the transaction into a conditional sale.[6] Where there is a variance in the dates, but the agreement to reconvey contains a recital that it and the deed were delivered on the same day, the presumption is that they constitute a mortgage; but this presumption may be rebutted by evidence showing that the deed was executed, not as a security for the performance of an obligation, but as the completion of a sale.[7] In California, where the grantee agreed that if he should not procure the testimony of two witnesses to a certain state of facts the deed should be null and void, it was held that the transaction did not constitute a mortgage; the legal estate had once vested in the grantee, and as it could not be divested by his default in performing an illegal agreement, the deed to him became absolute.[8]

§ 1104. **Condition in deed construed as lien.**—Where a deed contains the clause "nevertheless, this deed of con-

Schoenberger, 31 Pa. St. 295; Gay v. Hamilton, 33 Cal. 686; Tillson v. Moulton, 23 Ill. 648; Franklin v. Ayer, 22 Fla. 654; Gassert v. Bogk, 7 Mont. 585, 1 L.R.A. 240, 19 Pac. 281; Waters v. Crabtree, 105 N. C. 394, 11 S. E. 240; First Nat. Bank v. Ashmead, 23 Fla. 379, 2 So. 657.

[4] Marks v. Pell, 1 Johns. Ch. 594.

[5] Haines v. Thompson, 70 Pa. St. 434.

[6] Kerr v. Gilmore, 6 Watts, 405; Brown v. Nickle, 6 Pa St. 390.

[7] Haines v. Thompson, 70 Pa. St. 434. See Gubbings v. Harper, 7 Phila. 276; Baisch v. Oakeley, 68 Pa. St. 92.

[8] Patterson v. Donner, 48 Cal. 369; Porter v. White, 128 N. C. 42, 38 S. E. 24.

veyance is null and void, and of no effect until all the purchase money is paid, then of full force and effect," a noncompliance with the condition will not be treated as operating as an absolute avoidance of the title of the grantee. It will be construed as giving to the grantor merely a lien or mortgage to secure the unpaid purchase money.[9]

§ 1105. **Cancellation of defeasance.**—In those States in which the mortgage, irrespective of its form, is simply a lien or charge upon the mortgaged premises, the mortgagor retaining the legal title, the title is not transferred to the mortgagee by the surrender or cancellation of the defeasance.[1]

§ 1106. **Transfer of absolute title.**—If an absolute deed is executed, and the grantee therein at the same time executes to the grantor a bond for reconveyance upon the payment of a certain sum, and if after default in payment has occurred, the bond by the mutual consent of the parties is destroyed, and the possession of the land is transferred to the grantee by virtue of a new contract, in which by a parol agreement the grantor is to surrender all claim upon the land, the title does not pass by such delivery of possession.[2] The destruction of the bond does not estop the grantor from denying that the title passed by the deed.[3] But where this equitable doctrine does not prevail, an absolute title may be vested in the mortgagee, if the rights of others have not intervened by the subsequent cancellation, upon sufficient consideration of the

[9] Miskelly v. Pitts, 9 Baxt. (Tenn.) 193.

[1] Sage v. McLaughlin, 34 Wis. 550; Thompson v. Mack, Harr. Mich. 150; Bringham v. Jones, 44 Wis. 498. Where the grantee agrees to reconvey upon the payment by the grantor of the sum due, and the defeasance is surrendered, the mortgagor, notwithstanding the surrender, may redeem upon making the payment: Clark v. Finlon, 90 Ill. 245.

[2] Howe v. Carpenter, 49 Wis. 697. As to whether a deed absolute on its face but intended as a mortgage passes the legal title: See 11 L.R.A. (N.S.) 209.

[3] Howe v. Carpenter, 49 Wis. 697.

agreement for reconveyance. But this must be done after the creation of the mortgage, for an agreement made at the time, allowing the mortgagee at his option to declare his estate absolute, and depriving the mortgagor of his right of redemption, is invalid.[4] If at the time the deed is executed a bond of defeasance is given, which at the expiration of the time limited is surrendered and destroyed, and if upon a consideration exceeding the former one in amount a new bond is given, by which the grantee agrees to reconvey the premises upon the payment within an additional time of the increased sum, the grantor thereby surrenders and abandons his title as mortgagor, and the fee is vested in the grantee. The second bond is considered merely a personal contract on the part of the grantee.[5] Where the original transaction is confirmed as a sale, after the delivery for a sufficient consideration of the defeasance for cancellation, and is so treated as a sale by the grantor and his heirs, it cannot subsequently be dealt with as a mortgage, and foreclosed.[6]

[4] Trull v. Skinner, 17 Pick. 213; Harrison v. Phillips Academy, 12 Mass. 456; Waters v. Randall, 6 Met. 479; Cramer v. Wilson, 202 Ill. 83, 66 N. E. 869, affirmed 195 U. S. 408, 49 L. ed. 256, 25 Sup. Ct. 94.

[5] Falis v. Conway Mut. F. Ins. Co., 7 Allen, 46, in which Hoar, J., says: "The bond of defeasance, the only contract made with him at the time when he conveyed the land, had been surrendered, and by the agreement of the parties had the time when he conveyed the become inoperative and void. The new bonds given in succession were in every essential particular new and independent contracts; they were different in amount, upon a consideration partly new and to be performed at a different time. They were therefore merely personal contracts; and not being made at the same time with the conveyance of the land, or provided for in any agreement made at that time, did not create any estate in the land. The plaintiff had surrendered and abandoned the title which he held as mortgagor, and made a contract to purchase the land upon a new condition and for a new consideration": Carpenter v. Carpenter, 70 Ill. 457; Maxfield v. Patchen, 29 Ill. 39, 42; Rice v. Rice, 4 Pick 349, 350, n.

[6] Shubert v. Stanley, 52 Ind. 46; McMillan v. Jewett, 85 Ala. 476, 5 So. 145; Cramer v. Wilson, 202 Ill. 83, 66 N. E. 869; Cassem v. Heutis, 201 Ill. 208, 66 N. E. 283,

§ 1107. **Waiver of right of redemption.**—When the transaction is a mortgage, the mortgagor cannot, by any contract made at the time, waive his right of redemption.[7] The fact that the deed is mentioned as an absolute conveyance in the receipts and accounts between the parties cannot affect the right of redemption.[8] Where it is agreed that the deed shall be absolute "with no right of redemption," if the grantor fails to pay the sum specified in an agreement for reconveyance under seal, made at the same time with the deed, the transaction is regarded as a mortgage, of which the right of redemption is an inseparable incident.[9] An agreement to restrict the right of redemption to the mortgagor alone, or to a particular class of persons, may be equivalent to depriving the mortgagor of the right of redemption altogether. A restriction of this character, therefore, is void, because it is inconsistent with the very nature of a mortgage.[1] An agreement made subsequently to convert into an absolute conveyance what was primarily a mortgage is viewed with disfavor, and

94 Am. St. Rep. 160; Hursey v. Hursey, 56 W. Va. 148, 49 S. E. 367.

[7] Clark v. Henry, 3 Cowen, 324; Robinson v. Farrelly, 16 Ala. 472; Youle v. Richards, 1 N. J. Eq. (Sax.) 534, 23 Am. Dec. 722; Rankin v. Mortimere, 7 Watts, 372; Cherry v. Bowen, 4 Sneed, 415; Pierce v. Robinson, 13 Cal. 116; Clark v. Condit, 18 N. J. Eq. 358; Rogan v. Walker, 1 Wis. 527; Plato v. Roe, 14 Wis. 453; Orton v. Knab, 3 Wis. 576; Knowlton v. Walker, 13 Wis. 264; Baxter v. Child, 39 Me. 110; Peugh v. Davis, 96 U. S. 332, 24 L. ed. 775; Fields v. Helms, 82 Ala. 449, 3 So. 106; Nelson v. Kelly, 91 Ala. 569, 8 So. 690; McMillan v. Jewett, 85 Ala. 476, 5 So. 145; Simon v. Schmidt, 41 Hun, 318; Turpie v. Lowe, 114 Ind. 37, 15 N. W. 834; Nelson v. Fisher, 148 N. C. 535, 62 S. E. 622; Poston v. Jones, 122 N. C. 536, 29 S. E. 951.

[8] Bayley v. Bailey, 5 Gray, 505; Thatcher v. Morris, 52 W. Va. 220, 43 S. E. 141, 94 Am. St. Rep. 928.

[9] Murphy v. Calley, 1 Allen, 107.

[1] Johnston v. Gray, 16 Serg. & R. 361, 116 Am. Dec. 577. And see McClurkan v. Thompson, 69 Pa. St. 305; Howard v. Harris, 1 Vern. 33; Newcomb v. Bohnam, 1 Vern. 8; Spurgeon v. Collier, 1 Eden, 55. But arrangements of this character are sometimes under peculiar circumstances permitted: Stover v. Bounds, 1 Ohio St. 107; Bonham v. Newcomb, 1 Vern. 8, 2 Vent. 364.

will not be upheld unless it appear that the creditor took no undue advantage.[2] It therefore follows that the creditor has the burden of proof to show the deliberate surrender, upon a sufficient consideration of the right of redemption.[3] When an existing debt is the consideration for a deed, an agreement depriving the debtor of his right of redemption is generally disregarded.[4]

§ 1108. **Confidential relations.**—A court of equity will closely watch transactions between persons occupying confidential relations toward each other. Where a deed has been made by a person to his confidential agent and advisor, and the grantor claims that it was given and received as security for a loan, the whole burden of sustaining the validity and good faith of the dealings between the parties is imposed upon the agent and advisor.[5] "Now it is a well-settled principle of equity jurisprudence," said Mr. Justice Potter, "that the court will always look with jealousy upon all transactions between parties so situated; and the burden of proof is entirely upon the guardian, trustee, agent, or other person sustaining this confidential relation, to show that he has taken no advantage of his situation. It is not necessary that there should be fraud to justify the court's interference. In the present case, there were all the elements usually found in cases where the courts

[2] Henry v. Davis, 7 Johns. Ch. 40; Wright v. Bates, 13 Vt. 341; Mills v. Mills, 26 Conn. 213.

[3] Brown v. Gaffney, 28 Ill. 149; Villa v. Rodriguez, 12 Wall. 324; Locke v. Palmer, 26 Ala. 312; Shaw v. Walbridge, 33 Ohio St. 1; Baugher v. Merryman, 32 Md. 185.

[4] Batty v. Snook, 5 Mich. 231; Enos v. Sutherland, 11 Mich. 538. A mere shuffling of words cannot destroy the provisions of law relating to mortgages. When the transfer of property is intended to secure the purchase price, the transaction is a mortgage: Palmer v. Howard, 72 Cal. 293, 1 Am. St. Rep. 60.

[5] Tappan v. Aylsworth, 13 R. I. 582; Kelso v. Kelso, 16 Ind. App. 615, 44 N. E. 1013, 45 N. E. 1065; Meeker v. Warren, 66 N. J. Eq. 146, 57 Atl. 421; Slawson v. Denton, 48 S. W. 350; Tuggle v. Berkeley, 101 Va. 83, 43 S. E. 199.

have granted relief. There was complete ignorance of business affairs, complete confidence, and the dependence resulting from that confidence on one side, and on the other side, superior business knowledge, and the influence of his position as administrator of her father's estate." [6]

§ 1109. **Notice given by recording.**—The defeasance without recording is good between the parties themselves.[7] Against others, recording is not necessary when the conveyance does not purport to be an absolute deed.[8] A purchaser with actual notice of an unrecorded defeasance takes the title subject to the mortgage.[9] It has been held that when the defeasance has not been acknowledged, and for that reason is not entitled to be recorded, a purchaser without notice of the defeasance, notwithstanding that it has in fact been recorded, acquires a title unaffected by it.[1] Continuance in possession by the grantor after the recording of the deed made by him does not impart notice of a bond for reconveyance.[2] A distinction is to be observed throughout this chapter between a legal mortgage and an equitable mortgage. Notice of a legal mortgage can be imputed to a purchaser only when he had sufficient grounds for believing that the conveyance and defeasance were in their execution and delivery parts of one transaction.[3] On the one hand, it is stated that a purchaser has notice when he has actual knowledge of such circumstances as would put a prudent man upon inquiry, and that by

[6] Tappan v. Aylsworth, 13 R. I. 582.

[7] Bayley v. Bailey, 5 Gray, 505, 510; Jackson v. Ford, 40 Me. 381.

[8] Russell v. Waite, Walk. Ch. 31.

[9] Newhall v. Pierce, 5 Pick. 450; Corpman v. Baccastow, 84 Pa. St. 363; Tufts v. Tapley, 129 Mass. 380; Catlin v. Bennett, 47 Tex. 165; Newhall v. Burt, 7 Pick. 157; Purrington v. Pierce, 38 Me. 447; Friedley v. Hamilton, 17 Serg. & R. 70, 17 Am. Dec. 638; Manufacturers & Mechanics' Bank v. Bank of Pa., 7 Watts, 335, 42 Am. Dec. 240; Butman v. James, 34 Minn. 547, 27 N. W. 66.

[1] Cogan v. Cook, 22 Minn. 137.

[2] Newhall v. Pierce, 5 Pick. 450.

[3] Newhall v. Burt, 7 Pick. 157.

prosecuting such inquiry, he might ascertain the actual right or title.[4] On the other hand, it is asserted that knowledge of the open and visible possession by the grantor after his conveyance by absolute deed, is not sufficient to imply actual notice.[5] The true rule, except where the statute is imperative, would seem to be that actual occupation by the mortgagor is sufficient to put a purchaser from the grantee upon inquiry, and if he fails to prosecute it, to fasten upon him notice of the mortgagor's rights. It is not to be presumed that a purchaser in good faith will buy land without ascertaining, or making an attempt to ascertain, the claims of the person in open possession.[6] A subsequent purchaser is bound only by what appears in the record, and has a right to assume where the instruments were executed on different days, and each is independent of the other, that the transaction was an absolute sale with an agreement to repurchase.[7] But if it is apparent from the construction of the instruments themselves that the transaction is a mortgage, as where there is a reference in the defeasance to the debt secured, the purchaser is charged with notice.[8] If the mortgagee, who is apparently a grantee, conveys to a person who has notice of the defeasance, such person acquired simply an assignment of the mortgage.[9]

§ 1110. Conditional sale or mortgage.—The peculiar circumstances belonging to each particular case must be the criterion by which to determine whether a conveyance is a

[4] Brinkman v. Jones, 44 Wis. 498; Musgrove v. Bonser, 5 Or. 313; 20 Am. Rep. 737; Porter v. Sevey, 43 Me. 519; Maupin v. Emmons, 47 Mo. 304; Wilson v. Miller, 16 Iowa, 111.

[5] Lamb v. Pierce, 113 Mass. 72; White v. Foster, 102 Mass. 375; Crassen v. Swoveland, 22 Ind. 427, 434; Story's Eq. Jur., § 399; Jones on Mortgages, §§ 253, 579.

[6] Daubenspeck v. Platt, 22 Cal. 330; Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431.

[7] Weide v. Gehl, 21 Minn. 449.

[8] Hill v. Edwards, 11 Minn. 22. See King v. Little, 1 Cush. 436.

[9] Halsey v. Martin, 22 Cal. 645.

mortgage or a conditional sale.[1] The difference between a mortgage and a conditional sale lies in the fact that a mortgage is a security for a debt while a conidtional sale is a deed, accompanied by an agreement to resell in specified terms.[2] And whenever from a consideration of the situation of the parties, and of the surrounding facts, together with the written instruments themselves, it is apparent the parties intended to make a conditional sale, the courts will respect and enforce their contract.[2a] "To deny the power of two individuals," says Chief Justice Marshall, "capable of acting for themeslves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the court of chancery, in a considerable degree the guardianship of adults as well as of infants. Such contracts are certainly not prohibited

[1] Edrington v. Harper, 3 Marsh. J. J. 353, 354, 20 Am. Dec. 145; Hughes v. Sheaff, 19 Iowa, 335; Heath v. Williams, 30 Ind. 495; Lucas v. Hendrix, 92 Ind. 54; Davis v. Stonestreet, 4 Ind. 101; Cornell v. Hall, 22 Mich. 377, 383; Smith v. Crosby, 47 Wis. 160; Hihn v. Peck, 30 Cal. 280; Horbach v. Hill, 112 U. S. 144; Stephens v. Allen, 11 Or. 188, 3 Pac. 168; Gibbs v. Penny, 43 Tex. 560; Loving v. Milliken, 59 Tex. 423; Stamper v. Johnson, 3 Tex. 1; Pendergrass v. Burris (Cal., Sept. 22, 1888), 19 Pac. 187; Gray v. Shelby, 83 Tex. 405, 18 S. W. 809; Gassert v. Bogk, 7 Mont. 585, 1 L.R.A. 240; Trimble v. McCormick (Ky., Feb. 7, 1891), 15 S. W. 358.

[2] Beidleman v. Koch, 85 N. E. 977; Cornell v. Craig (C. C.) 79 Fed. 685; Knickerbocker Trust Co. v. Penacook Mfg. Co., 100 Fed. 814; Martin v. Martin, 123 Ala. 191, 26 So. 525; Rose v. Gandy, 137 Ala. 329, 34 So. 239; Land v. May, 73 Ark. 415, 84 S. W. 489; Borcherd v. Farn, 16 Colo. App. 406, 66 Pac. 251; Crane v. Chandler, 190 Ill. 584, 60 N. E. 826; Greenwood v. Building & Loan Ass'n, 28 Ind. App. 548, 63 N. E. 574; Heath v. Williams, 30 Ind. 495; Breenwood B. & L. Ass'n v. Stanton, 28 Ind. App. 548, 63 N. E. 574; Bigler v. Jack, 114 Iowa, 667, 87 N. W. 700; Yost v. First National Bank, 66 Kan. 605, 72 Pac. 209; Fabrique v. Cherokee & P. Coal & Mining Co., 69 Kan. 733, 77 Pac. 584; Fulweiler v. Roberts, 26 Ky. Law Rep. 297, 80 S. W. 1148.

[2a] Bigler v. Jack, 114 Iowa, 667, 87 N. W. 700.

either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale; and as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leading of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be whether the contract in the specific case is a security for the repayment of money or an actual sale."[3] As a court of equity will receive any evidence to show that an absolute conveyance was intended as a security, a transaction which court of law would determine to be a conditional sale, a court of equity may declare to be a mortgage.[4] Yet when it clearly appears that the parties intended a conditional sale, their contract will be enforced.[5] But it should be observed that the contract in a doubtful case will be construed to be a mortgage rather than a conditional sale.[6] If a defeasance exists, although it may not have been recorded, the equity of redemption under the former national bankruptcy

[3] Conway v. Alexander, 7 Cranch, 218, 3 L. ed. 321. Language to the same effect is employed by Chief Justice Rhodes in Henley v. Hotaling, 41 Cal. 22, from which we quote this sentence: "Such a contract is not opposed to public policy, nor is it in any sense illegal; and courts would depart from the lines of their duties should they, in disregard of the real intention of the parties, declare it to be a mortgage." See Haynie v. Robertson, 58 Ala. 37; Smith v. Crosby, 47 Wis. 160.

[4] McNamara v. Culver, 22 Kan. 661; Flagg v. Mann, 2 Sum. 486; Dougherty v. McColgan, 6 Gill & J. 275; Pearson v. Seay, 38 Ala. 643.

[5] Goodman v. Grierson, 2 Ball & B. 274; Bloodgood v. Zeily, 2 Caines Cas. 124; Davis v. Thomas, 1 Russ. & M. 506; Pennington v. Hanby, 4 Munf. 140. See Stroup v. Haycock, 56 Iowa, 729; Yost v. First Nat. Bank, 66 Kan. 605, 72 Pac. 209; Crane v. Chandler, 190 Ill. 584, 60 N. E. 826.

[6] Bonherdt v. Favor, 16 Colo. App. 406, 66 Pac. 251; Stahl v. Dehn, 72 Mich. 645, 40 N. W. 922;

act would vest in the grantor's trustees, and an attaching creditor could not obtain the benefit of an estoppel by reason of the nonregistration of the agreement of defeasance.[7]

§ 1111. **Purchase money mortgage by married woman.** —A person sold a tract of land to a woman whose husband was not living with her. The vendor supposed that she was unmarried, and he took her individual note and mortgage back for a part of the purchase money. Ordinarily, the mortgage would be void and incapable of correction. But in a suit by the assignee of the note, the court held that the deed and void mortgage were to be treated as one transaction. Hence, subsequent purchasers with notice would acquire the title in trust for the payment of the mortgage note.[8] The grantor would have had a vendor's lien if he had not taken the mortgage. But he was entitled also to have the more ample remedy of a trust capable of assignment, which could be enforced against subsequent purchasers with notice.[9] This principle is further illustrated by a case that occurred in California, where an owner of land agreed with a purchaser to sell him a tract of land. Part of the purchase money was to be paid at the time, and the balance was to be secured by a mortgage

Jones v. Gillett, 118 N. W. 314; Tucker v. Witherbee, 113 S. W. 123; Donovan v. Boeck, 217 Mo. 70, 116 S. W. 543; Martin v. Martin, 123 Ala. 191, 26 So. 525; Rose v. Gandy, 137 Ala. 329, 34 So. 239; Land v. May, 73 Ark. 415, 84 S. W. 489; Robertson v. Campbell, 2 Call, 421; Poindexter v. McCannon, 1 Dev. Eq. 377, 18 Am. Dec. 591; King v. Newman, 2 Munf. 40; Sears v. Dixon, 33 Cal. 326; Skinner v. Miller, 5 Litt. 84, 86; Gray v. Shelby, 83 Tex. 405, 18 S. W. Rep. 809; Cosby v. Buchanan, 81 Ala. 574, 1 So. Rep. 898; Walker v. McDonald, 49 Tex. 458; Mitchell v. Wellman, 80 Ala. 16; Vincent v. Walker, 86 Ala. 333, 5 So. Rep. 465; Stephens v. Allen, 11 Or. 188, 3 Pac. Rep. 168; Baugher v. Merryman, 32 Md. 185; Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. Rep. 371; O'Neil v. Cappelle, 62 Mo. 202; Turner v. Kerr, 44 Mo. 429; De Bruhl v. Maas, 54 Tex. 464; Heath v. Williams, 30 Ind. 495; Snavely v. Pickle, 29 Gratt. 27.

[7] Moors v. Albro, 129 Mass. 9.

[8] Ogle v. Ogle, 41 Ohio St. 359.

[9] Ogle v. Ogle, 41 Ohio St. 359.

on the land. At the request of the purchaser the deed was made to his wife, and the notes and mortgage for the part of the purchase price remaining unpaid were executed by her. The court, without deciding the point as to the loss of the vendor's lien, held that, as in the beginning the parties had agreed that a mortgage should be executed, the transaction would be treated as an equitable mortgage to secure the portion of the purchase money unpaid and the interest on this sum.[1] The decision was placed on the ground that, although the instrument purporting to be a mortgage was void, for the reason that the wife had no power to execute a mortgage of the community property, yet that equity would treat that as done which the parties agreed to have done, and which ought to have been done.[2]

[1] Remington v. Higgins, 54 Cal. 620.

[2] Mr. Justice Sharpstein concurred in the judgment, but was of the opinion that the grantor had not lost his vendor's lien, for the unpaid purchase money. He said on this point: "Under our Code, the effect of the plaintiff's deed was the same as if it had been executed to the husband. And the transaction must be treated as it would be if the land had been conveyed to him, and his wife had executed a mortgage upon it to secure the payment of the purchase money. She purchased nothing, obtained no title to anything, and gave no security for the payment of anything. Under the circumstances, it seems to me that she might, with perfect propriety, be left out of view altogether, and the case be considered as one in which the husband purchased the land, acquired the title, paid a part of the purchase money, and gave no security for the payment of the balance. If the plaintiff has done any act manifesting an intention not to rely upon the land for security, his claim to a vendor's lien cannot be maintained. But the facts as found by the court satisfy me that the plaintiff throughout manifested an intention to rely upon the land as security for the payment of the purchase money, for which credit was given. The very instrument which it is claimed constituted a waiver of the vendor's lien purports to be a mortgage upon the land sold by the plaintiff. Besides, the court finds that it was agreed between the vendor and the vendee that the payment of so much of the purchase money as was not paid at the time of the execution of the conveyance should be secured by a mortgage upon the land conveyed. No such mortgage was ever executed, but the agreement to execute it on the one side, and to accept it on the other, shows that it

§ 1111a. Same by natural guardian of minors.—So, where land is conveyed by deed to a father and his minor children, and he, for the purpose of securing the balance due on the purchase price of the land, gives a mortgage signed by him for himself and as guardian of his minor children, the mortgage may be enforced as an equitable mortgage upon the whole land, and the interest of the minors acquired under the deed is subject to the lien of the mortgage.[3] On the ground that a mortgage defectively executed, as well as an imperfect effort to create a mortgage upon specific property for the purpose of securing the payment of a debt, will, in equity, create a specific lien upon the property intended to be mortgaged, the court held, that the law as above stated would apply, though it did not appear whether any portion of the money paid was the property of the minors, or whether the father was or was not the guardian of their estates.[4] In other words,

was the intention of the vendor to rely upon the land for security."

[3] Peers v. McLaughlin, 88 Cal. 294.

[4] Peers v. McLaughlin, 88 Cal. 294. The court referred to cases where imperfect instruments were enforced; and, upon the subject of enforcing such contracts against minors said, per Mr. Justice De Haven: "We have not overlooked the fact that in all the cases above cited the persons against whom the imperfect instrument was enforced had the capacity to make a valid contract, while by the judgment here it is the land of the minors, who were and are incapable of contracting for land, and in a general sense of ratifying such a contract, against which this mortgage is enforced. But this fact ought not, under the circumstances here disclosed, to prevent the application of the equitable rule which lies at the foundation of these cases. It must be borne in mind also, that the agreement of the father, and his assumed agency in accepting a deed in pursuance of the agreement, is the source or foundation of all the right, legal or equitable, which these minors have in the land. The deed was made to them solely by direction of the father. That was the form which the transaction took, and in equity the agreement that the purchase price should be secured by a mortgage upon the land, the conveyance and the mortgage must be regarded as one transaction, and no person, whether minor or adult, can be permitted to adopt that part of an entire transaction which is beneficial, and reject its burdens. This commanding principle of justice is so well established that it has become one

in all such cases equity will consider as done that which the parties agreed to do, and which, as a matter of fair, conscientious dealing, ought to have been done. On the same principle, where a trustee holds land for the separate use of a married woman under a deed reserving to her the right to sell, and giving her the power, in union with her husband and trustee, to convey the land, and a trust deed is executed by her and her husband, to which the trustee is not a formal party, but which in a sealed writing attached to the instrument he approves, the trust deed will create an equitable mortgage, even though the legal title will not pass because the trustee is not a legal party.[5]

§ 1112. **Absolute deed in equity when executed as security for money.**—Where the transaction is considered to possess the nature of a mortgage, permitting the grantor to demand a reconveyance, the grantee has the right to enforce repayment; but where it amounts to a conditional sale, so that a repurchase is optional with the grantor, the grantee

of the maxims of the law. The father acted for the children, and they must either accept or repudiate the entire contract which he made; they cannot retain its fruits and at the same time deny its obligations. 'A party cannot apply to his own use that part of the transaction which may bring to him a benefit, and repudiate the other, which may not be to his interest to fulfill. Thus it had been held that an infant cannot avoid a mortgage and affirm a deed, when both are made at one and the same time, relate to the same property, and go to make up one transaction. If the mortgage be avoided under the plea of infancy, the deed becomes of no effect': Heath v. West, 28 N. H. 108.

"In this case the minors are before the court, and have filed an answer by their guardian *ad litem*. They have not disclaimed the title vested in them by the deed procured under the circumstances stated, but seek to defeat the lien of plaintiffs' mortgage, so far as their title is concerned, by the plea 'that they have not ratified any contract relating to the sale of said lot, and that they are incapable of ratifying the same.' But what the rules of equity would not permit them to do if they had attained their majority they cannot be permitted to do now through their guardian *ad litem*."

cannot compel repayment. In other words, the rights of the parties must be reciprocal.[6] The question to be solved is whether the transaction is essentially a loan. In a case in West Virginia, the grantee, under an absolute deed, agreed that the grantor might repurchase the lands conveyed in three, six, and twelve months respectively, for certain fixed sums, largely in excess of the consideration expressed in the conveyance, and interest thereon, provided that the grantor would elect to repurchase within six months from the date of the agreement. The time provided for the grantor to elect having elapsed without his doing so, the grantee declined to allow a repurchase. It appearing that the transaction was, in fact, a loan, the court permitted the grantor to redeem by paying the sum advanced with interest.[7] The question is one of in-

[5] Bensimer v. Fell, 35 W. Va. 15, 29 Am. St. Rep. 774. See, also, Averett v. Lipscombe, 76 Va. 404.

[6] Williams v. Owen, 10 Sim. 386; Crowell v. Craig, C. C. 79 Fed. 685; Alderson v. White, 2 De Gex & J. 97; McNamara v. Culver, 22 Kan. 661, 669; Hurst v. Beaver, 50 Mich. 612; Davis v. Thomas, 1 Russ. & M. 506; Tapply v. Sheather, 8 Jur. N. S. 1163; Goodman v. Grierson, 2 Ball. & B. 274; Shaw v. Jeffrey, 13 Moore P. C. C. 432; Green v. Butler, 26 Cal. 595. See People v. Irwin, 14 Cal. 428; Ford v. Irwin, 18 Cal. 117; Fisk v. Stewart, 24 Minn. 97.

[7] Klinck v. Price, 4 W. Va. 4; 6 Am. Rep. 268; Hodgkin v. Wright, 127 Cal. 688, 60 Pac. 431; Fahay v. State Bank of O'Neill, 1 Neb. (unof.) 89, 95 N. W. 505; First National Bank v. Sargent, 65 Neb. 594, 59 L.R.A. 296, 91 N. W. 595; Rose v. Gandy, 137 Ala. 329, 34 So. 239. The substance, not the form, of the transaction must determine its nature: Holton v. Meighen, 15 Minn. 69; Spence v. Steadman, 49 Ga. 133; Hicks v. Hicks, 5 Gill & J. 75; Hill v. Edwards, 11 Minn. 22; Weide v. Gehl, 21 Minn. 449; Kuhn v. Rumpp, 46 Cal. 299; Wheeland v. Swartz, 1 Yeates, 579; Starks v. Redfield, 52 Wis. 349; Leahigh v. White, 8 Nev. 147; Cole v. Bolard, 22 Pa. St. 431; Lindsay v. Matthews, 17 Fla. 575; Ehert v. Chapman, 8 Baxt. (Tenn.) 27; Clark v. Finlon, 90 Ill. 245; Wells v. Somers, 4 Ill. App. 297; Scott v. Mewhirter, 49 Iowa, 487. As is said in Robinson v. Cropsey, 2 Edw. Ch. 138, 144: "If the deed or conveyance be accompanied by a condition or matter of defeasance expressed in the deed, or even contained in a separate instrument or exist merely in parol, let the consideration for it have been a pre-existing debt, or a present advance of money to the grantor, the only inquiry necessary to be made is.

tention, to be gathered from all the facts and circumstances bearing upon the transaction.[8] Where land has been sold, and by agreement between vendor and vendee, after default in payment, an absolute decree of foreclosure is entered in the vendor's favor, and he thereupon conveys to a third party, who advances the amount remaining unpaid, and accepts the conveyance for the benefit of the former vendee, he occupies the position of a mere mortgagee of such former vendee.[9] A deed of land with a lease back to the grantor containing a clause for redemption by the payment of a specified amount within a specified time is a mortgage.[1]

§ 1113. Administrators and judicial sales.—Two persons occupied the position of coadministrators of an estate. One of them made a deed of land to the other, describing him as the administrator of the estate. The grantor having died, a suit was brought by his heirs and representatives to have the deed declared to be a mortgage. The facts were, that the deed was intended only as security for the repayment of

whether the relation of debtor and creditor remains, and a debt still subsists between the parties; for if it does, then the conveyance must be regarded as a security for the payment, and be treated in all respects as a mortgage. On the other hand, where the debt forming the consideration for the conveyance is extinguished at the time by the express agreement of the parties, or the money advanced is not paid by way of loan, so as to constitute a debt and liability to repay it, but by the terms of the agreement the grantor has the privilege of refunding or not at his election, then it must be deemed purchase money, and the transaction will be a sale upon condition, which the grantor can defeat only by a repurchase, or performance of the condition on his part, within the time limited for the purchase, and in this way entitle himself to a reconveyance of the property." See Wilmerding v. Mitchell, 42 N. J. L. 476.

[8] Stephens v. Allen, 11 Or. 188; Horbach v. Hill, 112 U. S. 144, 28 L. ed. 670; Albany & Santiam Water Ditch Co. v. Crawford, 11 Or. 243; Davis v. Brewster, 59 Tex. 93; Shear v. Robinson, 18 Fla. 379.

[9] Hoile v. Bailey, 58 Wis. 434.

[1] Vliet v. Young, 34 N. J. Eq. 15; Mobile Building etc. Assoc. v. Robertson, 65 Ala. 382; Blizzard v. Craig, 7 Lea (Tenn.), 693.

funds of the estate used in paying the purchase money; the grantor continued to reside on the land; he paid taxes on the property, and erected permanent improvements. After the death of the grantor, the grantee stated to a person who desired to buy the property, that he thought he had a mortgage on the property, but, after examining his papers, he ascertained that he had a deed. This statement was not denied or explained by the grantee. The court held that while the evidence must be clear and convincing, yet, that under the circumstances, the deed should be considered to be a mortgage.[2] If an assignment of a certificate of redemption to secure a loan of money which the assignee has made to the redemptioner, with which to make a redemption by means of a second mortgage from a sale made under the foreclosure of a prior mortgage, is, in reality, a hypothecation of the redemptioner's interest in the land, to the lender, the latter, if he obtains the sheriff deed under the certificate assigned to him, will hold as mortgagee and not as absolute owner.[3] If the title is obtained by a person at a judgment sale under an agreement that it is to be security for a debt or for money loaned, the transaction is a mortgage.[4]

§ 1114. **Third person disputing character of instrument.**—A third person, who does not claim title under any conveyance or purchase from the grantee under an absolute deed, cannot dispute the character of the instrument when it is claimed to be a mortgage.[5] Thus, while a grantor in an absolute deed intended as a mortgage was absent from the State, a third person took possession of the land without

[2] Parks v. Parks, 66 Ala. 326. Spicer v. Johnson, 61 S. W. 1041.

[3] San Jose Safe Deposit Saving Bank v. Madera Bank, 121 Cal. 539, 54 Pac. 83.

[4] Smith v. Doyle, 46 Ill. 451; Kloch v. Walter, 70 Ill. 416; Jones v. Pierce, 134 Pa. St. 533, 19 Atl. 689; Garnes v. Brockenhoff, 136 Pa. St. 175, 19 Atl. 958; Thacher v. Morris, 52 W. Va. 220, 43 S. E. 141, 94 Am. St. Rep. 928.

[5] Parker v. Hubble, 75 Ind. 580.

having a deed from the grantee. Such third person sold the land and delivered the possession to another, who erected a dwelling-house and made improvements upon the land, without the knowledge of the grantor, and without any surrender of possession on his part. A suit was brought to recover possession from the latter by the grantor. The defense made was, that possession could not be recovered on the mere showing that the deed was a mortgage. But the court held that the action could be maintained. The court said: "Before the adoption of the code, in an action of this sort, the plaintiff would not have been permitted to show that his deed was a mortgage. The action being an action at law, strictly, he would have been bound by the legal effect of the deed, according to its terms, unless before suing in ejectment, he had obtained a decree in equity declaring the true nature of the instrument. Equitable principles are applicable to actions under the code, which was designed to simplify the remedies of parties, and to enable them to obtain in one procedure what before could have been accomplished only by a resort to two tribunals; but it was not intended to modify the rules of right, and permit the recovery, in the action of the code, of any relief on terms on which neither law nor equity would before have granted it." [6]

§ 1115. **Whenever a debt exists, transaction is a mortgage.**—"It is essential to a mortgage that there should be a debt to be secured. It may be antecedent to or created contemporaneously with the mortgage."[7] It is not requisite, however, that there should be any note or agreement to pay

[6] Parker v. Hubble, 75 Ind. 580, 583, per Woods, J. And see Healey v. O'Brien, 66 Cal. 517.

[7] Snavely v. Pickle, 29 Gratt. 35; McNamara v. Culver, 22 Kan. 661; Loving v. Milliken, 59 Tex. 423; Glover v. Payn, 19 Wend. 518; Lodge v. Turman, 24 Cal. 385; Landers v. Beck, 92 Ind. 49; Stryker v. Hershy, 38 Ark. 264; Ahern v. McCarthy, 107 Cal. 382; Banta v. Wise, 135 Cal. 277, 67 Pac. 129; Platt v. McClurg, 49 Atl. 1125; Usher v. Livermore, 2 Iowa (2

the debt, and therefore the nature of the transaction must be determined by the facts and circumstances attending it if it does not appear that a debt or loan was the consideration for the conveyance, it will be difficult to declare it a mortgage.[8] Where an absolute deed is made, not as security for the payment of an existing debt, but is made and accepted as paying or discharging it, an agreement to reconvey in a certain time and for a certain sum does not make it a mortgage. The arrangement is a conditional sale, and the grantee's title can be defeated only by a compliance with the terms of the agreement.[9] Thus, where the consideration for a deed absolute in

Clarke) 117; Bobb v. Wolf, 148 Mo. 335, 49 S. W. 996; Morrison v. Jones, 31 Mont. 154, 77 Pac. 507; Hursey v. Hursey, 56 W. Va. 148, 49 S. E. 367; Fabrique v. Cherokee etc. Mining Co., 69 Kan. 733, 77 Pac. 584.

[9] Overstreet v. Baxter, 30 Kan. 55; Flagg v. Mann, 14 Pick. 467; Galt v. Jackson, 9 Ga. 151; Conway v. Alexander, 7 Cranch, 218, 3 L. ed. 321; Lund v. Lund, 1 N. H. 39, 8 Am. Dec. 29; McDonald v. Kellogg, 30 Kan. 170; Martin v. Martin, 123 Ala. 191, 26 So. 525; Greenwood B. & L. Ass'n v. Stanton, 28 Ind. App. 548, 63 N. E. 574.

[9] Honore v. Hitchings, 8 Bush, 687; Hall v. Savill, 3 Gregne, G. 37, 54 Am. Dec. 485; Stinchfield v. Milliken, 71 Me. 567; Magnusson v. Johnson, 73 Ill. 156; Spence v. Steadman, 49 Ga. 133; Morrison v. Brand, 5 Daly, 40; Ruffier v. Womack, 30 Tex. 332; Glover v. Payn, 19 Wend. 518; Slowey v. McMurray, 27 Mo. 113, 72 Am. Dec. 251; O'Neill v. Capelle, 62 Mo. 202; Pitts v. Cable, 44 Ill. 103; Haynie v. Robertson, 58 Ala. 37; West v. Hendrix, 28 Ala. 226; French v. Sturdivant, 8 Me. 246; Smith v. Crosby, 47 Wis. 160; Snavely v. Pickle, 29 Gratt. 27; Hillhouse v. Dunning, 7 Conn. 139; Murphy v. Purifoy, 52 Ga. 480; Mobile Building & Loan Association v. Robertson, 65 Ala. 382; Vincent v. Walker, 86 Ala. 333, 5 So. Rep. 465; Booker v. Waller, 81 Ala. 549, 8 So. Rep. 225; Perdue v. Bell, 83 Ala. 396, 3 So. Rep. 698; Robinson v. Farrelly, 16 Ala. 475; McMillan v. Jewett, 85 Ala. 476, 5 So. Rep. 145; Tisdale v. Maxwell, 58 Ala. 42; Adams v. Pilcher, 92 Ala. 478, 8 So. Rep. 757; Turner v. Wilkinson, 72 Ala. 364; Bridges v. Lindner, 60 Iowa, 190, 14 N. W. Rep. 217; Hughes v. Sheaff, 19 Iowa, 335; Union Mut. Life Ins. Co. v. Slee, 110 Ill. 35; Freer v. Lake, 115 Ill. 662, 4 N. E. Rep. 512; Rue v. Dole, 107 Ill. 275; Sutphen v. Cushman, 35 Ill. 186; Batcheller v. Batcheller, 144 Ill. 471, 33 N. E. Rep. 24; Fisher v. Green, 142 Ill. 80, 31 N. E. Rep. 172; Kleinschmidt v. Kleinschmidt, 9 Mont. 477; Stryker v. Hershy, 38 Ark. 264;

form was an old debt, the amount paid being a fair price, and there was no agreement for repurchase at the time, but afterward an agreement was made for a reconveyance, on

Voss v. Elder, 109 Ind. 260, 10 N. E. Rep. 74; Rogers v. Beach, 115 Ind. 413, 17 N. E. Rep. 609; Reed v. Reed, 75 Me. 264; Gassert v. Bogk, 7 Mont. 585, 1 L.R.A. 240, 19 Pac. Rep. 281; Gray v. Shelby, 83 Tex. 405, 18 S. W. Rep. 809; Odell v. Montross, 68 N. Y. 499; Kraemer v. Adelsberger, 122 N. Y. 469, 25 N. E. Rep. 859; Hoile v. Bailey, 58 Wis. 434; Kerr v. Hill, 27 W. Va. 576; Davis v. Demming, 12 W. Va. 246; Hoffman v. Ryan, 21 W. Va. 21 W. Va. 415; Yost v. First Nat. Bank, 72 Pac. 209, 66 Kan. 605; Hopper v. Syrvester, 90 Md. 363, 45 Atl. 206; Blumberg v. Beckman, 80 N. W. 710, 121 Mich. 647; Frost Mfg. Co. v. Springfield Foundry & Machine Co., 79 Mo. App. 652; Smyth v. Reed, 78 Pac. 478, 28 Utah, 262; Sadler v Taylor, 38 S. E. 583, 49 W. Va. 104. A member of a limited partnership, whom we shall designate as A, held the title to certain real estate in his own name, but it constituted partnership property, and he held the title for the benefit of the firm. The special partner, whom we shall designate as B, withdrew from the firm, thereby dissolving it, and at that time the firm was indebted to him in the sum of sixty thousand dollars. A executed to B a deed of the property, which was dated March 21, 1871, and was recorded on the following day. This deed was absolute on its face, but an instrument dated April 1, 1871, was executed by all the members of the firm, reciting the indebtedness of the firm to B, and that the latter "receives and takes" from A the deed and also other deeds of real estate held by A and conveyed in the same manner, as security for the payment of thirty thousand dollars of such indebtedness; B to hold the property as trustee only for the firm. For the balance of the indebtedness B took the notes of the firm. It was stated in the instrument that the understanding was that B should pay over to his copartners whatever he realized from a sale of the real estate transferred to him, over this sum of thirty thousand dollars, and the copartners agreed that if this sum should not be realized they would pay the balance, and the sale was to be made within two years. It was also agreed that the firm was to retain possession of the property, collect the rents, and pay taxes and interest on a mortgage resting on the property. The net proceeds were to be paid to B, and applied toward the discharge of the secured indebtedness. B was not to sell the lands without the consent of the firm for a less sum than the sums mentioned in the several deeds, as the consideration, and it was provided that if he should make a sale at a less sum he should be charged with the difference. B died, and his executor, treating the deed and defeasance as a mortgage, conveyed B's interest in them to C, who com-

payment of the exact sum to which the old debt, if it had not been paid, would have come, the presumption was said to be that the conveyance was not a mortgage.[1] A grantee under an absolute deed executed an agreement, in which he stipulated that if the grantor within a prescribed time should return the consideration, with interest, he would deliver up the deed, but in case of the grantor's failure to do so he should lose all

menced an action for foreclosure. C obtained judgment, became the purchaser at the sale thereunder, received the referee's deed, and subsequently conveyed the property to D. A contract was made with E for the sale of the property, but he refused to accept a deed on the ground that the title was defective, claiming that upon the death of B the title vested in his heirs, and that, because the heirs were not made parties in the foreclosure suit, they were not affected by it. E brought an action to recover back the sum paid by him upon the execution of the contract of sale and expenses. It was found by the referee that the defeasance was executed "on or about the date of the delivery" of the deed. The court held, on appeal, that it was to be assumed that the defeasance, and acceptance and delivery of the deed, were contemporaneous, and that the deed never took effect until the defeasance was executed. The two instruments, notwithstanding the difference in their dates, it was held, were to be taken and read together, and when so read they constituted a mortgage, in a suit for a foreclosure to which the heirs of B were not necessary parties. Accordingly the title was held to be good, and the action brought by the purchaser could not be maintained: Kraemer v. Adelsberge 122 N. Y. 467.

A had a tax deed to land, and, believing such title to be invalid, desired to secure the land for the purpose of cutting the timber therefrom and selling it to B, who was a mill-owner engaged in manufacturing lumber in that vicinity. A wrote to the owner of the land in B's name and with his consent, seeking to purchase it. Subsequently B purchased the land, paid the price agreed on therefor, and took the deed in pursuance of an agreement between him and A that the latter would cut the timber thereon and deliver it to B at his mills at a price agreed on, and that A should receive credit for the value of the lumber so delivered upon the amount advanced by B for the land until full payment was made, when B would convey the land to A; and it was agreed that in the meantime B should hold the title as security for the moneys advanced by him. It was held that B was a mortgagee: Stark v. Redfield, 52 Wis. 349. See Wells v. Morrow, 38 Ala. 125.

[1] Calhoun v. Lumpkin, 60 Tex. 185.

claim to the deed. The court held that as there was no debt secured, this agreement was not the defeasance of a mortgage, but a contract to reconvey.[2] If the deed absolute in form was in fact intended as a mortgage, it may be treated as a mortgage in proceedings to foreclose.[3] And in the case of an insolvent estate, a deed made as security for a loan may be treated as a mortgage, in a suit by the administrator of the estate of the grantor, for the benefit of the grantor's creditors.[4] If after the execution of the deed the parties to it still understand that the relation of debtor and creditor continues, this understanding should certainly be regarded as a strong reason for the belief that the deed was intended to be a mortgage.[5]

§ 1116. **Voluntary deed and agreement for mortgage.** —Where a deed is made at the request of a husband to his wife, and she parts with nothing for the conveyance, the property is not to be protected in her hands by those rules applicable in ordinary cases to the property of married women.

[2] Reading v. Weston, 7 Conn. 143, 18 Am. Dec. 89. See Parson v. Seay, 35 Ala. 612. But wherever there is a recognition of a debt by the parties, an agreement of this character constitutes the transaction a mortgage: Alstin v. Cundiff, 52 Tex. 453; Montgomery v. Chadwick, 7 Iowa, 114. A bond was executed by a grantee reciting the deed to him and the indebtedness of the grantor. It provided that if the debt were discharged on or before a certain time, the bond should be void, but that it should continue in force if the grantee should refuse to reconvey the land upon payment. The transaction was held to be a mortgage: Van Wagner v. Van Wagner, 7 N. J. Eq. (3 Halst.) 27. See Henley v. Hotaling, 41 Cal. 22.

[3] Herron v. Herron, 91 Ind. 278.

[4] Reed v. Reed, 75 Me. 264; Kerrigan v. Fielding, 62 N. Y. S. 115, rehearing denied, 63 N. Y S. 1110.

[5] Budd v. Van Orden, 33 N. J. Eq. 143: Jones v. Gillett, 118 N. W. 314, debt may be implied: Equitable Building & Loan Assn. v. King, 48 Fla. 252, 37 So. 181; Wilson v. Rehm, 117 Ill. App. 473; Brown v. Follett, 155 Ind. 316, 58 N. E. 197; Mott v. Fiske, 155 Ind. 597, 58 N. E. 1053; Tannyhill v. Pefferl, 70 Neb. 31, 96 N. W. 1005; Balduff v. Griswold, 9 Okla. 438, 60 Pac. 223; Yingling v. Redwine, 12 Okla. 64, 69 Pac. 810.

Thus, in such a case, the husband gave his notes for the price, and signed a written agreement, to which, however, his wife was not a party, to execute with her a mortgage back after increasing a prior mortgage to a sufficient amount to repair the buildings. The prior mortgage was increased, and the wife then declined to execute a second mortgage in compliance with the agreement made by the husband. It appeared that she did not know of the agreement to give the mortgage when she accepted the deed, but in a suit to compel her to execute the mortgage, it was held that this fact made no difference, as, when she learned of the agreement, she could have surrendered the property, and in that event she would have occupied no worse position than when the deed was given. If she did not wish to do this she ought to perform the agreement which formed a material part of the consideration for the deed.[6]

§ 1117. **Absolute deed made upon application for loan.** —Where a person, who appears to be a grantor, desired in the inception of the transaction to borrow money, and obtains the money, courts are inclined to say that the parties have made a mortgage, although the transaction may have assumed the form of a sale.[7] "The circumstance that there

[6] Hall v. Hall, 59 Conn. 104; Dillon v. Dillon, 24 Ky. Law Rep. 781, 69 S. W. 1099.

[7] Russell v. Southard, 12 How. 139, 13 L. ed. 927; Holmes v. Grant, 8 Paige, 243; Parmelee v. Lawrence, 44 Ill. 405; Brown v. Nickle, 6 Pa. St. 390; Miller v. Thomas, 14 Ill. 428; Wheeler v. Ruston, 19 Ind. 334; Davis v. Deming, 12 W. Va. 246; Cross v. Hepner, 7 Ind. 359; Kellum v. Smith, 33 Pa. St. 158; Crassen v. Swoveland, 22 Ind. 427; Sears v. Dixon, 33 Cal. 326; Jones v. Cullen, 100 Tenn. 1, 42 S. W. 873; Plummer v. Ilse, 41 Wash. 5, 2 L.R.A.(N.S.) 627, 82 Pac. 1009, 111 Am. St. Rep. 997; Fleming v. Georgia R. Bank, 120 Ga. 1023, 48 S. E. 420; Mott v. Fiske, 155 Ind. 597, 58 N. E. 1053; Le Compte v. Pennock, 61 Kan. 330, 59 Pac. 641; Gowin's Admx. v. Vincent, 27 Ky. Law Rep. 1076, 87 S. W. 804; Moore v. Universal Elevator Co., 122 Mich. 48, 80 N. W. 1015; Darling v. Darling, 123 Mich. 307, 82 N. W. 48. In Miller v. Thomas, 14 Ill. 428, there was an absolute deed and an agreement

were negotiations for a loan, or the admission by the grantee that he loaned the money to the grantor, is a strong circumstance to show that the real transaction was a mortgage, and not a conditional sale." [8]

for a reconveyance within a limited time. The money not being repaid at the time agreed upon, possession was taken by the mortgagee, and the land sold to a third person. Says the court: "Upon this subject Shephard was consulted, who suggested that if he took a mortgage it would take as long to collect it as it would to sue the note. He then said he would *buy* the land, but in such a way that he could sell it at a certain day, for he would not have has money out of his hands beyond his control. The result was a conveyance of the land from Edwards, and an agreement for a resale or conveyance upon the payment of the amount due upon a certain day. There is much evidence given of the declarations of the parties as to their intentions, made not only at the time of the transaction, but subsequently, which it is unnecessary to recapitulate minutely. As is generally observed in such cases, the strength of the declarations testified to vary very much according to the inclination of witnesses, and the form of the questions put to them eliciting the answers. Upon the whole, it is manifest that it was the intention of both parties to provide the strongest security possible for the payment of the money designed to be secured at the day stipulated, but, after all, it was only as security that the conveyance was made. While, on the one hand, Edwards (the grantor) stated, if he did not pay the money at the time agreed upon, he must lost his land, on the other, Brown stated that he held the land as security for the payment of the money. . . . In cases of this sort, the real character of the arrangement may as often be gathered from the nature of the transaction and character of the circumstances as from the express declarations of the parties. These when considered can leave the mind in but little doubt on the subject. It is manifest beyond contradiction, that Brown did not wish to become the real purchaser of the land, but he wanted his money at the time agreed upon. Edwards did not wish to part with the land, but desired to give Brown the most perfect security upon it that the money should be promptly paid."

[8] Davis v. Deming, 12 W. Va. 246, 283, per Green, J. In Locke v. Palmer, 26 Ala. 312, the court observes: "There are, in most cases of this character, no tests which will enable a court to determine with anything like positive certainty, whether a mortgage or a conditional sale was intended; but the inclination of equity in such cases is always to lean against the latter, for the reason that an error which converted the transaction into a mortgage would not be as injurious as a mistake which changed a mortgage into a conditional sale; and this leaning is

§ 1118. **Presumption of loan.**—As the intention of the grantor in the beginning was to borrow money, the presumption is natural, unless an alteration of this intention is shown, that any transfer made of his property, connected with negotiations for borrowing money, was made as security for a loan.[9] And this is true, though a different consideration than the one first sought be recited in the deed. The parties having

strongly manifested whenever the contract had its origin in a proposition for a loan, or the relation of debtor and creditor existed between the parties; these circumstances being regarded as amongst the circumstances tending to show that a mortgage was intended."

[9] Davis v. Hemenway, 27 Vt. 589, Anon., 2 Hayw. (N. C.) 26; Crews v. Treadgill, 35 Ala. 334, 344: Beebe v. Wisconsin Mtg. Loan Co., 117 Wis. 328, 93 N. W. 1103; Schneider v. Reed, 123 Wis. 488, 101 N. W. 682. In Crews v. Treadgill (supra) the court said: "This case, then, furnishes most of the evidences of a mortgage. It originated in a loan of money; the possession of the premises remained with the grantor by the permission of the grantee, and the amount of money advanced was little, if any, more than half the then market value of the lands." This case approves the earlier decision of Locke v. Palmer, 26 Ala. 312.

In Smith v. Sackett, 15 Ill. 528, the court said (p. 533), per Scates, J: "Though the loan was refused in the usual form on a note or mortgage, yet they made no particular objection to receiving it in the form of a bond for a deed from the lender. It is very apparent that Sackett preferred and insisted upon this form, under the impression that upon a failure of payment it gave him the advantage of raising the amount by sale to another, supposing the *form* of the transaction conclusive of its true character. It was in this, if at all, he committed his mistake. Courts will look behind and outside of deeds to ascertain whether they were intended as mortgages, although absolute upon their face; and when that character is established, it will ever be treated as a mortgage."

In Davis v. Hopkins, 15 Ill. 519, in a similar case, the court said: "Indeed it seems to be a device resorted to for the concealment of usury, or hard and unconscionable terms, but it is destined to defeat. Whenever its true character may be reached and exposed by proofs, I do not perceive that it opens the door any wider than it already stands to combinations of fraud and perjury. All our transactions are liable to the same where we are destitute of evidence for their exposure; and the remedy proposed by disregarding would equally apply and exclude all testimony, verbal or written, because it might be the result of combination, fraud, deceit, perjury, and forgery."

treated as borrower and lender, the conveyance will be considered a mortgage, unless it appear that they afterward contracted for a sale of the property without reference to the loan.[1] In a case in New York, where an absolute deed was

[1] Morris v. Nixon, 1 How. 118, 11 L. ed. 69. And see Sweetzer's Appeal, 71 Pa. St. 264; Leahigh v. White, 8 Nev. 147; Dwen v. Blake, 44 Ill. 135; Tibbs v. Morris, 44 Barb. 138; Richardson v. Barrick, 16 Iowa, 407; Smith v. Doyle, 46 Ill. 451; Knowlton v. Walker, 13 Wis. 264; Phillips v. Hulsizer, 20 N. J. Eq. 308; Marvin v. Prentice, 49 How. Pr. 385; Fiedler v. Darrin, 50 N. Y. 437, 441.

In Preschbaker v. Feaman, 32 Ill. 475, one Servant was employed by the parties to draw the papers between them. In his testimony he said that he first drew a conditional deed, but the parties preferred a regular deed with an agreement for a reconveyance, and he drew the papers accordingly. Several witnesses who were present at the negotiations testified that Preschbaker desired to *sell* the farm. Others testified that Preschbaker had frequently said that he had sold the farm. The lower court regarded the transaction a conditional sale, and dismissed the bill to redeem. On appeal the Supreme Court reversed the judgment, saying: "To determine whether such a transaction is a sale, or a mortgage to secure the payment of the money advanced, the intention of the parties at the time must control. To ascertain that intention, the transaction must be viewed in the light of all the surrounding circumstances. In equity, the form of the transaction is not regarded, but the substance must control. . . . In such a case all of the attendant circumstances will be considered in ascertaining the true character of the transaction. It is from them the intentions of the parties can be ascertained. . . . It then remains to determine whether the evidence in this case brings it within the rule; whether it is shown to have been designed as a mortgage or a conditional sale. Both instruments having been executed at the same time, must be regarded as forming but one transaction, and they seem rather to indicate a loan and mortgage than a purchase and resale. Such purchases and resales are not of frequent occurrence, while such mortgages are usual." The court, after reviewing the evidence, said: "And whilst the evidence is somewhat conflicting, yet when all of the circumstances are considered, we cannot avoid the conclusion that it was designed as a mortgage to secure a loan." See, also, Harbison v. Houghton, 41 Ill. 529; Whitcomb v. Sutherland, 18 Ill. 578; Coates v. Woodworth, 13 Ill. 654.

In Ruckman v. Alwood, 71 Ill. 155, one A. J. Alwood was persecuted by mob violence, which resulted in the burning of his crops. His lands were new, and he was embarrassed for means to develop them. Ruckman, a man of wealth, was a cousin, and professed a

held to be a mortgage, the court, speaking of the circumstances that led it to that conclusion, said: "The application was for a loan, and all the negotiations were, in respect to the form of the security, upon the premises in question; and there was no treaty for a purchase by the plaintiff, and no pretense that the defendants would have sold the premises for the sum actually alvanced by the plaintiff, or for twice that amount. The time of repayment was the day fixed by the borrower on the first application; and the amount to be repaid, the principal sum advanced, and the ten per cent proposed to be paid, and which the plaintiff was so willing to receive." [2]

friendly interest in Alwood. He suggested to Alwood the idea of conveying the property to him as a means of avoiding these persecutions. Ruckman advanced money, and took an absolute deed. Alwood frequently said to the neighbors that, although he was still in possession, he had ceased to have any interest in the lands or the products, but had sold the premises to Ruckman. Ruckman attempted to treat the deed as absolute, but the court held it to be a mortgage.

[2] Fiedler v. Darrin, 50 N. Y. 438, 442. An agreement for a sale of land for which a deed is to be executed in two years, with an indorsed agreement by the vendee to cancel the agreement on repayment of the price, with interest, by the vendor, within two years, is a mortgage: Brown v. Nickle, 6 Pa. St. 390. In Kerr v. Gilmore, 6 Watts, 405, the court says (p. 407): "The result of these cases seems to be that, if the agreement is in substance a loan of money, no management or contrivance of the lender; no form of expression in the instruments; not even dating the defeasance several days after the deed; not even the lender uniformly stating that he will not have a mortgage, will avail. A sale in form, but which in fact and substance may be avoided by the payment of money within a given time, is and will be held to be a mortgage; if a mortgage until that period elapses, it must continue a mortgage until lapse of time or some other matter changes it. In different cases we find different particulars stated as being *criteria*, by which to distinguish whether the instrument be a mortgage or an absolute sale. Each of these may have weight; but it is not safe to designate the insertion or omission of any one clause or circumstance as conclusive, for that would be adopted by the rapacious, and submitted to by the needy, and the wholesome rules now established would become useless." The court, conceding that the parties in a fair case may make

§ 1119. **Sale may have been made.**—But it does not by any means follow that because the transaction began by an application for a loan, a loan was made. An application of this character may terminate in either an absolute or conditional sale. Undoubtedly, courts will carefully scrutinize all transactions where a sale has been the result of negotiations initiated by an application for a loan. Yet when it clearly appears a sale was intended, it will be upheld.[3] Where a mortgagor applied to the mortgagee for a second loan, and the latter refused to give him the money, but agreed to purchase the land, giving up the first mortgage and paying the additional sum sought by the mortgagor, and agreed also that the mortgagor might repurchase within six months on repayment of both the original loan and the additional sum paid, the transaction was held to be a sale with a right of repurchase, and not a mortgage.[4]

§ 1120. **Delivery of deed in payment of debt.**—An agreement by a grantee under an absolute deed, delivered in payment of a debt made at the same time as the deed, to reconvey upon receiving within a stipulated time an amount equal to the debt and interest, does not necessarily constitute

a conditional sale, continues: "The authorities, however, say that, even when the matter assumes this appearance, the courts are bound to scrutinize the transaction with great care, and to be watchful that it was not originally a loan of money; and when we consider that many of those who lend are astute to devise some mode by which to become absolute owners, if the money be not repaid at the day, this caution would seem to be necessary." See People v. Irwin, 14 Cal. 428; Kelleran v. Brown, 4 Mass. 443; Eaton v. Green, 22 Pick. 526; Colwell v. Woods, 3 Watts, 188, 27 Am. Dec. 345; Poindexter v. McCannon, 1 Dev. Eq. 373, 18 Am. Dec. 591; Crane v. Bonnell, 1 Green Ch. 264.

[3] Turner v. Kerr, 44 Mo. 429; Holmes v. Fresh, 9 Mo. 201, 206; Flagg v. Mann, 14 Pick. 467; McDonald v. McLeod, 1 Ired. Eq. 221; De France v. De France, 34 Pa. St. 385; Ahern v. McCarthy, 107 Cal. 382, 40 Pac. 482; Miller v. Green, 138 Ill. 563, 28 N. E. 837; Shays v. Norton, 48 Ill. 100; Sadler v. Taylor, 38 S. E. 583, 49 W. V. 104.

[4] Adams v. Adams, 51 Conn. 544.

the transaction a mortgage. The test in all these cases is the existence of a debt. Wherever there is a debt which may be the subject of an action, the deed must be declared a mortgage. But where the conveyance discharges the debt, and this is the intention of the parties, so that an action could not be maintained to recover the debt, it being paid, the sale must be held absolute.[5] Where the title has been transferred by an actual sale, a contract by the purchaser for a resale of the property, within a specified time, for the price that he paid, does not change the transaction into a mortgage.[6] The essential fact to be determined is, whether the conveyance operates as a discharge of the debt. If the indebtedness remains uncanceled, the conveyance is treated in equity as a mortgage, though the grantee may not regard it as such. But he cannot hold the absolute title without at the same time relinquishing the right to compel payment of the debt.[7] The fact that the vendee maintains possession for a long time

[5] Page v. Vilhac, 42 Cal. 75; Farmer v. Grose, 42 Cal. 169; Morrison v. Brand, 5 Daly, 40; Weathersly v. Weathersly, 40 Miss. 462, 90 Am. Dec. 344; Turner v. Kerr, 44 Mo. 429; Hoopes v. Bailey, 28 Miss. 328; Baugher v. Merryman, 32 Md. 185; Holmes v. Warren, 145 Cal. 457, 78 Pac. 954; Samuelson v. Mickey, 73 Neb. 852, 103 N. W. 671, Id. 73 Neb. 852, 106 N. W. 461; Doying v. Chesebrough, 36 Atl. 893; Sadler v. Taylor, 49 W. Va. 104, 38 S. E. 583; Fuller v. Jenkins, 130 N. C. 554, 40 S. E. 706; Creswell v. Smith, 61 S. C. 576, 39 S. E. 757; Dabney v. Smith, 38 Wash. 40, 80 Pac. 199. In Farmer v. Grose, 42 Cal. 169, the court said: "In cases of this class the well-established test by which to determine whether the transaction is a mortgage or a defeasible sale is the fact whether or not, notwithstanding the conveyance, there is a subsisting continuing *debt* from the grantor to the grantee. If the consideration for the conveyance was an antecedent debt, and the property is to be reconveyed on the payment of the debt with interest, and nothing more appears, *prima facie* the transaction would be a mortgage. In like manner, if there was no antecedent debt, but a loan of money to be repaid with interest, and such was the real intention and understanding of the parties, it would be a mortgage and not a defeasible sale, whatever may be the terms employed in the contract."

[6] Mason v. Moody, 26 Miss. 184; Porter v. Nelson, 4 N. H. 130.

[7] Sutphen v. Cushman, 35 Ill. 186.

without the payment of interest or rent, and the relation of debtor and creditor is not recognized in the subsequent dealings of the parties, tends to show that the transaction was not a mortgage.[8] Where the relation of debtor and creditor continues, the grantee possesses the right to call upon the grantor for any deficiency arising upon a foreclosure and sale. Unless he has this right, an agreement to reconvey with the deed creates a conditional sale.[9] A mortgagor executed a quitclaim deed to the mortgagee, who held two overdue mortgages on the land, the grantor taking back a lease. There was a provision for a reconveyance if he, the grantor and debtor, should pay the debt within a time specified, and the old notes and mortgages were not surrendered. The court held that the instrument was to be treated as a mortgage, and not as an absolute deed.[1]

§ 1120a. Note for deficiency after payment of a pre-existing debt.—But the fact that the grantee in the deed takes a note from the grantor does not of itself show that the deed is intended as a mortgage. The fact to be determined is whether the property is conveyed by the grantor and accepted by the grantee in total or partial payment of the debt. Prior to the execution of a deed, the grantors were indebted to the grantees in the sum of eighteen hundred dollars, and the deed was given in satisfaction of such indebtedness, and, at the time of the execution of the deed, the grantors gave to the grantees their note for five hundred dollars, with the understanding that if, from a sale of the land conveyed, the sum of eighteen hundred dollars and interest thereon should not be realized, then the note should

[8] O'Reilly v. O'Donoghue, Ir. Rep. 10 Eq. 73.

[9] Robinson v. Cropsey, 2 Edw. Ch. 138; Blackmore v. Byrnside, 7 Ark. 505; Slowey v. McMurray, 27 Mo. 113, 72 Am. Dec. 251; Johnson v. Clark, 5 Ark. 321; Saxton v. Hitchcock, 47 Barb. 220; De Bruhl v. Maas, 54 Tex. 464; Porter v. Clements, 3 Ark. 364. See Usher v. Livermore, 2 Iowa, 117.

[1] Bearss v. Ford, 108 Ill. 16.

be paid, but not otherwise. If a greater sum were obtained, or if, after that sum was realized, any land remained, the surplus of land or money it was agreed should belong to the grantors. The court held that the agreement did not constitute the deed a mortgage. The note for five hundred dollars was executed merely for the purpose of rendering certain the full realization of the antecedent indebtedness, if the land conveyed when sold should not realize that sum.[2]

§ 1121. **Purchase of mortgaged premises by mortgagee.**—A mortgagee has the right to purchase the mortgaged premises. If the deed made to him is in satisfaction of the mortgage debt, the deed does not thereby become a mortgage. An owner of land had made deeds of trust and had not paid the interest or taxes for four years. On receiving notice that the property would be sold, he stated that he preferred to make a deed for the property rather than to have a sale take place under the trust deeds or on foreclosure Finally the amount due was determined, and he executed a deed absolute in form for the property. But he took back a contract to convey the land to him upon the payment of the amount found to be due within one year. He executed, however, no new obligation, and his notes and deeds of trust were surrendered, and the trust deeds were satisfied on the records. This transaction was held to be a sale of the equity of redemption, and not in any sense a mortgage.[3] The con-

[2] Manasse v. Dinkelspiel, 68 Cal. 404.

[3] Rue v. Dole, 107 Ill. 275. "No new note was given," said Mr. Justice Craig, "nor was there any agreement by Rue to pay the executor a single dollar. The contract given to him does not bind him to make any payment whatever, but it merely provides that the executor shall convey the premises to him, *provided he pays* a certain amount at a certain time. If, then, there was no debt due from Rue to the executors, how could the deed and contract be held to be a mortgage? The land could not be conveyed as security for a debt, because there was no debt to secure. Suppose the complainants had, after the deed and contract were executed, and after the time for a conveyance had

tract by which the mortgage is converted into a sale should be based on an adequate consideration, and should be fair and reasonable.[4]

§ 1122. **Liability for taxes.**—Where no agreement exists to the contrary, the grantee of a deed absolute in form but intended as a mortgage is liable as between himself and grantor, according to a decision in Maryland, to pay the taxes on the property which have accrued after the date of the deed.[5]

§ 1123. **Comments.**—The decision in the case cited in the preceding section undoubtedly would have been good law in California, where by force of constitutional provisions formerly existing the mortgagee was compelled to pay the taxes on his mortgage, which for the purposes of assessment and taxation was deemed and treated as an interest in the property affected thereby.[6] But where the mortgage is not taxed to the mortgagee, it is doubtful if this decision would be regarded as correctly stating the law. If a deed absolute in form is in fact a mortgage, it should be treated as a mortgage for all purposes, and all the consequences that attach to a mortgage, such in form, should also attach to an instrument which

expired, sued the defendant in an action at law to recover the amount of the original indebtedness, could the action have been maintained? We think not, for the reason the land was conveyed in satisfaction of the indebtedness. And where a plea of payment would operate as a bar to an action of that character, for the reason the conveyance had extinguished the debt, the transaction may be regarded as an absolute sale."

[4] Le Compte v. Penmost, 61 Kan. 330, 59 Pac. 641; McMullen v. Jewett, 85 Ala. 476, 5 So. 145; Dougherty v. McColgan, 6 Gil. N. J. 275; Wilson v. Giddings, 28 Ohio St. 554; Carpenter v. Carpenter, 70 Ill. 457; Cassens v. Henstis, 201 Ill. 208, 66 N. C. 283, 94 Am. St. Rep. 160; Cramer v. Wilson, 202 Ill. 83, 66 N. E. 869; Sadler v. Taylor, 49 W. Va. 104, 38 S. E. 583. A new consideration is necessary: Hursey v. Hursey, 56 W. Va. 148, 49 S. C. 367.

[5] Davis v. Hall, 52 Md. 673.

[6] Cal. Const. art. xiii, §§ 4, 5.

in substance is a mortgage, regardless of what its form may be. It seems to the author, that if the grantee is declared to be a mortgagee, he should not occupy a worse position than he would have occupied had the instrument been in the form of a mortgage; and hence, it would seem reasonable, in those States where no deduction is made in favor of the mortgagor for mortgages on his property, that he should be chargeable with the taxes paid by the grantee under an absolute deed intended as a mortgage.

§ 1124. **Third person as purchaser.**—If a third person is induced to become a purchaser, and he agrees to convey the premises to the person inducing him to purchase on the payment of a certain sum to him within a certain time, the agreement must be complied with, or all rights to purchase under it are forfeited.[7] A conditional sale and not a mortgage must be the result where the relation of debtor and creditor is not created.[8] But in equity, if the debtor has any interest in the property, legal or equitable, and obtains a conveyance for a person who advances money therefor, upon an understanding that the title shall be transferred to him upon paying the money advanced, he has the right to redeem from the grantee, who, having secured the title by his act, holds it as his mortgage.[9] Where a person has a contract for the purchase of land, and procures another who takes the deed in his own name to advance the money, the latter is a mortgagee,

[7] Hill v. Grant, 46 N. Y. 496; Stephenson v. Thompson, 13 Ill. 186; Hull v. McCall, 13 Iowa, 467; Roberts v. McMahan, 4 Greene, G. 34.

[8] Humphrey v. Snyder, 1 Morris, 263; Galt v. Jackson, 9 Ga. 151; Chapman v. Ogden, 30 Ill. 515. See Carr v. Rising, 62 Ill. 14; Smith v. Sackett, 15 Ill. 528.

[9] Houser v. Lamont, 55 Pa. 311, 93 Am. Dec. 755; Stoddard v. Whiting, 46 N. Y. 627; Turner v. Wilkinson, 72 Ala. 361; Wright v. Shumway, 1 Biss. 23; Carr v. Carr, 52 N. Y. 251; Lindsay v. Matthews, 17 Fla. 575; Hoile v. Bailey, 58 Wis. 434; Fisk v. Stewart, 24 Minn. 97; McBurney v. Wellman, 42 Barb. 390; Stinchfield v. Milliken, 71 Me. 567.

and his rights and obligations are the same as they would be if the land had been transferred to him by the debtor.[1] But then the person procuring another to purchase land must have either an equitable or legal interest in it, to cause an agreement by the purchaser to convey upon being reimbursed, to constitute the transaction a mortgage. When there is no such interest, the transaction well be regarded as a mere contract of sale.[2] Where a mortgagor after the expiration of the statutory time was allowed to redeem, another person advancing the money, and the mortgagee executed a quitclaim conveyance to the mortgagor, and the later executed an absolute deed to the person advancing the money, and received back a written agreement giving a certain time to redeem on payment of the money advanced, the conveyance in equity was deemed a mortgage.[3]

§ 1125. **Agreement to reconvey showing absolute sale.** —In the majority of cases, the agreement for repurchase does not attempt to define the transaction either as a con-

[1] Hidden v. Jordan, 21 Cal. 92; Strong v. Shea, 83 Ill. 575; Smith v. Knoebel, 82 Ill. 392; Brumfield v. Boutall, 24 Hun, 451; Barnett v. Nelson, 46 Iowa, 495; Hardin v. Eames, 5 Bradw. (Ill.) 153; San Jose Safe Deposit Bank of Savings v. Bank of Madera, 121 Cal. 539, 54 Pac. 83, Id. 121 Cal. 539, 54 Pac. 270; Clark v. Seagraves, 186 Mass. 430, 71 N. E. 813. And where the grantee advances only part of the purchase money, he has a lien upon the whole land, and not merely upon a proportionate undivided interest: Hidden v. Jordan, *supra*.

[2] Caprez v. Trover, 96 Ill. 456; McClintock v. McClintock, 3 Brewst. 76. See Penn. Life Ins. Co. v. Austin, 42 Pa. St. 257; Robertson v. Molini Milburn-Stoddard Co., 106 Iowa, 414, 76 N. W. 736.

[3] Turner v. Wilkinson, 72 Ala. 361. When land is conveyed by absolute deed to secure a loan, and a contract entered into between the parties that the property shall be re-conveyed on payment of the loan, the entire legal title vests in the grantee and no action is required on his part to devest the grantor of his equitable right to redeem: Fitch v. Miller, 200 Ill. 170, 65 N. E. 650; Malone v. Roy, 134 Cal. 344, 66 Pac. 313; Pitts v. Mixer, 115 Ga. 281, 41 S. E. 570; Johnson v. Property Loan & Bldg. Ass'n, 94 Ill. App. 260; Barlow v.

ditional sale or a mortgage. A statement in the agreement for a conveyance that it is not to be construed so as to make the transaction a mortgage, is not conclusive on the court. But where the contract for repurchase shows upon its face that the parties actually intended to make an absolute sale, giving the vendor an option to repurchase, it will be so construed when its provisions and the idea that a mortgage was intended are inconsistent.[4] A recital in an absolute deed that it was executed to secure a loan of money, shows that the deed upon its face is a mortgage.[5] If the instrument, however, contains a declaration that it is a conditional deed and not a mortgage, and that it is to be absolute if the sum specified is not paid at the time limited, it is held that it is to be construed as a conditional deed and not a mortgage.[6] Where the grantor claims after the transaction had been consummated, that it was a mortgage, while in fact it was a sale, a bill in equity may be maintained by the grantee to have it adjudged a sale.[7] The right to redeem from a mortgage

Cooper, 109 Ill. App. 375; Keeline v. Clark, 132 Iowa, 360, 106 N. W. 257.

[4] Hanford v. Blessing, 89 Ill. 188; Smith v. Crosby, 47 Wis. 160; Vance v. Anderson, 113 Cal. 532, 45 Pac. 816; Woods v. Jansen, 130 Cal. 200, 62 Pac. 473.

[5] Montgomery v. Chadwick, 7 Iowa, 114; Grogan v. Valley Trading Co., 30 Mont. 229, 76 Pac. 211; Ackerman v. Bergrisch, 50 Atl. 673; Posten v. Jones, 122 N. C. 536, 29 S. E. 951; Watkins v. Williams, 123 N. C. 170, 31 S. E. 388; Weiseham v. Hocker, 7 Okl. 250, 54 Pac. 464; Security Savings & Trust Co. v. Loewenberg, 38 Or. 159, 62 Pac. 647; Brickle v. Brickle, 55 S. C. 510, 33 S. E. 720; Sellers v. Sellers, 53 S. W. 316.

[6] Burnside v. Terry, 45 Ga. 621. The terms of an agreement may be so convincing that the transaction was a sale, that while not conclusive, very little additional evidence to this effect may lead to that conclusion: Hanford v. Blessing, 80 Ill. 188. Effect should be given to an express provision that an agreement for reconveyance should be deemed only a contract to reconvey, and not as an acknowledgment that the deed was intended as a mortgage, if consistent with the whole transaction: Ford v. Irwin, 18 Cal. 117. See Hickox v. Lowe, 10 Cal. 197; Bishop v. Williams, 18 Ill. 101; Snyder v. Griswold, 37 Ill. 216.

[7] Rich v. Doane, 35 Vt. 125; Gussert v. Bogk, 7 Mont. 585, 1 L.R.A.

exists until it has been taken away by foreclosure, but in the case of a conditional sale, the contract of the parties will be enforced, and there can be no redemption after the day fixed for payment.[8] A deed was executed, and the grantee agreed

240, 19 Pac. Rep. 281; Kahn v. Weil, 42 Fed. Rep. 704; Manasse v. Dinkelspiel, 68 Cal. 404, 9 Pac. 457. Where the original grantees in a deed reconvey to the original grantors by a deed reciting that it was intended to secure the payment of money to the grantors, the grantees still retain the legal title and the instrument in legal effect is only a mortgage creating a lien requiring judicial performance for its enforcement. If the parties have considered such conveyance as a mortgage such construction may be considered for the purpose of removing any doubt that may exist as to the nature of the transaction: Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712. The parties may agree for the conveyance of land at an agreed price with the right to repurchase at a higher price and such an agreement is valid and may be enforced: McElmworay v. Blodgett, 120 Ga. 9, 47 S. E. 531. If as a part of a transaction by which land is conveyed the grantee leases the premises to the grantor, giving him the privilege of repurchasing the property conveyed for an amount equal to the sum loaned by the grantee to the grantor with added interest, the only title possessed by the grantee is that of a mortgagee: Sowles v. Butler, 71 Vt. 271, 44 Atl. 355. A sale and not a mortgage results where grantee gives to the grantor a contract allowing the grantor three years in which to redeem the land: Martin v. Allen, 67 Kan. 758, 74 Pac. 249. See as to other cases where deeds have been made with the right on the part of the grantor to redeem or repurchase: Felton v. Grier, 109 Ga. 320, 35 S. E. 175; Davies v. Kendall, 50 La. Ann. 1121, 24 So. 264; Harper v. Citizens' Bank etc., 51 La. Ann. 511, 25 So. 446; Clark v. Landon, 90 Mich. 83; Brown v. Bank of Sumpter, 55 S. C. 51, 32 S. E. 816; Wiggins v. Wiggins, 16 Tex. Civ. App. 335, 40 S. W. 643; Kirby v. Nat. Loan etc. Co., 22 Tex. Civ. App. 257, 54 S. W. 1081; Reed v. Parker, 33 Wash. 107, 74 Pac. 61.

[8] People v. Irwin, 14 Cal. 428; Henley v. Hotaling, 41 Cal. 22; Cornell v. Hall, 22 Mich. 377; Joy v. Birch, 4 Clark & F. 57; Ensworth v. Griffiths, 1 Brown Parl. C. 149; Pegg v. Wisden, 16 Beav. 239; Perry v. Meddowcroft, 4 Beav. 197; Barrell v. Sabine, 1 Vern. 268; Holmes v. Grant, 8 Paige, 243; Glover v. Payn, 19 Wend. 518; Brown v. Dewey, 2 Barb. 28; Hanford v. Blessing, 80 Ill. 188; Pitts v. Cable, 44 Ill. 103; Dwen v. Blake, 44 Ill. 135; Shays v. Norton, 48 Ill. 100; Carr v. Rising, 62 Ill. 14; Haines v. Thomson, 70 Pa. St. 434; Rich v. Doane, 35 Vt. 125; Trucks v. Lindsay, 18 Iowa, 504; Merritt v. Brown, 19 N. J. Eq. 287; Ransome v. Frayser, 10 Leigh, 592; Moss v. Green, 10 Leigh, 251, 34 Am. Dec. 731; Schreiber v. Le

in writing to pay certain debts of the grantor, and the grantor was to repay the amount in a specified time, with interest, and upon repayment, the grantee was to reconvey to the grantor. The transaction, the court held, constituted a conditional sale and not a mortgage.[9]

§ 1126. **Agreement that grantee may sell.**—Where the agreement authorizes the grantee to sell the property and apply the proceeds toward the payment of the sum he has advanced, paying the residue, if any, to the grantor, the transaction is a mortgage.[1] But the grantee has the power to convey the estate free from the encumbrance.[2] A con-

Clair, 66 Wis. 579, 29 N. W. Rep. 570, 899. The privilege to repurchase may be a personal one, which cannot be enforced in case of the death of the grantor: Newton v. Newton, 11 R. I. 390, 23 Am. Rep. 476.

[9] Hays v. Carr, 83 Ind. 275.

[1] Eaton v. Whiting, 3 Pick. 484; Kidd v. Teeple, 22 Cal. 255; Ogden v. Grant, 6 Dana, 473; Hagthorp v. Hook, 1 Gill & J. 270; Crane v. Buchanan, 29 Ind. 570; Lawrence v. Farmers' Loan and Trust Co., 13 N. Y. 200; Ruffners v. Putney, 12 Gratt. 541; Gillis v. Martin, 2 Dev. Eq. 470, 25 Am. Dec. 729. Sanborn v. Magee, 79 Iowa, 501, 44 N. W. 720; Trimble v. McCormick, 15 S. W. 358, 12 Ky. L. Rep. 857; Jones v. Blake, 33 Minn. 362, 23 N. W. 538; Tower v. Fatz, 26 Neb. 706, 42 N. W. 884, 18 Am. St. Rep. 795; Hyndman v. Hyndman, 19 Vt. 9, 46 Am. Dec. 171; Alexander v. Rodriguez, 12 Wall. 323, 20 L. ed. 406, 129 N. Y. 223, 29 N. E. 297; Clark v. Haney, 62 Tex. 511, 50 Am. Rep. 536. In Kedd v. Teeple, 22 Cal. 255, the instrument granted, bargained, and sold a water ditch, authorized the grantees to collect the issue and profits, and, in case payment was not made, to sell the property. The court held it constituted a mortgage.

[2] Eaton v. Whiting, 3 Pick. 484. In that case, Parker, C. J., delivering the opinion of the court, says (p. 491): "An instrument of conveyance, therefore, which appears on the face of it, or by contemporaneous instruments, to be intended as security for the payment of a debt or the performance of other conditions, does not lose this character while the estate remains in the hands of the grantee, although he may have power to convey the estate free from such encumbrance. A power to sell, *executed* to one who relies upon such power, and expects and intends to purchase an absolute estate, will, without doubt, pass an unconditional estate to the purchaser, though this form of conveyance is rare in this country. But while the power remains un-

ditional sale is not converted into a mortgage by an agreement on the part of the grantor, who is a joint tenant, not to make partition without the grantee's advice and consent.[3] Nor does an agreement permitting the grantor, within a specified time, to sell the property for a larger sum than he received, by paying to the grantee the amount mentioned as the consideration in the deed, make the instrument a mortgage.[4]

§ 1127. **Surplus after sale.**—When a deed absolute on its face is intended as a mortgage, it will be treated as such in all its aspects, and, if the property is sold, the surplus remaining after the payment of the debt may be recovered by the mortgagor.[5] Thus, a corporation advanced the sum of seven hundred dollars to A, for the redemption of a piece of real estate for the benefit of the owner's children, the property being subject to a deed of trust to secure a debt. The property was thereafter conveyed to A for the expressed consideration of seven hundred dollars, he agreeing, in case the property should be sold for more than the loan and other necessary expenses incurred, to pay the surplus

executed, the relation of mortgagor and mortgagee subsists, if that was the relation created by the instrument separate from the power; but, even under such a power, it has been held in England that if the purchaser knows the original nature of the transaction, and appears not to have purchased wholly without reference to the conditional character of the title, he will be compelled in equity to surrender it on receiving the money he has advanced: See Croft v. Powel, 2 Com. Rep. 607."

[3] Cotterell v. Purchase, For. 61; Cas. t. Talb. 61.

[4] Stratton v. Sabin, 9 Ohio, 28, 34 Am. Dec. 418.

[5] Bettis v. Townsend, 61 Cal. 333. And see, also, Hunt v. Middlesworth, 44 Mich. 448, where a judgment had been recovered in another State for the surplus, and suit was afterward brought on this judgment in the State in which the deed was executed. In the suit based on the judgment, the offer of the grantee in the deed to show how the property was paid for when first conveyed, was held to be immaterial by reason of the judgment.

to the children of the owner. A subsequently sold the land for the sum of twelve hundred dollars. The court held that the transaction constituted a mortgage, and that an action could properly be brought in the names of the beneficiaries of the trust to recover the difference.[6] A mortgagee in possession, under a deed absolute in form, is, in case he sells the mortgaged premises, compelled to acount for the amount which he received, though he may be able to show, by the opinion of competent judges, that the sum for which the property was sold exceeds its market value.[7] Where a mortgagee takes a conveyance of the mortgaged premises, and in a collateral agreement in writing covenants that if he shall sell the premises for more than the amount of the mortgage he will pay over the surplus to the mortgagor and then afterward the mortgagee in possession makes improvements with the knowledge of the mortgagor and after the death of the mortgagee the property is sold for an amount equal to the value of the property plus the improvements, the mortgagor is not entitled to any of the proceeds of the sale.[8]

§ 1128. **Agreement that grantee may buy.**—An agreement executed by the grantee contemporaneously with the execution of a deed, and as part of the transaction, by which he binds himself to account to the grantor for a portion of the profits which may be realized by him on a resale of the property, and by which he is to sell if a specified price can be secured, is not inconsistent with the vesting of the title.[9] A

[6] Bettis v. Townsend, 61 Cal. 333; Robinson v. Gassoway, 39 So. 1023.

[7] Budd v. Van Orden, 33 N. J. Eq. 143.

[8] Hoerr's Estate, 20 Pa. Super. Ct. 425.

[9] Macauley v. Porter, 71 N. Y. 173. Rapallo, J., delivering the opinion of the court, said: "There was no condition attached to the grant upon which it was to become void, and the property revert to the grantor. The agreement clearly shows that the title was to pass to Porter, that he should have power of disposition over it, and that all he undertook to do was to account to his grantor for one-half of the profits which might be

grantor conveyed land by an absolute deed, and the grantee on the same day executed a covenant, in which he recited that the conveyance was made for the purpose of paying a specified sum of money, and he covenanted that he would not convey the premises within one year without the consent of the grantor, and that, if the grantor should find a purchaser within that time, he would, on receiving the amount with interest for which the land had been conveyed to him, convey to such purchaser; the covenant further provided that in case such sale should not be made within the year, it should then be submitted to certain persons named to decide what additional amount should be paid by the grantee for the land, which sum he covenanted to pay; the transaction was held not to be a mortgage, and the grantee was held entitled to recover the land in ejectment.[1] Where a conveyance is made for the purpose of securing future loans, and there is an oral agreement to convey on reimbursement, the deed will be held to be a mortgage.[2]

§ 1129. **Where no note is given.**—It is not necessary for the creation of a mortgage that there should be a note or any evidence of indebtedness. The rule is sometimes stated that every mortgage implies a loan, and every loan implies a debt.[3] The circumstance that there is no agree-

realized by him on a resale, if made within the year, and that he would not sell within the year for less than four thousand dollars without the consent of Miss Tracy. Such an agreement is not inconsistent with the vesting of the title in him, and to record such a deed and agreement as a mortgage would have been clearly improper."

[1] Baker v. Thrasher, 4 Denio, 493. The court said: "There was no condition or agreement under which the title could ever become revested in the grantor. It was to remain in the grantee, or the person to whom he should convey in pursuance of the covenant."

[2] Madigan v. Mead, 31 Minn. 94.

[3] Wright v. Bates, 13 Vt. 341; Flagg v. Mann, 14 Pick. 467; Murphy v. Calley, 1 Allen, 107; Davis v. Stonstreet, 4 Ind. 101. Mr. Justice Wells, in Campbell v. Dearborn, 109 Mass. 130, 12 Am. Rep. 671, says, on page 144: "When it is considered that the inquiry itself is supposed to be made necessary

ment for the payment of the debt may be of considerable importance as tending to show the nonexistence of the relation of debtor and creditor, and that the conveyance was not intended as a mortgage.[4] But it is not conclusive; attention should be paid to the absence of a collateral undertaking as a circumstance only, from which the intention of the parties to make a mortgage or a sale with a contract for repurchase may be ascertained.[5]

§ 1130. **Quitclaim deed.**—Where the real intent is to secure a person for a debt due to him from the owner of land, and to give him the means of making a more rapid disposition of the property for the satisfaction of the debt, the nature of the deed that is executed is immaterial. A quitclaim deed in such a case cannot be considered as a final surrender of all the interest of the grantor.[6] But a quitclaim deed conveys the legal title, and though it may have been in-

by the adoption of forms and outward appearance differing from the reality, it is hardly reasonable that the absence of an actual debt manifested by a written acknowledgment or an express promise to pay should be regarded as of more significance than the absence of a formal defeasance. . . . A mortgage may exist without any debt or other personal liability of the mortgagor. If there is a large margin between the debt or sum advanced and of the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor." See, also, to the effect that no written evidence is necessary: Wing v. Cooper, 37 Vt. 169; Brant v. Robertson, 16 Mo. 129; Fisk v. Stewart, 24 Minn. 97; Montgomery v. Spect, 55 Cal. 352.

[4] Conway v. Alexander, 7 Cranch, 218 3 L. ed. 321; Bacon v. Brown, 19 Conn. 34; Horn v. Keteltas, 46 N. Y. 605; Jarvis v. Woodruff, 22 Conn. 548; Brumfield v. Boutall, 24 Hun, 451.

[5] Murphy v. Caley, 1 Allen, 107; Flint v. Sheldon, 13 Mass. 443, 448, 7 Am. Dec. 162; Flagg v. Mann, 14 Pick. 467; Brown v. Dewey, 1 Sand Ch. 56; Brant v. Robertson, 16 Mo. 129; Rice v. Rice, 4 Pick. 349; Kelly v. Beers, 12 Mass. 387.

[6] Curtiss v. Sheldon, 47 Mich. 262; Huston v. Canfield, 57 Neb. 345, 77 N. W. 763; Canfield v. Huston, Id.; Babcock v. Wells, 25 R. I. 23, 54 Atl. 596, 105 Am. St. Rep. 848. And see Bearss v. Ford, 108 Ill. 16.

tended as a mortgage, a *bona fide* purchaser, without notice from the grantee, will take the title free from equities.[7]

§ 1131. **Continued possession of grantor.**—The grantor's continuance in possession is a circumstance tending to show that the transaction is a mortgage.[8] "If the vendor remains in the possession of the property after the alleged sale, this is a circumstance that tends to show that it was not really a sale, but a mortgage, for such continuing possession in the vendor, after a sale, if not inconsistent with a sale, is an unusual accompaniment of it."[9] A grantee, on the same day that a conveyance absolute on its face was made

[7] Brophy Mining Co. v. Brophy & Dale etc. Mining Co., 15 Neb. 101.

[8] Hoffman v. Ryan, 21 W. Va. 415; Davis v. Deming, 12 W. Va. 246; Lawrence v. Dubois, 16 W. Va. 443; Kerr v. Hill, 27 W. Va. 576; Matheney v. Sandford, 26 W. Va. 386; Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. 371; Van Gilder v. Hoffman, 22 W. Va. 1; Ruffier v. Womack, 30 Tex. 332; Crews v. Threadgill, 35 Ala. 334; Thompson v. Banks, 2 Md. Ch. 430; Wright v. Bates, 13 Vt. 341; Edwards v. Hall, 79 Va. 321.

[9] Davis v. Demming, 12 W. Va. 246, 282, per Green, J. In Streator v. Jones, 3 Hawks, 423, Hall, J., said (p. 438): "I have said that the evidence in this case convinces me that the deed in question should be considered as a mortgage, because I think it was understood by the parties that the land was redeemable; and I have come to this conclusion from the evidence given in the case. Although the evidence proving directly the declaration of Jones is not much to be relied upon, yet it is corroborative of other evidence as to the value of the land, the possession kept afterward by Streator, and the rent charged, etc., as well as the needy situation of Streator." In the same case Henderson, J., said, on page 445: "The resales, particularly when made immediately after the execution of the title deeds, should be strictly scrutinized. . . . The object of the bargain was not to acquire the property, but to make a profit of money; not that a person may not use his money to his profit and its increase, by buying and selling, but it must be a real sale and transfer of right, which from their very nature is not to be presumed. For why should a person really and *bona fide* purchase the property, and in a moment after, without any cause and before that foible of our nature, proneness to change, could exert its influence, part with it again? It is said the motive was to make money. It is admitted and was so understood before the contract was closed, and formed

to him, executed and delivered to the grantor an agreement for reconveyance on payment of a given sum within a limited time; the grantor remained in the possession and use of the land as before; these facts were held to show that the deed was intended only as a security for the payment of a debt.[1]

§ 1132. **Payment of Interest.**—If, by the contract or understanding between the parties, interest is to be paid, it is a circumstance tending to show the existence of a debt, and that the transaction is a mortgage and not a conditional sale.[2] It may happen that what is really the payment of in-

part of it; and it is true that there may be, upon principle, a sale made under such circumstances, but I have never known one, and they are so rare that I have never known a person who had."

[1] Clark v. Finlon, 90 Ill. 245; Ransone v. Frayser, 10 Leigh, 592; Gibson v. Eller, 13 Ind. 124; Lincoln v. Wright, 4 DeGex & J. 16; Ruffier v. Womack, 30 Tex. 332; Campbell v. Dearborn, 109 Mass. 130, 12 Am. Rep. 671; Steel v. Black, 3 Jones Eq. 427; Daubenspeck v. Platt, 22 Cal. 330; Strong v. Shea, 83 Ill. 575; Thompson v. Banks, 2 Md. Ch. 430; Sellers v. Stalcup, 7 Ired. Eq. 13; Kemp v. Earp, 7 Ired. Eq. 167. In Lawrence v. Dubois, 16 W. Va. 443, 461, the court said: "Another strong circumstance is that the vendor remains in the possession of the property long after the alleged sale and payment therefor." In Kemp v. Earp, 7 Ired. Eq. 167, the court said (p. 171): "The plaintiff held possession for the balance of the year 1845, during the year 1846, and until August, 1847, *without paying* rent. It is not suggested that by the terms of the sale she was entitled to remain on the land rent free. This is inconsistent with the fact of an absolute sale, and can only be accounted for on the ground of a mortgage." Where a person, who afterward died, gave an absolute deed to a creditor, but remained in possession of the land, it was held, in a contest between the other creditors and the widow of the deceased, that parol evidence might be admitted to show that the conveyance was only a mortgage: Carter v. Hallahan, 61 Ga. 314.

[2] Montgomery v. Spect, 55 Cal. 352; Murphy v. Calley, 1 Allen, 107; Farmer v. Grose, 42 Cal. 169; Harbison v. Houghton, 41 Ill. 522; Honore v. Hutchings, 8 Bush, 687. In Montgomery v. Spect, 55 Cal. 352, the court said: "But, although there was no personal obligation on the part of Spect to pay the seven thousand dollars with interest, there is one circumstance which tends to raise a presumption of loan, or indebtedness, and that is that the sum to be paid by Spect, in case he desired a reconveyance, was the precise amount expressed

terest may be made to assume the appearance of the payment of rent. Thus, a deed was executed, and the grantor afterward took a lease of the premises from the grantee, and the grantee covenanted to reconvey to the grantor on the payment of a sum of money within a time specified; it was held that although the lease and covenant gave the transaction the appearance of a conditional sale, still the relation of mortgagor and mortgagee existed.[3] A conveyance of land in fee and a bond to reconvey upon payment of the consideration, and to permit the obligee meanwhile to occupy the premises, at a rent equal to interest on that sum, constitute a mortgage.[4] A grantor took back a lease by which he was entitled to the possession of the land conveyed by the payment of a monthly rent, and which gave him the privilege of repurchasing at

as the consideration in the deed, with interest at one and one-fourth per cent per month." In Murphy v. Calley, 1 Allen, 107, a deed of land absolute in form, and an agreement under seal, executed by the grantee at the same time, covenanting to reconvey, if within a specified time the grantor should repay the sum paid for the conveyance with interest, and providing that if the grantor did not repay that sum with interest the agreement should be void and the deed absolute, with no further right of redemption, were held to constitute a mortgage. The court remarked that the agreement to reconvey on the repayment of a certain sum, with lawful interest thereon, showed that money was advanced to the grantor at the time of making the deed as part of the same transaction. It also said with reference to the objection that there was no collateral undertaking by the plaintiff to pay the money, and hence no mutuality existed, that this was by no means conclusive of the nature of the transaction; that it was only one circumstance to be considered.

[3] Wright v. Bates, 13 Vt. 341; Preschbaker v. Freman, 32 Ill. 475; Ewart v. Walling, 42 Ill. 453. In Wright v. Bates, *supra*, it is said (p. 350): "Bates intended to hold a security for the money which he had loaned, and yet cut off the equity of redemption, an intention which a court of chancery will defeat. In no sense can we regard the lease in connection with the facts proved as a conditional sale. . . . The law does not permit the mortgagor to be *tolled* of his equity of redemption by such a shift."

[4] Woodward v. Pickett, 8 Gray, 617.

any time within the expiration of twelve months by repaying the amount received as consideration for the deed. He remained in possession for eleven years, and his payments of rents during that time amounted to more than the sum that he received; the transaction was held to be a mortgage, and the debt was held to be discharged by the payments.[5]

§ 1133. **Inadequacy of price.**—The fact that there is great inadequacy between the sum received by the grantee and the real value of the land will not of itself authorize a court to permit a redemption. But it is a circumstance which is entitled to weight as tending to show that the transaction was not really a sale, but in fact a mortgage.[6] Different persons may place different values upon the same piece of property, and hence inadequacy of price must be gross to be

[5] Boatright v. Pick, 33 Tex. 68, 75.

[6] Montgomery v. Spect, 55 Cal. 352; Husheon v. Husheon, 71 Cal. 407; Thornborough v. Baker, 3 Swanst. 628, 631; Bridges v. Linder, 60 Iowa, 190; Langton v. Horton, 5 Beav. 9; Wharf v. Howell, 5 Binn. 499; Davis v. Thomas, 1 Russ. & M. 506; Williams v. Owens, 5 Mylne & C. 303; Freeman v. Wilson, 51 Miss. 329; Douglass v. Culverwell, 3 Giff. 251; Davis v. Stonestreet, 4 Ind. 101; Pearson v. Seay, 35 Ala. 612; Wilson v. Patrick, 34 Iowa, 362; Trucks v. Lindsey, 18 Iowa, 504; Overton v. Bigelow, 3 Yerg. 513; Lawrence v. DuBois, 16 W. Va. 443; Davis v. Demming, 12 W. Va. 246; Matthews v. Porter, 16 Fla. 466, 487; West v. Hendrix, 28 Ala. 226; Gibbs v. Penny, 43 Tex. 560; Thompson v. Banks, 2 Md. Ch. 430; Pierce v. Traver, 13 Nev. 526; Peagler v. Stabler, 91 Ala. 308, 9 So. Rep. 157; Vincent v. Walker, 86 Ala. 333, 5 So. Rep. 465; Crews v. Threadgill, 35 Ala. 334; Turner v. Wilkinson, 72 Ala. 361; Rodgers v. Moore, 88 Ga. 88, 13 S. E. Rep. 962; Helm v. Boyd, 124 Ill. 370, 16 N. E. Rep. 85; Klein v. McNamara, 54 Miss. 90; Gossum v. Gossum (Ky., Mch. 24, 1891), 15 S. W. Rep. 1057; Turpie v. Lowe, 114 Ind. 37, 15 N. E. Rep. 834; Helm v. Boyd, 124 Ill. 370, 16 N. E. Rep. 85; Walker v. Farmers' Bank, 14 Atl. Rep. 819 (Del., June 21, 1888). See Ferris v. Wilcox, 51 Mich. 105, 47 Am. Rep. 551; Rubo v. Bennett, 85 Ill. App. 473; Bigler v. Jack, 114 Iowa, 667, 87 N. W. 700; Lewis v. Wells, 85 Fed. 896; Bonnette v. Wise, 111 La. 855, 35 So. 953; Forester v. Van Auken, 12 N. D. 175, 96 N. W. 301; Shiver v Arthur, 54 S. C. 184, 32 S. E. 310.

a controlling fact in determining the character of the transaction.[7] A lender does not usually advance an amount equal to the full value of the land, and, accordingly, the fact that the consideration paid is all that the land is worth is evidence of some weight to show that the transaction was a sale and not a mortgage.[8] But the fact that the consideration expressed in the deed is somewhat greater than was actually paid by the grantee is not entitled to weight in determining whether the deed should be treated as a mortgage or not, when the instrument was made and the consideration written in it under the grantor's direction, and without the knowledge or assent of the grantee.[9]

§ 1134. **Character of transaction fixed in beginning.**— Where the transaction was in the beginning a contract of mortgage, it will continue to possess this character; if it was originally a conditional sale, it will not be changed into a mortgage by lapse of time. If a conveyance is intended to be a sale with a right to repurchase, it is not made a mortgage by recording it as such.[1] Where it is in the beginning a sale, absolute or conditional, no event occurring afterward, except a new agreement between the parties, can turn it into a mortgage.[2] Nor will the acts and declarations of a party

[7] Elliott v. Maxwell, 7 Ired. Eq. 246.

[8] Carr v. Rising, 62 Ill. 14, 19. Inadequacy of price is not conclusive. Adequacy of price in connection with the fact that no note is given is not conclusive that the transaction is a conditional sale: Brown v. Dewey, 2 Barb. 28; s. c., 1 Sand. Ch. 56. Where no debt or loan is created, but only a right to repurchase exists, it is immaterial whether the sum paid for the deed or a greater sum is to be paid for a reconveyance: Glover v. Payn, 19 Wend. 518; Pitts v. Cable, 44 Ill. 103; West v. Hendrix, 28 Ala. 226; French v. Sturdivant, 8 Me. 246.
Text Gal. 369.

[9] Stewart's Appeal, 98 Pa. St. 377.

[1] Morrison v. Brand, 5 Daly, 40.

[2] Kearney v. McComb, 16 N. J. Eq. 189; Reed v. Reed, 75 Me. 264; Buse v. Page, 32 Minn. 111, 19 N. W. Rep. 736, 20 N. W. Rep. 95; Kleinschmidt v. Kleinschmidt, 9 Mont. 477, 24 Pac. Rep. 266; Finck v. Adams, 36 N. J. Eq. 188; Davis

change its character. These are nothing more than admissions, which are admissible in evidence for what they are worth.[3] The same considerations apply to the assignment of a mortgage,[4] or a lease,[5] where there is an agreement to reassign within a limited time. A conveyance made upon trust may be declared a mortgage rather than a trust.[6] It requires a subsequent agreement to change the character of a mortgage, taken in the beginning as such; but its character cannot be changed to the detriment of intervening interests.[7] A purchaser who has knowledge that the grantor claims an interest in the property takes a conveyance of it charged with the equities attached to it in the hands of the mortgagee.[8]

v. Brewster, 59 Tex. 93; Clark v. Henry, 2 Cow. 324; Gray v. Shelby, 83 Tex. 405, 18 S. W. Rep. 809; McCauley v. Smith, 132 N. Y. 524, 30 N. E. 997; Gassert v. Bogk, 7 Mont. 585, 1 L.R.A. 240, 19 Pac. Rep. 281; Devore v. Woodruff, 1 N. Dak. 143, 45 N. W. Rep. 701; Swetland v. Swetland, 3 Mich. 482; Sadler v. Taylor, 49 W. Va. 104, 38 S. E. 583; Herrich v. Teachout, 74 Vt. 196, 52 Atl. 432.

[3] See Holmes v. Fresh, 9 Mo. 201; Thomaston Bank v. Stimpson, 21 Me. 195; Nichols v. Reynolds, 1 R. I. 30, 36 Am. Dec. 238. But very slight circumstances may turn the scale, where the evidence is not clear whether the transaction was a sale or a mortgage: McKinney v. Miller, 19 Mich. 142; Waite v. Dimick, 10 Allen, 364; Hickox v. Lowe, 10 Cal. 197.

[4] Henry v. Davis, 7 Johns. Ch. 40; Pond v. Eddy, 113 Mass. 149; Briggs v. Rice, 130 Mass. 50.

[5] Polhemus v. Trainer, 30 Cal. 685. See Goodman v. Grierson, 2 Ball. & B. 274, 278; Halo v. Schick, 57 Pa. St. 319. See Smith v. Cremer, 71 Ill. 185, as to contract of purchase.

[6] Bromfield v. Boutall, 24 Hun, 451. See, also, Taylor v. Cornelius, 60 Pa. St. 187; Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651; Vance v. Lincoln, 38 Cal. 586; Comstock v. Stewart, Walk. Ch. 110; McMenomy v. Murray, 3 Johns. Ch. 435; Charles v. Claggett, 3 Md. 82; Marvin v. Titsworth, 10 Wis. 320; Frick's Appeal, 87 Pa. St. 327; Holmes v. Matthews, 3 Eq. Rep. 450; Jenkin v. Row, 5 De Gex & S. 107; Bell v. Carter, 17 Beav. 11; Chambers v. Goldwin, 5 Ves. 834; Myers' Appeal, 42 Pa. St. 518.

[7] Elliott v. Wood, 53 Barb. 285; Cooper v. Whitney, 3 Hill. 95; Tibbs v. Morris, 44 Barb. 138; Bunacleugh v. Poolman, 3 Daly, 236; Clark v. Henry, 2 Cowen, 324; Parsons v. Munford, 3 Barb. Ch. 152; Williams v. Thorn, 11 Paige, 459; Palmer v. Gurnsey, 7 Wend. 248; Marks v. Pell, 1 Johns. Ch. 594.

[8] French v. Burns, 35 Conn. 359;

§ 1135. Sale and resale.—Attention has already been called to the fact that there may be a sale of property, and an agreement for a resale, without the transaction partaking of the nature of a mortgage. As an allustration of this principle, a case occurred in New York which is cited specially, because it had in it some of the incidents that might indicate that the deed should be treated as a mortgage. A held the bond of B secured by a mortgage upon a number of lots. B executed a deed to A of a number of lots, some of which were included in the mortgage, and the consideration expressed in the deed was approximately the amount due at the time on the mortgage, the deed being recorded on the day that the mortgage was satisfied of record. A agreed to give to B, by an instrument acknowledged on the day that the deed was recorded, the privilege of repurchasing, if he should, before the expiration of a specified time, pay to A a sum of money corresponding in amount to the sum due upon the bond and mortgage, with interest compounded semi-annually, but no reference was made to the mortgage, or to any indebtedness, nor did B make any agreement to pay the amount specified, or to purchase the property, and the value of the property was not in excess of the consideration expressed in the deed. C subsequently, by assignment from B, succeeded to the latter's rights under the agreement, and to his interest in the property. The court held that the deed was not intended as security merely, but that it was given and received in satisfaction of the prior indebtedness, and hence that it was an absolute conveyance, with a right to repurchase.[9]

Radford v. Folsom, 58 Iowa, 473. A mortgagor may release subsequently an equity of redemption, but it must be done upon a fair consideration. His right of redemtion cannot be waived by any stipulation made at the time the deed is executed: Peugh v. Davis, 96 U. S. 332.

[9] Randall v. Sanders, 87 N. Y. 578, 23 Hun, 611. See also Hayes v. Emerson, 75 Ark. 551, 87 S. W. 1027. And see Adams v. Adams, 51 Conn. 544.

§ 1136. **Parol evidence.**—At law parol evidence, showing that an absolute deed was intended as a mortgage, is, it is generally admitted, inadmissible.[1] The question whether a deed absolute upon its face was intended as a mortgage, is one over which courts of equity have exclusive jurisdiction.[2] In England, it is held that equity will construe an absolute deed to be a mortgage, when, through fraud or accident, the defeasance has been omitted,[3] or when there really is a separate defeasance, though not reduced to writing;[4] or when, by the acts of the parties, it is apparent that the conveyance was intended as a mortgage.[5] This evidence was admitted in the earliest cases upon the sole grounds of fraud, accident, or mistake, and this is now the ground upon which the jurisdiction in some States is placed. But the general rule now prevailing in this country is, that parol evidence is admissible to show a deed to be in fact a mortgage, aside from any question of fraud or mistake.[6] As the grounds upon which courts

[1] Benton v. Jones, 8 Conn. 186; Bryant v. Crosby, 36 Me. 562, 58 Am. Dec. 767; Hogel v. Lindell, 10 Mo. 483; Stinchfield v. Milliken, 71 Me. 567, 570; Reading v. Weston, 8 Conn. 117, 20 Am. Dec. 97; Bragg v. Massie, 38 Ala. 89, 79 Am. Dec. 82; Farley v. Goocher, 11 Iowa, 570; Webb v. Rice, 6 Hill, 219; McClane v. White, 5 Minn. 178; Moore v. Wade, 8 Kan. 380; Belote v. Morrison, 8 Minn. 87. But see 27 Cyc. 1021; Pearson v. Daney, 144 Ala. 427, 39 So. 474; Bernhard v. Bruner, 65 Ill. App. 641; Oberdorfer v. White, 25 Ky. Law Rep. 1629, 78 S. W. 436. It is admissible in Illinois, both at law and in equity; Tillson v. Moulton, 23 Ill. 648; Miller v. Thomas, 14 Ill. 428; Coates v. Woodworth, 13 Ill. 654. And in California such testimony is admissible at law as well as in equity: Jackson v. Lodge, 36 Cal. 28; Vance v. Lincoln, 38 Cal. 586; Cunningham v. Hawkins, 27 Cal. 604.

[2] Foley v. Kirk, 33 N. J. Eq. 170; Stinchfield v. Milliken, 71 Me. 567.

[3] England v. Codrington, 1 Eden, 169; Lincoln v. Wright, 4 De Gex & J. 16; Maxwell v. Montacute, Prec. Ch. 526.

[4] Manlove v. Bale, 2 Vern. 84; Whitfield v. Parfitt, 15 Jur. 852; Farmers & Mechanics Bank v. Smith, 61 App. Div. 315, 70 N. Y. S. 536.

[5] Cripps v. Jee, 4 Bro. C. C. 472; Allenby v. Dalton, 5 Law J. K. B. 312.

[6] Russell v. Southard, 12 How. 139, 13 L. ed. 927; Peugh v. Davis, 96 U. S. 332, 24 L. ed. 775; Heughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Gay v. Hamilton, 33

of equity receive parol evidence are wholly equitable, the plaintiff must have equitable grounds to entitle him to relief.[7]

§ 1137. **Declarations of party as evidence.**—In a suit brought for the purpose of determining whether a deed absolute in form was intended as a mortgage, the declarations made after the execution of the deed by a party to the deed and to the suit, may be received in evidence as against himself.[8] Where, at the time of the execution of a deed absolute on its face, the grantor was informed that it conveyed away all his property, evidence vague and uncertain as to admissions of the grantee, that the grantor had a right to redeem, and the fact that the grantor retained possession of the land for some time after the deed was executed, and that the price paid was somewhat less than what the property

Cal. 686; Campbell v. Dearborn, 109 Mass. 130, 12 Am. Rep. 671; Huoncker v. Merkey, 102 Pa. St. 462; Newton v. Fay, 10 Allen, 505; Hartley's Appeal, 103 Pa. St. 23; King v. Warrington, 2 N. M. Ty. 318; Vance v. Lincoln, 38 Cal. 586; McDonough v. Squire, 111 Mass. 217; Raynor v. Lyons, 37 Cal. 452. Such evidence is introduced to show the real intention of the parties. Mr. Jones in his treatise on Mortgages, reviews the cases in the different States at length, pointing out the particular grounds upon which in each State the jurisdiction is founded: Vol. I, §§ 285–321. See, also, 27 Cyc. 1021 for a review of the cases of the several States. Sadler v. Taylor 49 W. Va. 104, 38 S. E. 583; Philips v. Mo., 91 Minn. 311, 97 N. W. 969; Glass v. Hieronymus, 125 Ala. 140, 82 Am. St. Rep. 225, 28 So. 71; Northern Assurance Co. v. Chicago Mut. Bldg. & Loan Ass'n, 98 Ill. App. 152, affirmed 198 Ill. 474, 64 N. E. 979; Schmitt v. Merriman, 109 Ill. App. 433; Ætna Ins. Co. v. Jacobson, 105 Ill. App. 283; Stitt v. Rat Portage Lumber Co., 96 Minn. 27, 104 N. W. 561; Culp v. Woten, 79 Miss. 503, 31 So. 1; Cobb v. Day, 106 Mo. 278, 17 S. W. 323; Weiseham v. Hocker, 7 Okla. 250, 54 Pac. 464; Meyer v. Davenport Elevator Co., 12 S. D. 172, 80 N. W. 189; Shank v. Groff, 43 W. Va. 337, 27 S. E. 340; Brown v. Johnson, 115 Wis. 430, 91 N. W. 1016.

[7] Hassam v. Barrett, 115 Mass. 256; Arnold v. Mattison, 3 Rich. Eq. 153. See Baldwin v. Cawthorne, 19 Ves. 166.

[8] Ross v. Brusie, 64 Cal. 245; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Hopper v. Smyser, 90 Md. 363, 45 Atl. 206.

was really worth, do not make the deed a mortgage.[9] The conduct of the parties subsequently to as well as at the time of the transaction may be shown, although the evidence to establish that the deed was intended as a mortgage must be clear and convincing.[1]

§ 1138. **Effect of delay in seeking relief.**—Where such facts exist as make the transaction a mortgage, the mortgagor has the same time to discharge his debt as he would have if he had executed a mortgage instead of a deed; hence delay in claiming the deed to be a mortgage has not the effect given to it when the enforcement of executory contracts is sought in equity.[2] Some weight may be given to delay as bearing upon the question of whether the instrument was intended as a mortgage or not. But the tardiness of the grantor may be explained, and no lapse of time unless the action is barred by the statute of limitations, will be sufficient to exclude the introduction of parol evidence to show that the conveyance was intended as a mortgage.[3] But where there is other evidence to show that there was a sale, lapse of time is a circumstance to be considered.[4] A grantor is estopped to claim that a deed was a mortgage, where the grantee takes possession, and with the knowledge of the grantor sells the property.[5]

[9] Edwards v. Wall, 79 Va. 321.

[1] Bartling v. Brasuhn, 102 Ill. 441.

[2] Odenbaugh v. Bradford, 67 Pa. St. 96.

[3] Anding v. Davis, 38 Miss. 574, 77 Am. Dec. 658.

[4] Full v. Owen, 4 Younge & C. 192. It was held in a case where the bill to redeem was not filed until thirteen years after the execution of the deed, and more than seven years after the grantee had refused to recognize the claim of the grantor for an equity of redemption, and no sufficient excuse for the delay was given, that the laches was such as to bar any claim to relief: Maher v. Farwell, 97 Ill. 56; De France v. DeFrance, 34 Pa. St. 385; Conner v. Chase, 15 Vt. 764.

[5] Woodworth v. Carman, 43 Iowa, 504. A mortgagor abandoning his right to redeem from an absolute conveyance, is bound by his election: Hancock v. Harper,

§ 1139. **Judgment creditor may show that debtor's deed is a mortgage.**—Where a creditor has obtained a judgment, and, at a sale under execution issued upon it, has purchased his debtor's land, he is permitted to show that a deed made by his debtor was really a mortgage. He is subrogated to the rights of the debtor, and is entitled to a reconveyance upon paying the sum due upon the mortgage.[6] And, without being an execution purchaser, he may show that the deed is really a mortgage.[7] A grantee's creditor, however, when a deed is in fact a mortgage, can obtain only a defeasible title by a sale on execution. He does not take a better title than that held by the judgment debtor.[8] The right to treat a deed intended as a mortgage as such is mutual and the grantee cannot be compelled by other creditors of the grantor to treat it as a deed in the absence of circumstances creating an estoppel, or where it would be unjust to subsequent judgment creditors, who though not answering in the action are treated by all as actually pursuing their remedies.[9]

§ 1140. **Sheriff's deed.**—A deed made by a sheriff and absolute on its face may be shown by parol evidence to

86 Ill. 445, Cottrell v. Purchase, Cases t. Talbot, 61; Maxfield v. Patchen, 29 Ill. 39, 42; Carpenter, 70 Ill. 457. If a party claiming that a deed is a mortgage obtains a decree entitling him to a reconveyance on the payment of a specified sum, and fails to pay said sum, although the conveyance is executed and tendered, the court can order, on a petition in the nature of a supplementary bill to enforce the decree, that the amount of rent in the hands of the lessee of the property be paid to the grantee, to be applied on the original decree: Winston's Appeal, 97 Pa. St. 385.

[6] Clark v. Condit, 18 N. J. Eq. 358; Judge v. Reese, 24 N. J. Eq. 387; Van Buren v. Olmstead, 5 Paige, 9. See Gulley v. Macy, 84 N. C. 434.

[7] Allen v. Kemp, 29 Iowa, 452; De Wolf v. Strader, 26 Ill. 225, 79 Am. Dec. 371; Dwen v. Blake, 44 Ill. 135; Bennett v. Wolverton, 24 Kan. 284. A judgment becomes a lien upon the equity of redemption: Christie v. Hale, 46 Ill. 117.

[8] Leech v. Hillsman, 8 Lea, 747.

[9] Andrus v. Burke, 61 N. J. Eq. 297, 48 Atl. 228.

have been intended as security for the payment of money. The rule is as applicable to deeds of this kind as to deeds between private parties.[1] Thus, in the case cited, the bidder at a sheriff's sale borrowed money from another with which to pay the bid, and it was then agreed that, as security for the loan, the deeds of the sheriff should be made directly to the person advancing the money until it was repaid. The grantee in the sheriff's deeds subsequently claimed the legal title in his own interest, and the bidder at the sale, having tendered to the grantee the full amount of the loan and interest, obtained a decree declaring the deeds executed by the sheriff to be mortgages, and ordering the legal title to be conveyed upon payment of the money secured.[2]

§ 1141. Absolute owner as to third parties.—As to third persons, the grantee of the legal title is considered the legal owner.[3] Therefore, if an absolute conveyance is made as security for a loan, a purchaser from the grantee, without notice of the deed being intended as a mortgage, obtains a title to which the equity of the grantor does not attach.[4] But a purchaser who has notice acquires a de-

[1] Logue's Appeal, 104 Pa. St. 136. See contra Stephenson v. Thompson, 13 Ill. 186; Foster v. Rice, 101 N. W. 771, 126 Iowa, 190; McElroy v. Allfree, 131 Iowa, 112, 108 N. W. 116, 117 Am. St. Rep. 412; Philips v. Mo., 91 Minn. 311, 97 N. W. 966; Dickson v. Steward, 71 Neb. 424, 98 N. W. 1085, 115 Am. St. Rep. 596.

[2] Logue's Appeal, 104 Pa. St. 136. And see Beatty v. Brummett, 94 Ind. 75; Hoile v. Bailey, 58 Wis. 434; San Jose Safe Deposit Bank of Savings v. Bank of Madera, 121 Cal. 539, 54 Pac. 83; Id., 121 Cal. 539, 54 Pac. 270; Klock v. Walter, 70 Ill. 416; Gaines v. Brockerhoff, 136 Pa. St. 175, 19 Atl. 958; Thacker v. Morris, 43 S. E. 141, 94 Am. St. Rep. 928.

[3] Digby v. Jones, 67 Mo. 104; Fiedler v. Darrin, 59 Barb. 651; McCarthy v. McCarthy, 36 Conn. 177; Jenkins v. Rosenberg, 105 Ill. 157; Pico v. Gallardo, 52 Cal. 206; Thaxton v. Roberts, 66 Ga. 704; Groton Savings Bank v. Batty, 30 N. J. Eq. 126; Luesenhof v. Einsfeld, 93 App. Div. 68, 87 N. Y. 268, reversed 184 N. Y. 590, 77 N. E. 1191.

[4] Pico v. Gallardo, 52 Cal. 206; Frink v. Adams, 36 N. J. Eq. 485.

feasible title;[5] and when no valuable consideration has been paid, the purchaser's position is no better than that of his grantor.[6] Where a purchaser has knowledge or notice of the true state of the title, his deed is only an assignment of the grantee's interest in the property.[7] If a grantee, under an absolute deed, agrees to reconvey on the performance by the grantor of certain conditions within a specified time, and if after the expiration of such time, the grantee conveys to another who had no actual knowledge of such agreement, and who makes costly improvements, the grantor in the first deed knowing of this sale, but not disclosing his interest, and inducing, by his statements and conduct, the purchaser to believe that he was purchasing an unincumbered title, the first grantor, although the relation existing between him and his grantee may have been that of mortgagor and mortgagee, cannot secure the aid of a court of equity to enable him to redeem.[8]

§ 1142. **Notice in bankruptcy proceedings.**—A person who has proved a claim against the estate of a bankrupt, cannot be charged with notice that a deed executed by the bankrupt was intended only as a mortgage, from the fact that the property embraced in the deed was placed in the schedule of assets, for the person so proving his claim was afterward as much a stranger to the schedule as if his claim had never

[5] Houser v. Lamont, 55 Pa. St. 311, 93 Am. Dec. 755; Radford v. Folsom, 58 Iowa, 473; Graham v. Graham, 55 Ind. 23; Amory v. Lawrence, 3 Cliff. 523; Smith v. Knoebel, 82 Ill. 392; Kuhn v. Rumpp, 46 Cal. 299; Lawrence v. Dubois, 16 W. Va. 443.

[6] Zane v. Fink, 18 W. Va. 693; Lawrence v. Du Bois, 16 W. Va. 443. See, also, Abbott v. Hanson, 24 N. J. L. (4 Zab.) 493; Williams v. Thorn, 11 Paige, 459. A grantee seeking to redeem must pay the amount due: White v. Lucas, 46 Iowa, 319; Cowing v. Rogers, 34 Cal. 648; Heacock v. Swartwout, 28 Ill. 291; Westfall v. Westfall, 16 Hun, 541.

[7] Radford v. Folsom, 58 Iowa, 473.

[8] Tufts v. Tapley, 129 Mass. 380.

been proved at all.[9] Nor would the presence of the assignee and his attorney at a meeting of the bankrupt's creditors to provide for leasing the property pending litigation concerning them, no agreement for leasing having been executed, and the assignee making no declaration of any interest in the bankrupt, be sufficient to place a subsequent purchaser from the grantee of the bankrupt upon inquiry so as to charge him with notice of the nature of the deed.[1]

§ 1143. **Payment of debt.**—A purchaser is not affected by any secret trust or equity of which he had no notice. The payment of the whole amount due from the mortgagor, in a case where the mortgage is in the form of an absolute deed, can have no effect upon the title of a person claiming under the mortgagee, who possesses no notice of the fact that the deed is in reality a mortgage.[2]

§ 1144. **Parol evidence to show a mortgage a conditional sale.**—As we have seen, parol evidence is admissible in equity to show that a deed with or without an agreement to reconvey is a mortgage. But if the instrument shows upon its face that it is a mortgage, parol evidence is not received to show that the parties intended to make a conditional sale; the court must construe the instrument without a resort to oral evidence.[3] The proof, if admitted, would contradict the writing; it is received for the purpose of showing an absolute deed to be a mortgage, to raise an equity consistent with and superior to the written conveyance.[4]

[9] Jenkins v. Rosenberg, 105 Ill. 157.

[1] Jenkins v. Rosenberg, 105 Ill. 157. An attaching creditor cannot claim an estoppel in bankruptcy proceedings, because an agreement for defeasance has not been recorded: Moors v. Albro, 129 Mass. 9.

[2] Sweetzer v. Atterbury, 100 Pa. St. 18.

[3] Alstin v. Cundiff, 52 Tex. 453.

[4] Kunkle v. Wolfersberger, 6 Watts, 126; McClintock v. McClin-

§ 1145. **Proof of other conditions.**—When it is shown by parol testimony that a deed absolute on its face was not intended to operate as such, but as a mortgage, all the conditions of the instrument or transaction may be proved in a similar manner.[5] Between the parties, it may be shown by parol testimony that the mortgage was afterward extended so as to cover new debts.[6] The burden of proof rests upon him who alleges that a deed absolute in form was really intended as a mortgage, regardless of whether it is the grantee or the grantor.[7]

§ 1146. **Time for redemption.**—On general principles the right to redeem and the right to foreclose are reciprocal. In a case in California, it was decided that when the right to foreclose is barred by the statute of limitations, the right to redeem is also barred.[8] But the court evidently overlooked a provision of the code applicable to the very question. The code provides that "an action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claim-

tock, 3 Brewst. 76; Reitenbaugh v. Ludwick, 31 Pa. St. 131, 138; Woods v. Wallace, 22 Pa. St. 171; Wharf v. Howell, 5 Binn. 499.

[5] Walker v. Walker, 17 S. C. 329.

[6] Walker v. Walker, 17 S. C. 329.

[7] Bryant v. Broadwell, 140 Cal. 490; Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763; Gannon v. Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; Heaton v. Gaines, 198 Ill. 479, 64 N. E. 1081; Burgett v. Osborne, 172 Ill. 227, 50 N. E. 206; Eames v. Hardin, 111 Ill. 634; Bentley v. O'Bryan, 111 Ill. 53; Knowles v. Knowles, 86 Ill. 1; Wright v. Wright, 98 N. W. 137; Allen v. Fogg, 66 Iowa, 229, 23 N. W. 643; Mulfaupt v. Yowsee, 35 La. Ann. 1052; Kellogg v. Northrup, 115 Mich. 327, 73 N. W. 230; Tilden v. Streeter, 45 Mich. 533, 8 N. W. 502; Winters v. Earl, 62 N. J. Eq. 52, 28 Atl. 15; Fullerton v. McCurdy, 55 N. Y. 637; Northwestern F. M. Ins. Co. v. Lough, 13 N. D. 601, 102 N. W. 160; Haines v. Thomson, 70 Pa. St. 434; Todd v. Campbell, 32 Pa. St. 250; Glass v. Hieronymous, 125 Ala. 140, 82 Am. St. Rep. 225; Miller v. Price, 66 S. C. 85, 44 S. E. 584; Miller v. Yturria, 69 Tex. 549, 7 S. W. 206; Johnson v. Scrimshire, 93 S. W. 712; Tridley v. Somerville, 60 W. Va. 272, 54 S. E. 502.

[8] Taylor v. McClain, 60 Cal. 651; 64 Cal. 513.

ing under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage."[9] The right to foreclose is barred in four years. But by this section the right to redeem is limited to five years. This section was not referred to in the opinion of the court, and manifestly escaped its attention.

§ 1147. **Presumption in doubtful cases.**—Where a person seeks to have an absolute deed declared a mortgage, he should make strict proof of the fact.[1] It is said, however, in many well considered cases, that when it is doubtful whether a transaction is a mortgage or a conditional sale, it will be

[9] Code Civ. Proc. Cal. § 346.

[1] Magnusson v. Johnson, 73 Ill. 156; Taintor v. Keyes, 43 Ill. 332; Sharp v. Smitherman, 85 Ill. 153; Edwards v. Wall, 79 Va. 321; Knowles v. Knowles, 86 Ill. 1; Smith v. Cremer, 71 Ill. 185; Knight v. McCord, 63 Iowa, 429; Price v. Karnes, 59 Ill. 276; Dwen v. Blake, 44 Ill. 135. See, also, Williams v. Stratton, 18 Miss. (10 Smedes & M.) 418; Maher v. Farwell, 97 Ill. 56; Howland v. Blake, 97 U. S. 624, 24 L. ed. 1027; Coburn v. Anderson, 62 How. Pr. 268; Hancock v. Harper, 86 Ill. 445; Jones v. Brittain, 1 Woods, 667; Bingham v. Thompson, 4 Nev. 224; Hopper v. Jones, 29 Cal. 18; Conwell v. Evill, 4 Blackf. 67; Pierce v. Traver, 13 Nev. 526; Johnson v. Van Velsor, 43 Mich. 208; Arnold v. Mattison, 3 Rich. Eq. 153; Williams v. Cheatham, 19 Ark. 278; Butler v. Butler, 46 Wis. 430; Henley v. Hotaling, 41 Cal. 22; Moore v. Ivey, 8 Ired. Eq. 192; Tilden v. Streeter, 45 Mich. 533; Franklin v. Sewall, 110 La. 292, 34 So. 448; Johnson v. Scrimshire, 93 S. W. 712; Hayes v. Emerson, 75 Ark. 551, 87 S. W. 1027; Woods v. Jansen, 130 Cal. 200, 62 Pac. 473; Bryant v. Broadwell, 140 Cal. 490, 74 Pac. 33; Williams v. Williams, 180 Ill. 361, 54 N. E. 229; Gannon v. Moles, 209 Ill. 180, 70 N. E. 689; Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763, affirming 117 Ill. App. 636; Wright v. Wright, 98 N. W. 137; Kellogg v. Northrup, 115 Mich. 327, 73 N. W. 230; Northwestern Fire etc. Co. v. Lough, 13 N. D. 601, 102 N. W. 160; Miller v. Price, 66 S. C. 85, 44 S. E. 584; Fridley v. Somerville, 60 W. Va. 272, 54 S. E. 502; Jones v. Kennedy, 138 Ala. 502, 35 So. 465; Betts v. Betts, 132 Iowa, 72, 106 N. W. 928; Booh v. Beasley, 138 Mo. 455, 40 S. W. 101; Bobb v. Wolff, 148 Mo. 335, 49 S. W. 996; Johnson v. Scrimshire, 42 Tex. Civ. App. 611, 93 S. W. 712.

treated as a mortgage, and the doubts solved in favor of allowing the grantor to redeem.[2] "If, however, any given transaction should turn out, upon investigation, to be a conditional sale, and it should be satisfactorily established to be a real sale, and not a thin disguise whereby a loan is concealed, as a matter of course, such transaction will be held valid in accordance with the intention of the parties. But courts of equity watch transactions of this sort with such zealous and ever vigilant solicitude, that if the matter be in doubt, they will resolve that doubt in favor of the theory of a mortgage, and compel the transaction to assume and wear that hue and complexion."[3] The reason given for this rule is "because in the case of a mortgage, the mortgagor, although he has not strictly complied with the terms of the mortgage, still has his right of redemption; while in the case of a conditional sale, without strict compliance, the rights of the conditional purchaser are forfeited."[4]

[2] Trucks v. Lindsey, 18 Iowa, 504; Heath v. Williams, 30 Ind. 495; Klein v. McNamara, 54 Miss. 90; De Brühl v. Maas, 54 Tex. 464; Russell v. Southard, 12 How. 139, 13 L. ed. 927; Pioneer Gold Min. Co. v. Baker, 10 Saw. 539, 23 Fed. 258; Artz v. Grove, 21 Md. 456; Hickox v. Lowe, 10 Cal. 196; Free v. Cobine, 11 Eq. Rep. 406; Peugh v. Davis, 96 U. S. 336, 24 L. ed. 776; Conway v. Alexander, 7 Cranch, 236, 3 L. ed. 321; O'Neill v. Cappelle, 62 Mo. 202; Brandt v. Robertson, 16 Mo. 129; Turner v. Kerr, 44 Mo. 429; Desloge v. Ranger, 7 Mo. 327; Heath v. Williams, 38 Ind. 495; Bacon v. Brown, 19 Conn. 34; Baugher v. Merryman, 32 Md. 185; King v. Newmann, 2 Munf. 40; Robertson v. Campbell, 2 Call. 421; Davis v. Demming, 12 W. Va. 246; Secrest v. Turner, 2 Marsh. J. J. 471; Skinner v. Miller, 5 Litt. 84; Bright v. Wagle, 3 Dana, 252; Matthews v. Sheehan, 69 N. Y. 585; Poindexter v. McCannon, 1 Dev. Eq. 377, 18 Am. Dec. 591; McDonald v. McLeod, 1 Ired. Eq. 221; Page v. Foster, 7 N. H. 392; Crane v. Bonnell, 1 Green Ch. 264; Holton v. Meighen, 15 Minn. 69; Cornell v. Hall, 22 Mich. 377. See De Laigle v. Denham, 65 Ga. 482.

[3] O'Neill v. Cappelle, 62 Mo. 202, 207; Mitchell v. Wellman, 80 Ala. 16; Turner v. Cochran, 70 S. W. 1024.

[4] Matthews v. Sheehan, 69 N. Y. 590. "In cases of doubt, however, a court of equity always leans in favor of a mortgage rather than a conditional sale": Davis v. Demming 12 W. Va. 246. "The leaning of courts has always been against considering a conveyance a condi-

§ 1147a. **Trend of authority.**—While there has been a wide divergence of opinion as to whether, in a doubtful case, the court should presume that the deed was intended to be absolute or a mortgage, yet the trend of authority is to the effect that the party claiming that a deed was intended as a mortgage should establish that fact by clear and convincing evidence, and slight or indefinite evidence will not be permitted to change the character of the instrument from what it appears on its face to be, into a mortgage. It may be said to be the law, that the evidence to show that a deed was intended as a mortgage should be satisfactory, and sufficient to overcome the strong presumption created by the language of the deed—that it is what it purports to be, an absolute conveyance—and where the evidence is doubtful and unsatisfactory, the deed must be held to be absolute.[5] This

tional sale; and where there has been any doubt, it has been viewed as a mortgage," said the court in Page v. Foster, 7 N. H. 392, 394.

[5] Townsend v. Petersen, 12 Colo. 491; Whitsett v. Kershow, 4 Colo. 419; Armor v. Spalding, 14 Colo. 302; Perot v. Cooper, 17 Colo. 80, 31 Am. St. Rep. 258; Bingham v. Thompson, 4 Nev. 224; Pierce v. Traver, 13 Nev. 526; Henley v. Hotaling, 41 Cal. 22; Mahoney v. Bostwick, 96 Cal. 53, 31 Am. St. Rep. 175; Langer v. Merservey, 80 Iowa, 159; Conwell v. Evill, 4 Blackf. 67; Albany etc. Canal Co. v. Crawford, 11 Or. 243; Ensminger v. Ensminger, 75 Iowa, 89, 9 Am. St. Rep. 462; Allen v. Fogg, 66 Iowa, 229; Matthews v. Porter, 16 Fla. 466; Williams v. Cheatham, 19 Ark. 278; Arnold v. Mattison, 3 Rich. Eq. 153; Knapp v. Bailey, 79 Me. 195, 1 Am. St. Rep. 295; Hyatt v. Cochran, 37 Iowa, 309; Wright v. Mahaffey, 76 Iowa, 96; Pancake v. Cauffman, 114 Pa. St. 113; Moore v. Ivey, 8 Ired. Eq. 192; Glass v. Hieronymus, 125 Ala. 140, 28 So. 140, 82 Am. St. Rep. 225; Case v. Peters, 20 Mich. 298; Tilden v. Streeter, 45 Mich. 533; Johnson v. Van Velsor, 43 Mich. 208; Kibby v. Harsh, 61 Iowa, 196; Corbit v. Smith, 37 Iowa, 309; Knight v. McCord, 63 Iowa, 429; Shays v. Norton, 48 Ill. 100; Magnusson v. Johnson, 73 Ill. 156; Helm v. Boyd, 124 Ill. 370; Maher v. Farwell, 97 Ill. 56; Price v. Karnes, 59 Ill. 276; Parmelee v. Lawrence, 44 Ill. 405; Hancock v. Harper, 86 Ill. 445; Strong v. Strong, 126 Ill. 301, 27 Ill. App. 148; Bartling v. Brashun, 102 Ill. 441; Knowles v. Knowles, 86 Ill. 1; Workman v. Greening, 145 Ill. 447; Bailey v. Bailey, 115 Ill. 551; Faringer v. Ramsey, 2 Md. 365; Lance's Appeal, 112 Pa. St. 456; Nicolls v. McDonald, 101 Pa.

principle is expressed in various forms by the courts, but such expressions all contain the idea, that the mind must be thoroughly satisfied that the instrument is something different from what it purports to be, before a court is justified in so declaring.

St. 514; Cadman v. Peter, 118 U. S. 73, 30 L. ed. 78; Satterfield v. Malone, 35 Fed. Rep. 445; Williams v. Stratton, 18 Miss. 418; Adams v. Adams, 51 Conn. 544; Downing v. Woodstock Iron Co., 93 Ala. 262; Peagler v. Stabler, 91 Ala. 308; Howland v. Blake, 97 U. S. 624, 24 L. ed. 1027; Edwanes v. Wall, 79 Va. 321; Sable v. Maloney, 48 Wis. 331; Schriber v. Le Clair, 66 Wis. 579; Rockwell v. Humphrey, 57 Wis. 410; Hunter v. Maanum, 78 Wis. 656; Kerr v. Hill, 27 W. Va. 576; Hinton v. Pritchard, 107 N. C. 128, 10 L.R.A. 401; Leggett v. Leggett, 88 N. C. 108; McNair v. Pope, 100 N. C. 404; Smiley v. Pearce, 98 N. C. 185; Mitchell v. Welman, 80 Ala. 16; Knaus v. Dreher, 84 Ala. 319; Turner v. Wilkinson, 72 Ala. 361; Parks v. Parks, 66 Ala. 326; Hartley's Appeal, 103 Pa. St. 23; Stewart's Ap. peal, 98 Pa. St. 377; Logue's Appeal, 104 Pa. St. 306, 49 Am. Rep. 508; Haines v. Thompson, 70 Pa. St. 434; Erwin v. Curtis, 43 Hun, 292; Shattuck v. Bascom, 55 Hun, 14; Holmes v. Grant, 8 Paige, 243; McClellan v. Sanford, 26 Wis. 595; Newton v. Holley, 6 Wis. 592; McCormick v. Herndon, 67 Wis. 648; Kent v. Lasley, 24 Wis. 654; Butler v. Butler, 46 Wis. 430; Marks v. Pell, 1 Johns. Ch. 594; Coyle v. Davis, 116 U. S. 108, 29 L. ed. 583; Cobb v. Day, 106 Mo. 278; Wilson-v. Parshall, 129 N. Y. 223; Heaton v. Gaines, 198 Ill. 479, 64 N. E. 1081; Williams v. Williams, 180 Ill. 361, 54 N. E. 229; Burgett v. Osborne, 172 Ill. 227, 50 N. E. 206; Eames v. Hardin, 111 Ill. 634; Bentley v. O'Bryan, 111 Ill. 53; Sharp v. Smitherman, 85 Ill. 153; Mann v. Jobusch, 70 Ill. App. 440. The presumption is that the instrument is what it purports on its face to be and hence a deed will operate as such unless the evidence proves it to be a mortgage: Rogers v. Beach, 115 Ind. 413, 17 N. E. 609, and to overcome its apparent effect the evidence must be reasonably clear and satisfactory: Betts v. Betts, 132 Iowa, 72, 106 N. W. 928. Affirmative evidence is required to change the apparent character of a deed into a mortgage: Ketts v. Wilson, 130 Ind. 492, 29 N. E. 401. The evidence to overcome the presumption should be unequivocal and convincing: Bobb v. Wolff, 148 Mo. 335, 49 S. W. 996. That the party asserting a deed to be a mortgage has the burden of proof, see, also, Crowell v. Keene, 159 Mass. 352, 34 N. E. 405; Cobb v. Day, 106 Mo. 278, 17 S. W. 723; Book v. Beasly, 138 Mo. 455, 40 S. W. 101; Shiver v. Arthur, 54 S. C. 184, 32 S. E. 310; Turner v. Cochran, 30 Tex. Civ. App. 549, 70 S. W. 1024.

§ 1148. In general.

CHAPTER XXXII.

DEED TO ONE, PURCHASE MONEY PAID BY ANOTHER.

§ 1149. Legislation as to resulting trusts.
1149a. Mortgage as a conveyance.
1150. Deed to one, and purchase money paid by another.
1151. Some instances.
1151a. Arises by implication of law.
1152. Consideration paid by several.
1152a. Consent that title should be taken in name of another.
1153. Deed taken in the name of one joint purchaser.
1154. Interests acquired.
1155. Purchase of specific part.
1156. Deed taken by agent.
1157. Payment made with agent's funds.
1158. Agent at execution sale.
1159. Partnership funds.
1160. Guardian and ward.
1161. Wife's separate property.
1161a. Protection of wife's rights.
1162. Trust funds generally.
1163. Attorney's knowledge of defect in judicial proceedings.
1164. Investment of stolen money.
1165. Comments.
1166. Surrender of contract for purchase of real estate.
§ 1167. Tenants in common.
1168. Deed to wife or child.
1169. Illustrations.
1170. Parol agreement.
1171. Where no obligation to provide exists.
1172. Presumption rebuttable.
1173. Married woman as agent of husband.
1174. Payment of purchase money by alien.
1175. Payment when title passes.
1176. Gift or loan to cestui que trust.
1177. Agreement to convey to another.
1177a. Deed to assignee for benefit of creditors.
1178. Resulting trust not converted into express trust by agreement.
1179. Part payment under agreement to convey.
1180. Advancing portion of money.
1181. Agreement to purchase by two or more parties.
1182. Parol evidence to establish trust.
1183. Convincing proof required.
1184. Parol evidence to rebut resulting trust.
1185. Benefit inconsistent with the trust.

§ 1186. Professional services.
1187. Conveyance of legal title only.
1188. Laches of cestui que trust.
§ 1189. Deeds without consideration.
1190. Payment for improvements.

§ 1148. **In general.**—Where one pays the purchase money, but the title is taken in the name of another, the party taking the legal title will, under certain circumstances, be declared a trustee of the one whose money paid for the land. A trust of this kind is known as a resulting trust. Each case must in a measure be determined by its own circumstances. In some cases the deed will convey to the grantee a beneficial interest, as when it is made to a wife or child, who, nevertheless, has paid no part of the purchase money.[1]

§ 1149. **Legislation as to resulting trusts.**—The rule as to resulting trusts, where the purchase money has been paid by one and the deed taken by another, has been modified or abolished in several of the States. In New York the title vests in the grantee, where it has been so taken with the consent or knowledge of the person paying the consideration, and where the grantee has not purchased the land in violation of a trust. But the conveyance is deemed fraudulent as against the creditors who were such at that time, of the person having the consideration, and the grantee has the burden of proof of showing that the transaction was not for a fraudulent purpose.[2] Statutes of a similar import have

[1] Robinson v. Taylor, 2 Bro. Ch. 594; Elliott v. Elliott, 2 Ch. Cas. Ch. 232; Coningham v. Mellish, Prec. Ch. 31; Hayes v. Kingdome, 1 Vern. 33; Christ's Hospital v. Budgin, 2 Vern. 683; Lloyd v. Spillett, 2 Atk. 566; Jennings v. Selleck, 1 Vern. 467; Baylis v. Newton, 2 Vern. 28; Smith v. King, 16 East, 283; Grey v. Grey, 2 Swanst. 598; Cook v. Hutchinson, 1 Keen, 42; Rogers v. Rogers, 3 P. Wms. 193; Cripps v. Jee, 4 Bro. C. C. 472. It is not necessary for the creation of a resulting trust that one party should have been guilty of fraud: Talbot v. Barber, 11 Ind. App. 1, 38 N. E. Rep. 487.

[2] Rev. Stats., pt. 2, ch. 1, art. 6, §§ 51–53, vol. 2, p. 1105 (ed. 1875). See Jencks v. Alexander, 11 Paige, 619; Bodine v. Edwards, 10 Paige,

been passed in Indiana,[3] Minnesota,[4] Michigan,[5] Kansas,[6] Wisconsin,[7] Kentucky.[8] But these provisions of the statute imply that the party paying the purchase money had full knowledge that the deed was made to another.[9] And it has been held under these statutes, where the purchase was made by the parties paying the money for the benefit of, and intended as a gift or advancement to, their daughter, who was an infant, and an absolute deed was executed to a third person for the benefit of such infant daughter, but without her consent or knowledge, that these statutes did not apply, and that the holder of the legal title had a mere naked title without interest, against which a judgment rendered against him could not become a lien.[1] If it is expressly agreed between two

504; Siemon v. Schurck, 29 N. Y. 598; Brewster v. Power, 10 Paige, 562; Lounsbury v. Purdy, 16 Barb. 376, 18 N. Y. 515; Gilbert v. Gilbert, 1 Keyes, 159; Willink v. Vanderveer, 1 Barb. 599; Norton v. Stone, 8 Paige, 222; Reid v. Fitch, 11 Barb. 399; Watson v. Le Row, 6 Barb. 481; Swinburne v. Swinburne, 28 N. Y. 568; Buffalo R. R. Co. v. Lampson, 47 Barb. 533; Stover v. Flack, 41 Barb. 162; Foote v. Bryant, 47 N. Y. 544; Reitz v. Reitz, 80 N. Y. 538; Day v Roth, 18 N. Y. 448; Underwood v. Sutcliffe, 77 N. Y. 58; Traphagen v. Burt, 67 N. Y. 30; Ocean Nat. Bank v. Olcott, 46 N. Y. 12; McCartney v. Bostwick, 32 N. Y. 53; Jackson v. Forrest, 2 Barb. Ch. 576; Sieman v. Austin, 33 Barb. 9.

[3] Stats. 1876, vol. 1, p. 915, §§ 6–8.

[4] Stats. (Younge's ed. 1830), p. 553, §§ 7–9. See Durfee v. Pavitt, 14 Minn. 424.

[5] Comp. Laws 1871, vol. 2, p. 1331, § 7. See Fisher v. Fobes, 22 Mich. 454; Groesbeck v. Seeley, 13 Mich. 329.

[6] Comp. Laws (Dassler's ed., 1881.)

[7] Rev. Stats. (Taylor's ed., 1872), vol. 2, p. 1129, § 7.

[8] Gen. Stats. 1873, p. 587, § 19. See Martin v. Martin, 5 Bush. 47. And see, as to other States, McDonough's Executors v. Murdock, 15 How. 367, 14 L. ed. 732; Gaines v. Chew, 2 How. 619, 11 L. ed. 402; Hutchins v. Haywood, 50 N. H. 491; Clark v. Chamberlain, 13 Allen, 257.

[9] Reitz v. Reitz, 80 N. Y. 538.

[1] Siemon v. Schurck, 29 N. Y. 508. "It is fairly inferable," said Hogeboom, J., "from the phraseology of these sections, and it is obvious from the notes of the revisers, that the principal, if not the only mischief intended to be remedied and uprooted by these sections, was a secret trust for the benefit of the person paying the consideration. It was not deemed consistent with fair dealing and just

persons that the title shall be placed in the name of one for the benefit of both, the statute abolishing resulting trusts does not apply.[2] Nor does the statute apply where a deed absolute on its face is accompanied by a parol defeasance.[3] Nor does it apply to a case where money of the complainant has been invested in lands and a deed taken without his knowledge or consent in the names of his step-children. He will be in such a case entitled in equity to a conveyance.[4]

§ 1149a. **Mortgage as a conveyance.**—Under a statute providing that when a conveyance is made to one person and the consideration paid by another, no resulting trust shall arise, but the title shall vest in the grantee, a mortgage is not a conveyance. Although one person is named as the payee in a note and mortgage, the title is in the person by whom the money is supplied. "It is true" said the court, "that the words 'grant' and 'conveyance' are sometimes con-

policy that a person for whose use such a conveyance was made, and who was designed to reap all the benefits thereof, should thus conceal a real ownership under an assumed name; and the statute, therefore, virtually imposed upon him the penalty of the forfeiture of his estate. No such argument—at least, not in all its force—applies to the case of a gift or advancement made by a parent to a child, where the latter was intended to be vested with the beneficial ownership and the complete equitable title. It may be difficult to give a satisfactory reason why the title should not have been conveyed directly to the child for whose benefit the conveyance was intended; but whether the real motive was to conceal the character of the transaction from the other children, or equally deserving claimants upon the bounty of the parent, or from a supposed inconvenience or embarrassment in making the conveyance to a minor, or from ignorance or injudicious advice, or any other cause, we are able to see that the mischiefs of such a transaction are by no means as great as those arising from a secret trust in favor of the person paying the consideration himself."

[2] Gage v. Gage, 43 N. Y. S. 810, 13 App. Div. 565.

[3] Stitt v. Rat Portage Lumber Co., 96 Minn. 27, 104 N. W. 561.

[4] Ransom v. Ransom, 31 Mich. 301. See, also, Chapman v. Chapman, 114 Mich. 144, 72 N. W. 131; Bulen v. Granger, 56 Mich. 207, 22 N. W. 306.

strued to include a mortgage even in jurisdictions where, as in Kansas, such an instrument passes no estate in the land. For various reasons that are unassailable, but which are peculiar to each of the several classes of cases, such interpretation has been adopted in the construction of statutes relating to the homestead right, to the alienation of public lands by a settler before acquiring title, to the registration of instruments affecting real estate, and to other matters. These reasons have no application here. A mortgage is but an incident of the debt it secures. It inures to the benefit of the owner of the debt without formal assignment as a separate and independent right. It is extinguished by the payment of the indebtedness."[5] Such a statute does not relate to personal property, and hence, a bond and mortgage may be held by one as trustee for another paying the consideration.[6]

§ 1150. Deed to one, and purchase money paid by another.—The law presumes, in the absence of a statutory declaration to the contrary, that the one who pays the consideration is the one to reap the benefit, and that if, from any cause or reason operating between themselves, the title is not taken in the name of the one who has paid the purchase price, this was done for some reason satisfactory to themselves, yet not for the purpose of vesting the whole title in the apparent grantee. Hence, it may be asserted that, as a general proposition, where the purchase money is paid by one and the title taken in the name of another, the two being strangers to each other, a resulting trust arises, and the grantee will be held to be a trustee for the person who parted with the consideration for which the deed was made.[7] "It is a settled principle that where one person purchases property

[5] Hanrion v. Hanrion, 73 Kan. 25, 84 Pac. 381, 117 Am. St. Rep. 453.

[6] Robbins v. Robbins, 89 N. Y. 251. See, also, Meier v. Bell, 119 Wis. 482, 97 N. W. 186; Baker v. Terrell, 8 Minn. 195.

[7] Union College v. Wheeler, 59 Barb. 585; Boyd v. McLean, 1 Johns. Ch. 582; Neale v. Hagthorp,

for a stranger, and the purchase money is paid by the stranger, or out of his funds, although the title is taken in the name of the person making the purchase, a trust results, and the

3 Bland, 551; Hempstead v. Hempstead, 2 Wend. 109; Willis v. Willis, 2 Atk. 71; Woodman v. Morrel, 2 Freem. 33; Wallace v. Duffield, 2 Serg. & R. 521, 7 Am. Dec. 660; Dillard v. Crocker, Speer Eq. 20; Edwards v. Edwards, 39 Pa. St. 369; Bostleman v. Bostleman, 24 N. J. Eq. 103; Long v. Steiger, 8 Tex. 460; Groesbeck v. Seeley, 13 Mich. 329; Campbell v. Campbell, 21 Mich. 428; Glidewell v. Spaugh, 36 Ind. 319; Garrett v. Garrett, 1 Strob. Eq. 96; Davis v. Baugh, 59 Cal. 568; Johnson v. Quarles, 46 Mo. 423; Rankin v. Harper, 23 Mo. 579; Paul v. Chouteau, 14 Mo. 580; Russell v. Lode, 1 Greene, 566; Williams v. Hollingsworth, 1 Strob. Eq. 103, 47 Am. Dec. 527; McGovern v. Knox, 21 Ohio St. 551, 8 Am. Rep. 80; Bayles v. Baxter, 22 Cal. 575; Millard v. Hathaway, 27 Cal. 119; Wilson v. Castro, 31 Cal. 420; Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Case v. Codding, 38 Cal. 191; Settembre v. Putnam, 30 Cal. 490; Trench v. Harrison, 17 Sim. 111; Murless v. Franklin, 1 Swanst. 17; Grey v. Grey, 2 Swanst. 597; Rider v. Kidder, 10 Ves. 360; Ex parte Vernon, 2 Wms. 549; Lade v. Lade, 1 Wils. 21; Hungate v. Hungate, Toth. 120; Redington v. Redington, 3 Ridg. App. 177; Finch v. Finch, 15 Ves. 50; Ex parte Houghton, 17 Ves. 253; Crop v. Norton, 9 Mod. 235; Ambrose v. Ambrose, 1 P. Wms. 321; Henderson v. Hoke, 1 Dev. & B. Eq. 119; Strimpfler v. Roberts, 18 Pa. St. 283, 57 Am. Dec. 606; Lloyd v. Carter, 17 Pa. St. (5 Harris) 216; Beck v. Graybill, 28 Pa. St. (4 Casey) 66; Lynch v. Cox, 23 Pa. St. (11 Harris) 265; Kisler v. Kisler, 2 Watts, 323, 27 Am. Dec. 308; Cutler v. Tuttle, 19 N. J. Eq. 549, 558; Hollis v. Hollis, 1 Md. Ch. 479; Guthrie v. Gardner, 19 Wend. 414; Wasley v. Foreman, 38 Cal. 90; Perry v. Head, 1 Marsh. A. K. 46; Gass v. Gass, 1 Heisk. 613; Elliott v. Armstrong, 2 Blackf. 198; Phillips v. Crammond, 2 Wash. C. C. 441; Kirkpatrick v. Davidson, 2 Kelly, 297; Hall v. Sprigg, 7 Mart. (La.) 243, 12 Am. Dec. 506; Nichols v. Thornton, 16 Ill. 113; Prevo v. Wallers, 4 Scam. 35; McDonough's Executors v. Murdock, 15 How. 367, 14 L. ed. 732; Church v. Cole, 36 Ind. 35; Hampson v. Fall, 64 Ind. 382; Letcher v. Letcher, 4 Marsh. J. J. 592; Baumgartner v. Guessfeld, 38 Mo. 36; McLennan v. Sullivan, 13 Iowa, 521; Tinsley v. Tinsley, 52 Iowa, 14; Rogan v. Walker, 1 Wis. 527; Seaman v. Cook, 14 Ill. 501; Rhodes v. Green, 36 Ind. 11; Stark v. Cannady, 3 Litt. 399, 14 Am. Dec. 76; Harris v. Union Bank, 1 Cold. 152; Irvine v. Marshall, 7 Minn. 286; Groves v. Groves, 3 Younge & J. 170; Wray v. Steele, 2 Ves. & B. 390; Pelly v. Maddin, 21 Vin. Abr. 498; Smith v. Baker, 1 Atk. 385; Withers v. Withers, Amb. 151; Lever v. Andrews, 7 Brown Parl. C. 288; Clarke v. Danvers, 1 Ch. Cas. Ch. 310;

land is held in trust for the party whose money is paid. This trust arises without any declaration in writing, for it is expressly excepted by the statute of frauds from the opera-

Smith v. Camelford, 3 Ves. J. R. 712; Prankerd v. Prankerd, 1 Sim. & S. 1; Goodright v. Goodright, 1 Watk. Cop. 227, Lofft, 230; Jackman v. Ringland, 4 Watts & S. 149; Bank of United States v. Carrington, 7 Leigh, 566; Tebbetts v. Tilton, 31 N. H. 283; Hall v. Young, 37 N. H. 134; Lyford v. Thurston, 16 N. H. 399; Page v. Page, 8 N. H. 187; Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371; Hopkinson v. Dumas, 42 N. H. 296; Hall v. Congdon, 56 N. H. 279; Brown v. Cherry, 59 Barb. 628; Howell v. Howell, 15 N. J. Eq. 75; Johnson v. Dougherty, 18 N. J. Eq. 406; Depeyster v. Gould, 2 Green Ch. 480, 29 Am. Dec. 723; Botsford v. Burr, 2 Johns. Ch. 408; Jackson v. Sternberg, 1 Johns. Cas. 523; Kelley v. Jenness, 50 Me. 455, 79 Am. Dec. 623; Baker v. Vining, 30 Me. 126, 50 Am. Dec. 617; Buck v. Pike, 11 Me. 9; Cecil Bank v. Snively, 23 Md. 253; Newells v. Morgan, 2 Harris, 225; Dorsey v. Clarke, 4 Har. & J. 551; Chapline v. McAfee, 3 Marsh. J. J. 513; McGuire v. Ramsey, 4 Eng. 519; Taliaferro v. Taliaferro, 6 Ala. 404; Leiper v. Hoffman, 26 Miss. 615; Click v. Click, 1 Heisk. 607; Williams v. Van Tuyl, 2 Ohio St. 336; Clark v. Clark, 43 Vt. 685; Pinney v. Fellows, 15 Vt. 525; Dewey v. Long, 25 Vt. 564; Lounsbury v. Purdy, 16 Barb. 376; McCartney v. Bostwick, 32 N. Y. 53; Harder v. Harder, 2 Sand. Ch. 17; Jackson v. Woods, 1 Johns. Cas. 163; Hoxie v. Carr, 1 Sum. 187; Livermore v. Aldrich, 5 Cush. 435; Peabody v. Tarbell, 2 Cush. 232; Root v. Blake, 14 Pick. 271; Kendall v. Mann, 11 Allen, 15; Faringer v. Ramsay, 2 Md. 365; McGowan v. McGowan, 14 Gray, 121, 74 Am. Dec. 668; Dean v. Dean, 6 Conn. 285; Powell v. Monson etc. Mfg. Co., 3 Mason, 362; Stewart v. Brown, 2 Serg. & R. 461; Jackson v. Matsdorg, 11 Johns. 91, 6 Am. Dec. 355; Steere v. Steere, 5 Johns. Ch. 1, 9 Am. Dec. 256; White v. Carpenter, 2 Paige, 218; Kellogg v. Wood, 4 Paige, 579; Partridge v. Havens, 10 Paige, 618; Foote v. Colvin, 3 Johns. 218, 3 Am. Dec. 478; Jackson v. Morse, 16 Johns. 197, 8 Am. Dec. 306; Forsythe v. Clark, 3 Wend. 638; Stratton v. Dialogue 16 N. J. Eq. 70; Nixon's Appeal, 63 Pa. St. 279; Foster v. Trustees of Athenæum, 3 Ala. 302; Caple v. McCallum, 27 Ala. 461; Mahorner v. Harrison, 13 Smedes & M. 53; Walker v. Brungard, 13 Smedes & M. 764; Andrews v. Jones, 10 Ala. 401; Powell v. Powell, 1 Freem. Ch. 134; Salmon v. Symonds, 30 Cal. 301; McCarrall v. Alexander, 48 Miss. 128; Simson v. Eckstein, 22 Cal. 580; Gaines v. Chew, 2 How. 619, 11 L. ed. 402; Tarpley v. Poage, 2 Tex. 139; Bludworth v. Lake, 33 Cal. 256; Harris v. Reynolds, 13 Cal. 514, 73 Am. Dec. 600; Price v. Reeves, 38 Cal. 457; Hassey v. Wilkie, 55 Cal. 525; Oberthier v. Stroud, 33 Tex. 522; Ensley v. Ballentine, 4 Humph. 233;

tion of that statute, and the facts necessary to constitute such trust may be proved by parol evidence. A similar rule prevails in cases where the consideration proceeds from two or more persons jointly. A resulting trust will arise in proportion to the amount of the consideration which they may have respectively contributed." [8] But the payment, in order to raise a resulting trust, must be for some specific part or distinct interest in the estate.[9]

§ 1151. Some instances.—Where A buys land, and takes the deed in the name of B, and the latter advances the purchase money, and takes A's notes for the same, and agrees to convey to A on repayment of the money advanced and interest, the money advanced by B may be considered as a

Smitheal v. Gray, 1 Humph. 491, 34 Am. Dec. 664; Doyle v. Sleeper, 1 Dana, 536; Jenison v. Graves, 2 Blackf. 444; Creed v. Lancaster Bank, 1 Ohio St. 1; Hutchinson v. Hutchinson, 59 Cal. 313; Milliken v. Ham, 36 Ind. 166; Bruce v. Roney, 18 Ill. 67; Smith v. Sackett, 5 Gilm. 534; Latham v. Henderson, 47 Ill. 185; Albright v. Oyster, 19 Fed. Rep. 489; Connor v. Follansbee, 59 N. H. 124; Gogherty v. Bennett, 37 N. J. Eq. 87; Brown v. Brown, 77 Va. 619; Harker v. Reilly, 4 Del. Ch. 72; Lipcomb v. Nichols, 6 Colo. 290; McNamara v. Garrity, 106 Ill. 384; Goldsberry v. Gentry, 92 Ind. 193; Lewis v. Montgomery etc. Loan Assn., 70 Ala. 276; Parker v. Coop, 60 Tex. 111; Milner v. Freeman, 40 Ark. 62; Buren v. Buren, 79 Mo. 538; Reynolds v. Reynolds, 30 Kan. 91; Boyer v. Libbey, 88 Ind. 235; Leggett v. Leggett, 88 N. C. 108; Witte v. Wolfe, 16 S. C. 256; Sherburne v. Morse, 132 Mass. 469; Rupp's Appeal, 100 Pa. St. 531; Seibold v. Christman, 75 Mo. 308; Robinson v. McDiarmid, 87 N. C. 455; Witts v. Horney, 59 Md. 584; Law v. Law, 76 Va. 527; Ward v. Spivey, 18 Fla. 847; Beadle v. Beadle, 2 McCrary, C. C. 586; Lawry v. Spaulding, 73 Me. 31; Van Sycle v. Kline, 34 N. J. Eq. 332; Robinson v. Leflore, 59 Miss. 148; Hardin v. Darwin, 66 Ala. 55; Stafford v. Wheeler, 93 Pa. St. 462; Harrison v. Emery, 85 N. C. 161; Walker v. Elledge, 65 Ala. 51; Kelly v. Johnson, 28 Mo. 249; Frederick v. Haas, 5 Nev. 389; Bartlett v. Pickersgill, 1 Eden, 515; Rothwell v. Dewees, 2 Black. 613, 17 L. ed. 309.

[8] Cutler v. Tuttle, 19 N. J. Eq. (4 Green, C. E.) 549, 558, per Dupue, J.

[9] McGowan v. McGowan, 14 Gray, 119, 74 Am. Dec. 668, and cases cited.

loan to A, and the land so purchased will be held by B, as trustee for A.[1] Where one having a grant of land from the Mexican government dies intestate, and a person erroneously believing himself to be the heir sells a part of the land to another, who, subsequently acting under the impression that he has acquired a valid title, obtains a confirmation of the grant and a patent from the United States, the true heirs at law are not deprived by the patent of their interest in the property, but the patentee holds the legal title in trust for them.[2] Where two persons agree with an owner of land to purchase it of him for five hundred dollars, each to have an undivided half, and one of the intending purchasers accepts from the agent of the other a watch in lieu of one hundred and seventy-five dollars, and other chattels, for the purpose of selling them to make up the balance of one-half of the purchase price, cancels a debt due him by the owner, in part payment of the land, and sells the chattels and pays the balance, a resulting trust arises in favor of the other vendee for one-half of the land.[3] A resulting trust does not arise from the agreement of the parties, but from the fact that the purchase money has been paid by one, and the title taken in the name of another.[4] Where a father purchased land, paying two thousand five hundred dollars for the same, of which sum twelve hundred dollars belonged to one of his sons, and took the deed in his own name, and afterward the son died, leaving his father, mother, and five brothers and sisters as his heirs, and the father, becoming indebted to a large amount subsequently conveyed the land without consideration to the brothers and sisters of the deceased son, and a suit was brought by the creditors of the father to subject the land to the payment of his debts, it was held that the heirs of the deceased son had a resulting trust in the land, to the extent of twelve undivided twenty-fifths, and that they

[1] Page v. Page, 8 N. H. 187.
[2] Wilson v. Castro, 31 Cal. 420.
[3] Frederick v. Haas, 5 Nev. 389.
[4] Bruce v. Roney, 18 Ill. 67.

held the legal title to the remaining thirteen twenty-fifths, subject to the lien of the creditors of the father, as also one-seventh of the twelve twenty-fifths, which was the father's share, as one of the seven heirs of the deceased son.[5] But where a father, for the purpose of defrauding his creditors, purchased land in the name of his son, it was decided that the presumption of an advancement to the son was repelled by the intended fraud upon creditors, and therefore the father had a resulting trust, which was subject to sale on execution under judgments obtained by such creditors.[6] And while, if the purchase price is paid by the husband, and the deed is taken in the name of the wife, it may be presumed that the purchase was an advancement to the wife, yet the transaction is open to explanation, and when it appears that the husband's object was to defraud creditors, he has a resulting trust, subject to sale on execution.[7] But where a father having an interest in the land has the deed made to his son, who has paid certain debts of the father, and the deed is treated by both father and son as an absolute conveyance, the father having sufficient property to pay all his debts, and no fraudulent intent existing, the conveyance is not fraudulent and void as to the father's subsequent creditors, although the consideration was not equal to the value of the land.[8]

§ 1151a. **Arises by implication of law.**—A resulting trust is not created by contract but arises by implication of law,[9] and it cannot arise where a fraudulent purpose is the foundation of the transaction.[1] Implications are not considered where the trust is expressed.[2] Thus a trust is express and not re-

[5] Latham v. Henderson, 47 Ill. 185.

[6] Rankin v. Harper, 23 Mo. 579. See, also, Doyle v. Sleeper, 1 Dana, 531.

[7] Guthrie v. Gardner, 19 Wend. 414.

[8] Dewey v. Long, 25 Vt. 564.

[9] Potter v. Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322.

[1] Sell v. West, 125 Mo. 621, 28 S. W. 696, 46 Am. St. Rep. 508.

[2] Coleman v. Parran, 43 W. Va. 737, 28 S. E. 769.

sulting where land is conveyed by a son to his father with the understanding that the latter was to hold it only for his support and to reconvey it either by deed or will.[3] A code provision requiring that all trusts in real property shall be created by an instrument in writing does not apply to trusts which result by law, as such a trust may be established by parol.[4] Such a trust is not within the purview of a statute prohibiting parol trusts in land.[5] A contract of agency is not within the statute of frauds where the president of a company was directed as agent to purchase land for the company which he agreed to do, but instead of doing this, purchased the land for himself and took the deed in his own name.[6] A resulting trust cannot arise where it is orally agreed that the grantor shall convey land to a creditor and that it shall be sold, and the proceeds distributed among the grantee and other creditors of the grantor, for the reason that a resulting trust cannot be based upon an express agreement.[7] It is said by Judge Corson that, "in a resulting trust intention is an essential element, although that intention is never expressed by words of direct creation. The law, however, presumes the intent from the facts and circumstances accompanying the transaction, and the payment of the consideration for the whole or a definite or aliquot part of the property sought to be impressed with the trust. There is usually no element of fraud in a resulting or implied trust, but the conveyance is made or taken with the knowledge and consent, express or implied, of the person who has paid the consideration. When one, therefore, takes

[3] Monson v. Hutchin, 194 Ill. 431, 62 N. E. 788.

[4] Culp v. Price, 107 Iowa, 133, 77 N. W. 848. See Los Angeles etc. R. Co. v. Occidental Oil Co., 144 Cal. 528, 78 Pac. 25.

[5] Tillman v. Murrell, 120 Ala. 239, 24 So. 712. See, also, Crosby v. Henry, 76 Ark. 615, 88 S. W. 949; Plumb v. Cooper, 121 Mo. 668, 26 S. W. 678; Butler v. Carpenter, 163 Mo. 597, 63 S. W. 823; Lyons v. Berlau, 67 Kan. 426, 73 Pac. 52; Rayl v. Rayl, 58 Kan. 585, 50 Pac. 501.

[6] Halsell v. Wise County Coal Co., 19 Tex. Civ. App. 564, 47 S. W. 1017.

[7] Byers v. McEniry, 117 Iowa, 499, 91 N. W. 797.

a conveyance secretly, contrary to the wishes of, and in violation of his duty to, the beneficiary, and in fraud of his rights, the trust is not a resulting but a constructive or involuntary trust." [8] If a purchaser at a foreclosure sale only agrees to convey to the mortgagor, should redemption be made within a certain time, a default of the mortgagor as to such payment will not justify a court in declaring a resulting trust.[9] A trust must result at the moment that title is taken, and no agreements made before or after that time can create a resulting trust.[1] If one agrees to buy land at a commissioners' sale for another, but buys it for himself, no trust will arise, although he was enabled to obtain the land at an inadequate price because other persons who would have bid did not do so when they became aware of this agreement.[2]

§ 1152. **Consideration paid by several.**—It is now well settled, whatever doubt there formerly may have been, that if the consideration money is paid by a number of persons, and the deed is taken in the name of a stranger, the latter will hold the legal title in trust for the joint purchasers.[3] If an unlawful perpetuity is created by a will, causing a failure of the trust, and the will makes no other provision for dispos-

[8] Farmers' etc. Bank v. Kimball M. Co., 1 S. D. 388, 36 Am. St. Rep. 739.

[9] Banes v. Morgan, 204 Pa. 185, 53 Atl. 754.

[1] Arnold v. Ellis, 20 Tex. Civ. App. 262, 48 S. W. 883; Williamson v. Gove, 73 S. W. 563.

[2] Whiting v. Dyer, 21 R. I. 278, 43 Atl. 181. See as to resulting trusts: Foster v. Beidler, 79 Ark. 418, 96 S. W. 175; Whitmer v. Schenk, 11 Idaho, 702, 83 Pac. 775; Stewart v. Douglass, 148 Cal. 511, 83 Pac. 699; McClenahan v. Stevenson, 118 Iowa, 106, 91 N. W. 797.

[3] Larkins v. Rhodes, 5 Port. 196; Baumgartner v. Guessfeld, 38 Mo. 36; Letcher v. Letcher, 4 Marsh. J. J. 590; Wray v. Steele, 2 Ves. & B. 388; Keaton v. Cobb, 1 Dev. Ch. 439, 18 Am. Dec. 595; Ross v. Hegeman, 2 Edw. Ch. 373; Powell v. Monson etc. Co., 3 Mason, 347. See Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Hidden v. Jordan, 21 Cal. 92; Avery v. Stewart, 136 N. C. 426, 68 L.R.A. 776, 48 S. E. 775.

ing of the property, a trust results in favor of the heir or next of kin, and administration may be had on the estate.[4]

§ 1152a. Consent that title should be taken in name of another.—The right of a party to have a resulting trust declared in his favor is not defeated by the fact that he consented that the title to the land should be taken in the name of another.[5] A vendor will hold the legal title as trustee for the vendee where the latter has paid the purchase price, taken possession of the land, and improved it with the consent of the vendor, and paid off the debts of the estate.[6] A subsequent payment will not relate back so as to attach a trust to the original purchase. The trust must arise when the deed is executed.[7] Where a lease containing an option of purchase was interlined so as to make another a colessee, and both jointly occupied the land, the colessee making valuable improvements, and the original lessee purchased the land, taking the deed in his own name, it was decided that the purchase inured to the benefit of the colessee, who, on payment of one-half of the purchase price, was entitled to a conveyance of a half interest.[8] A resulting trust may be created by a parol contract by which a purchaser is to buy the land and hold it for the joint benefit of himself and another.[9] If a woman by promising to marry a man fraudulently obtains money from him with which she purchases land, agreeing to hold the land as a substitute for her right to dower under the marriage, and if she refuses to marry him, a trust in the land will result in his favor to the extent of the money advanced by him.[1]

[4] Andrews v. Lincoln, 95 Me. 541, 56 L.R.A. 103, 50 Atl. 898.

[5] Summers v. Moore, 113 N. C. 394.

[6] Ryder v. Loomis, 161 Mass. 161.

[7] Moorman v. Arthur, 90 Va. 455.

[8] Barbour v. Johnson, 21 D. C. 40.

[9] Towle v. Wadsworth, 147 Ill. 80.

[1] Edwards v. Culberson, 111 N. C. 342, 18 L.R.A. 204, 16 S. E. 233.

§ 1153. Deed taken in the name of one joint purchaser.—So, where several parties contribute to the purchase of land, and the deed is taken in the name of one of them, each of the others has a resulting trust in the land in the proportion which the amount that he paid bears to the whole consideration price.[2] "The rule is well settled that when land is purchased for which one party pays the consideration and another party takes the title, a resulting trust immediately arises in favor of the party paying the consideration, and the other party becomes his trustee; and it is now equally well settled that if the one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party *pro tanto*."[3] Where land is purchased at a tax sale by one under an agreement that another shall have an equal interest, the former holds the title for both as tenants in common.[4] But where two persons separately purchase distinct parcels of land from the same grantor, the title to which proves to be void, one of them can subsequently

[2] Buck v. Swazey, 35 Me. 41, 56 Am. Dec. 681; Seaman v. Cook, 14 Ill. 501; Frederick v. Haas, 5 Nev. 389; Thomas v. Thomas, 62 Miss. 531; Bear v. Koenigstein, 16 Neb. 65; Jackson v. Bateman, 2 Wend. 570; Cloud v. Ivie, 28 Mo. 578; Morey v. Herrick, 18 Pa. St. 129; Purdy v. Purdy, 3 Md. Ch. 547; Rigden v. Walker, 3 Atk. 735; Stewart v. Brown, 2 Serg. & R. 461; Jackson v. Moore, 6 Cowen. 706; James v. James, 41 Ark. 301; Clark v. Clark, 43 Vt. 685; Bogert v. Perry, 17 Johns. 351, 8 Am. Dec. 411; Case v. Codding, 38 Cal. 191; Baumgartner v. Guessfeld, 38 Mo. 36; McDonald v. McDonald, 24 Ind. 68; Dow v. Jewell, 19 N. H. 340, 45 Am. Dec. 371; Brown v. Brown, 77 Va. 619; Kelley v. Jenness, 50 Me. 455, 79 Am. Dec. 623; Union College v. Wheeler, 5 Lans. 160. See Dikeman v. Norrie, 36 Cal. 94; Beadle v. Seat, 102 Ala. 532, 15 So. Rep. 243.

[3] Case v. Codding, 38 Cal. 191, per Rhodes, J., and cases cited. See, also, Pierce v. Pierce, 7 Mon. B. 433; Lake v. Gibson, 1 Eq. Cas. Abr. 291; Brothers v. Porter, 6 Mon. B. 106; Quackenbush v. Leonard, 9 Paige, 334; Powell v. Monson etc. Mfg. Co., 3 Mason, 347; Botsford v. Burr, 2 Johns. Ch. 405; Shoemaker v. Smith, 11 Humph. 81; Hall v. Young, 37 N. H. 134; Bernard v. Bongard, Har. (Mich.) 130; Pinney v. Fellows, 15 Vt. 525.

[4] Stewart v. Brown, 2 Serg. & R. 461.

acquire the true title to both of the different parcels, and he will not hold the title as trustee for the other.[5] An application was made to the proper officer for a grant of several lots of land for the mutual benefit of three persons, A, B, C, who agreed among themselves that A should pay the purchase money to the State for the lands as the same became due, and should obtain the patents, and that he should receive the purchase money and interest out of the sale of the land, and that on the payment of the money due to him, he should release one-third of the land to B and C, respectively. Subsequently the executors and trustees of A paid the purchase money and received the patents. B transferred his interest in the land to another person by an absolute deed, but really as security for a debt of one thousand four hundred and eighty dollars. The creditor afterward sold his interest in the land to the executors and trustees of A for one thousand dollars only. The court held that the executors and trustees of A took the legal title to the land as trustees for those having a beneficial interest in the land under the agreement, and that as the deed from B was only a mortgage, such executors and trustees of A were entitled to hold the mortgage for the amount which they paid for it and interest, and not for the amount for which it was originally given.[6]

§ 1154. **Interests acquired.**—It is said that in the absence of proof as to the exact amount of money contributed

[5] Collins v. Bartlett, 44 Cal. 371.

[6] Quackenbush v. Leonard, 9 Paige, 334. Land was purchased by six persons who contributed equally to the purchase price, and the title was placed in one of the purchasers, who executed an instrument declaring that he held it in trust for all, which was not recorded. A partition was subsequently made whereby one-half of the land was conveyed to three of the purchasers, and they in turn conveyed to him their interest in the other portions, which he was to hold in trust for himself and the other two purchasers, who paid equal portions of the bonus paid by them in the partition. The other two purchasers were held to have a resulting trust in the land: Rogers v. Donnellan, 11 Utah, 108, 39 Pac. Rep. 494.

by each for the purchase, the law will presume that the parties contributed equally.[7] A party may by the same deed take an undivided portion of the land to himself in his own right, and be charged as a trustee for other portions of the same land. He subsequently may purchase and take a deed to himself of the interest of some or all of his *cestuis que trust,* and then he ceases to be a trustee, but becomes the absolute owner of the share which he purchases.[8] Where A has mortgaged his land to B, with covenants of warranty, and subsequently, having paid the amount due on a prior mortgage, takes an assignment of the mortgage to himself, the title which he thus acquires would in the absence of explanation inure to the benefit of B. But if the fact is that C purchased the prior mortgage and paid the consideration, and A after its assignment to him by a previous agreement assigned it to C, or assigned it in blank and delivered it to C, with power to fill the blank, the assignment to A being clearly for the benefit of C, an implied resulting trust in his favor at once arises and attaches to the assignment made by the first mortgagee to A. If, however, a part of the money was paid by A and a part by C, the trust in favor of C extends only to the amount paid by him.[9] If an agreement is made by two proprietors of land, that one of them shall under a certain statute purchase an adjoining tract of government land, and that both shall furnish an equal sum of money to pay the price, and that the one who enters shall convey one half of the land to the other, and he enters under this agreement, a resulting trust arises in favor of the one advancing one half the money, as to one half of the land.[1]

[7] Shoemaker v. Smith, 11 Humph. (30 Tenn.) 81.

[8] Jackson v. Moore, 6 Cowen, 706.

[9] Kelley v. Jenness, 50 Me. 455, 79 Am. Dec. 623.

[1] Cloud v. Ivie, 28 Mo. 578. The interest acquired is the proportion which the amount paid by one bears to the whole price. Collins v. Corson (N. J. Ch. Dec. 26, 1894), 30 Atl. Rep. 862.

§ 1155. **Purchase of specific part.**—A resulting trust will not arise in favor of one of several joint purchasers, unless his part is some definite portion of the whole, and the money paid by him is for some aliquot part of the property.[2] "Such a trust can only arise in favor of a person who claims to have furnished the consideration money, when such consideration or some aliquot part thereof was furnished as part of the original transaction at the time the purchase was made. The party claiming the benefit of the resulting trust, must have occupied a position originally which would have entitled him to be substituted in the place of him to whom the conveyance has been made." [3] No resulting trust can arise where the proportions paid by the respective parties are uncertain.[4]

§ 1156. **Deed taken by agent.**—If an agent purchases property with the money belonging to his principal without the latter's knowledge, or if the agent has the deed made out in his own name against the consent of the principal, a resulting trust arises in favor of the principal.[5] A, under a contract

[2] Olcott v. Bynum, 17 Wall. 44, 21 L. ed. 570; Cuttler v. Tuttle, 19 N. J. Eq. 561; McGowan v. McGowan, 14 Gray, 119, 74 Am. Dec. 668; White v. Carpenter, 2 Paige, 217; Reynolds v. Morris, 17 Ohio St. 510; Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617; Sayre v. Townsends, 15 Wend. 647. See Hidden v. Jordan, 21 Cal. 92.

[3] Perry v. McHenry, 13 Ill. 227, 238. per Trumbull, J.

[4] Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617. Said the court, per Tenny, J: "And no case has been found where a resulting trust has been held to arise upon payments made in common by the one asserting his claim, and the grantee in the deed, wherein the grantor acknowledges the receipt of the consideration from him alone, when the amount belonging to one and the other is uncertain, and unknown even to those who make the payments; and no satisfactory evidence is offered exhibiting the portion which was really the property of each. The trust springs from a presumption of law, because the alleged *cestui que trust has paid the money*. Such presumption must be attended with no uncertainty. The whole foundation is the payment, and this must be clearly established."

[5] Follansbee v. Kilbreth, 17 Ill. 522, 65 Am. Dec. 691; Pugh v. Pugh, 9 Ind. 132; Day v. Roth, 18 N. Y. 448; Seichrist's Appeal, 66

for the purchase of a lot from B, entered into possession, and made certain improvements, but being unable to meet the payments, sold a part of the lot to C by parol, they both having agreed upon the division line. B, the owner of the land, with the consent of A, executed a deed for the whole lot to C, the latter agreeing with A to hold the other part of the lot in trust for A, and to convey such portion to him on the receipt of A's share of the purchase money. A continued in possession of his part according to the line agreed upon, and upon C's refusal to convey, it was held that he held in trust for A, and could be compelled to convey.[6] The *cestui que trust* when he discovers the fraud may repudiate the transaction, thus relieving himself of his equitable title, or he may waive the fraud and assert his rights as *cestui que trust;* he may also lose his equitable title, by laches, fraud, or agreement.[7] Where the agent takes the title by fraud in his own name, he becomes a trustee *ex maleficio*.[8] An agent having a sum of money in his hands belonging to his principal, wrote to her a letter admitting that he held the money for investment on her account, and requesting a power of attorney to invest the same, and she sent the power of attorney. There was no other evidence to show upon what understanding the agent had received the money. He subsequently invested the money by buying real estate, the deed for which was made out in his brother's name. The court held that the letter was proper evidence for the purposes of showing that the money was held in trust, and

Pa. St. 237; Squire's Appeal, 70 Pa. St. 268; Bridenbecker v. Lowell, 32 Barb. 9. And see Robb's Appeal, 41 Pa. St. 45; Eshleman v. Lewis, 49 Pa. St. 410; Wynn v. Sharer, 23 Ind. 573; Church v. Sterling, 16 Conn. 388; Farmers' etc. Bank v. King, 57 Pa. St. 202, 98 Am. Dec. 215; Moffit v. McDonald, 11 Humph. 457; Bank of America v. Pollock, 4 Edw. Ch. 215. See Kluender v. Fenske, 53 Wis. 118; Roberts v. Haley, 65 Cal. 397.

[8] Seichrist's Appeal, 66 Pa. St. 237. See, also, Gashe v. Young, 51 Ohio St. 376, 38 N. E. Rep. 20.

[7] Follansbee v. Kilbreth, 17 Ill. 522, 65 Am. Dec. 691.

[8] Squires' Appeal, 70 Pa. St. 266; Follansbee v. Kilbreth, 17 Ill. 522; 65 Am. Dec. 691.

that the agent was not a mere debtor, and that the principal had a resulting trust in the property so purchased.[9] So where the consideration for the purchase of land is real estate of the principal, a trust in his favor will result, where an agent for the purchase of real estate has the deed made in favor of his wife, and such trust is not affected by the fact that the principal had knowledge that the deed was so executed, and consented to the transaction.[1]

§ 1157. **Payment made with agent's funds.**—But where an agent purchases land with his own money, using no money of the principal, a resulting trust cannot be raised by parol evidence. Whatever trust there may be in a case of this kind, does not arise from the transaction itself, but from the agreement between the parties, and a trust created by express agreement must, under the statute of frauds, be in writing. "We think the doctrine well sustained that, where one man merely employs another by parol as an agent to purchase real property for him, and the person thus employed purchases the land in his own name, and no part of the purchase money is paid by the principal, and the agent denies the trust, it would directly overturn the statute of frauds to admit any other evidence than that which the statute requires."[2] Where A agrees by parol with B that he will

[9] Day v. Roth, 18 N. Y. 448.

[1] Bostleman v. Bostleman, 24 N. J. Eq. 103.

[2] Burden v. Sheridan, 36 Iowa, 125, 134, 14 Am. Rep. 505, per Miller, J., who examines several of the cases at length. See, also, Dorsey v. Clarke, 4 Har. & J. 551; Kennedy v. Keating, 34 Mo. 25; Pinnock v. Clough, 16 Vt. 500, 507, 42 Am. Dec. 521; Pearson v. East, 36 Ind. 28; Flagg v. Mann, 2 Sum. 486, 546; Nestal v. Schmid, 29 N. J. Eq. 458; Taliaferro v. Taliaferro, 6 Ala. 406; Minot v. Mitchell, 30 Ind. 228, 95 Am. Dec. 685; Heacock v. Coatsworth, Clarke, 84; Fowke v. Slaughter, 3 Marsh. A. K. 57, 13 Am. Dec. 133; Walker v. Brungard, 13 Smedes & M. 765; Moore v. Green, 3 Mon. B. 407; Arnold v. Cord, 16 Ind. 177; Woodhull v. Osborne, 2 Edw. Ch. 615; Jackman v. Ringland, 4 Watts & S. 149; Lathrop v. Hoyt, 7 Barb. 60; Lamas v. Bayly, 2 Vern. 627; O'Hara v.

attend a sale of B's farm under a decree of foreclosure, bid off the premises, take a deed in his own name, and agrees to let B have an opportunity to repay the amount bid, and secure a reconveyance, the agreement it is held is void, as being within the statute of frauds, and B has no resulting trust.[3] And where a guardian who is indebted to his ward purchases land, declaring it to be for the ward, and putting the ward in possession, but paying for the land with his own money and taking the title in his own name, no resulting trust arises, and the ward has no title to the land when no proof is made of an agreement that the land was to be given to the ward in payment of the debt.[4]

§ 1158. **Agent at execution sale.**—But if the principal furnishes the consideration, whether in money or other property, and the agent takes the title in his own name, a resulting trust is created.[5] Thus, a sheriff was about to sell certain real estate under an execution, and the judgment creditor requested a person to attend the sale as his agent, and in case the bids were not in excess of the judgment, to purchase the property, and have the amount bid credited by the sheriff on the execution. The agent made a bid as directed, and the amount bid was credited on the execution, but he took the certificate of purchase in his own name, instead of in that of the judgment creditor, and subsequently received a deed. The court decided that he held the title in trust for the judgment creditor.[6] Where a written contract is made by several persons that one of them shall purchase for the benefit of all, land about to be sold under an execution, each to supply his share of the money, and the purchaser to convey to each, one

O'Neil, 2 Brown Parl. C. 39; Atkins v. Rowe, Mos. 39; Rastel v. Hutchinson, 1 Dick. 44; Bartlett v. Peckersgell, 1 Edg. 515.

[3] Lathrop v. Hoyt, 9 Barb. 59.

[4] Taliaferro v. Taliaferro, 6 Ala. 404.

[5] Currey v. Allen, 34 Cal. 254.

[6] Currey v. Allen, 34 Cal. 254.

of the contracting parties cannot, after the purchase is effected, by securing another judgment, redeem the property and obtain the title for himself. He will become a trustee, holding the legal title in trust for all the parties interested in the contract.[7] A husband having given a note for his own indebtedness, his wife, for the purpose of securing its payment, executed jointly with him a mortgage upon land which he had previously conveyed to her by a deed of gift. This deed was duly recorded. The mortgage subsequently was foreclosed, and a person purchased the land for the husband with the latter's money, and conveyed the land to him. For the purpose of securing an antecedent indebtedness, the husband afterward conveyed the land to one who took without actual notice. The act of the husband in purchasing through an agent was but the payment of his own debt; and, therefore, he took the title in trust for his wife. As to the second mortgagee, the court held that the records were sufficient to put him upon inquiry, and that he was compelled at his own risk to acquire information as to the facts.[8]

§ 1159. **Partnership funds.**—Where one partner purchases real estate with partnership funds, and takes the deed in his own name, the other partners have a resulting trust equivalent to their share in the partnership. "We could not deny," said Mr. Justice Black, "the correctness of this proposition, without saying that one partner may, with the consent of the other, buy property for the benefit of both, and afterward appropriate it entire to his own use, because he got the deed in his own name. This would establish a rule under which one partner could always cheat another out of his own share. It would be a premium on bad faith, and the highest reward that could be offered for the violation of bargains, and the disregard of justice, truth, and conscience."[9] Under

[7] Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134.

[8] Hassey v. Wilke, 55 Cal. 525.

[9] In Coder v. Huling, 27 Pa. St.

a verbal agreement between A and B to purchase and improve real estate, sharing equally the profits and losses, two farms were purchased which were conveyed to them jointly. Their agent contracted for a third farm in his own name, but A, without B's knowledge or consent, had the contract assigned to himself, and secured a conveyance of the farm. Both A and B made permanent improvements at various times upon, and purchaseed cattle for, each of the farms. They treated all three farms alike, and B, with A's knowledge, superintended work performed upon the third farm, and made payments therefor. Both A and B visited such farms together, and had various conversations relative to the disposition of an interest therein, and A did not at any time intimate that B was not also as to this farm a joint owner, and B advanced money at different times on account of purchases for all three farms. The court held that A having taken title to such third farm, in fraud of the rights of B, the latter had a resulting trust therein, and that it was unnecessary for him to seek a dissolution of the partnership and an accounting, but that he was entitled to a conveyance from A of an undivided interest in the farm.[1] No resulting trust arises however, where there

84, 88. See, also, Smith v. Burnham, 2 Sum. 435; McCully v. McCully, 78 Va. 159; Homer v. Homer, 107 Mass. 85; Richards v. Manson, 101 Mass. 482; Phillips v. Crammond, 2 Wash. C. C. 401; Pugh v. Currie, 5 Ala. 446; Baldwin v. Johnston, Saxt. Ch. 441; Oliver v Piatt, 3 How. 401, 11 L. ed. 652; Winkfield v. Brinkman, 21 Kan. 682; Edgar v. Donnally, 2 Munf. 387; Evans v. Gibson, 29 Mo. 223, 77 Am. Dec. 565; Turner v. Pettigrew, 6 Humph. 438; Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Settembre v. Putnam, 30 Cal. 490; Freeman v. Kelly, Hoff. Ch. 90; Smith v. Ramsey, 1 Gilm. 373; Mallory v. Mallory, 5 Bush, 464; Ebbert's Appeal, 70 Pa. St. 79; Weinrich v. Wolf, 24 W. Va. 299. See Warren v. Schainwald, 62 Cal. 56.

[1] Traphagen v. Burt, 67 N. Y. 30, and cases cited. Where two brothers owning adjoining farms, engaged in farming in partnership and one of them bought a tract of adjacent land under an agreement that the north half should belong to him and the south half to his brother, paying for land with partnership funds and taking the title in his own name, it was decided

is a parol agreement between two persons to buy a single tract of land "in partnership," but the transaction is consummated by one, to whom the deed is made and by whom the consideration is paid, the other contributing nothing, but agreeing simply to contribute one half of the purchase price when demanded by the grantee.[2]

§ 1160. **Guardian and ward.**—A ward has a resulting trust in land purchased with his money by his guardian, the deed for which is made to the guardian.[3] And where the deed acknowledges the receipt of the consideration paid by him, "guardian of the minor children" of a person named, but the deed is made to himself, his heirs and assigns, without referring in any other mode to his guardianship, creditors of the guardian have sufficient notice that the land is held by him in trust.[4] But if the guardian pay for the land with his own money, declaring the purchase at the time to be for the benefit of his ward, the latter cannot claim a trust, because such a trust is void by the statute of frauds.[5]

§ 1161. **Wife's separate property.**—The same principle applies where a husband takes a deed in his own name for

that he held title to the south half in trust for his brother: Van Buskirk v. Van Buskirk, 148 Ill. 9. Where land belonging to a farm is conveyed by consent to one of the partners, the fact that the land was paid for by partnership funds will not create a resulting trust: Gunnison v. Erie Dime Savings and Loan Co., 157 Pa. St. 303.

[2] Norton v. Brink, 75 Neb. 566, 7 L.R.A.(N.S.) 945, 110 N. W. 669.

[3] Bancroft v. Consen, 13 Allen, 50; Caplinger v. Stokes, Meigs, 175; Puigh v. Puigh, 19 Ind. 132; Lee v. Fox, 6 Dana, 171. See Robinson v. Robinson, 22 Iowa, 427; Pillars v. McConnell, 141 Ind. 670; 40 N. E. Rep. 689. The right to enforce a resulting trust is not defeated by the fact that the ward can sue at law to recover the moneys used by the guardian in the purchase of the land in his own name: Thompson v. Hartling, 105 Ala. 263, 16 So. Rep. 711.

[4] Bancroft v. Consen, 13 Allen, 50.

[5] Kisler v. Kisler, 2 Watts, 323, 27 Am. Dec. 308; Snell v. Elam, 2 Heisk. 82; Johnson v. Dougherty, 18 N. J. Eq. 406.

land purchased with the separate property of his wife. She has a resulting trust.[6] She may elect to charge her husband personally, or claim the land as her own, and if part of her funds only were used in the purchase, she has a resulting trust to the extent of that part.[7] When the husband has conveyed the land so purchased to a third person, who has notice of the manner in which the husband acquired it, such third person is also chargeable with the trust. [8] Where a son obtains money from his mother to purchase land, on the understanding that he is to take the deed in his own name and hold the title for her benefit, and the son pays the money to the vendor, and the latter, at the request of the son's wife, who has knowledge of the acts, executes a deed to her, she holds the title in trust for the mother.[9] If a husband purchases land with his wife's money, and subsequently sells and exchanges it for another tract of land, she still has a right to pursue her money, and to fasten a trust on the land received by the

[6] Goldsberry v. Gentry, 92 Ind. 193; Fillman v. Divers, 31 Pa. St. 429; Kline's Appeal, 39 Pa. St. 463; Tilford v. Torrey, 53 Ala. 120; Pritchard v. Wallace, 4 Sneed, 405, 70 Am. Dec. 254; Pinney v. Fellows, 15 Vt. 525; Resor v. Resor, 9 Ind. 347; Barron v. Barron, 24 Vt. 375; Davis v. Davis, 46 Pa. St. 342; Raybold v. Raybold, 20 Pa. St. 308; Woodford v. Stephens, 51 Mo. 443; Darkin v. Darkin, 23 L. J. Ch. 890; Lench v. Lench, 10 Ves. 511; Wallace v. McCullough, 1 Rich. Eq. 426; Carter v. Bolin (Tex. App., May 15, 1895), 30 S. W. Rep. 1084; Berry v. Wiedman, 40 W. Va. 36, 20 S. E. Rep. 817; Howard v. Howard, 52 Kan. 469; Irick v. Clement, 49 N. J. Eq. 590. See Parker v. Coop, 60 Tex. 111; Derry v. Derry, 74 Ind. 560.

[7] Tilford v. Torrey, 53 Ala. 120. What her rights under the rule at the common law would be, see Waldrow v. Sanders, 85 Ind. 270; Westerfield v. Kimmer, 82 Ind. 365.

[8] Methodist Episcopal Church v. Jacques, 1 Johns. Ch. 450.

[9] Wormouth v. Johnson, 58 Cal. 622. Where two parcels of land, descending to a wife and other heirs, are bid in at an auction by her husband, and one of the parcels is paid for by crediting him with the wife's distributive share of the estate, he holds such parcel as trustee for his wife, but he is not a trustee as to the other parcel which he paid for in cash, with the money either of himself or his wife: Cooksey v. Bryan, 2 App. D. C. 557.

husband in exchange.[1] Where a wife takes title in her own name to land purchased with a fund belonging partly to the husband and partly to the wife, and she agrees on her husband's request to convey to him, there is a resulting trust in his favor.[2] Where the wife consents to the husband taking the title in his own name, for convenience, to property purchased with her funds, she may enforce the trust as against creditors of the husband.[3] If a father purchases land for his married daughter, but, through error, the husband is named as grantee in the conveyance, a trust will arise in her favor.[4]

[1] Walker v. Elledge, 65 Ala. 51. See English v. Law, 27 Kan. 242.

[2] Harden v. Darwin, 66 Ala. 55.

[3] City Nat. Bank v. Hamilton, 34 N. J. Eq. 158.

[4] Olinger v. Shultz, 183 Pa. 469, 38 Atl. 1024. See, also, Lord v. Bishop, 101 Ind. 334. Cases are numerous in which a trust has been declared in favor of a wife when the title to property purchased with her money, has been taken in the name of her husband. See Garner v. Second Nat. Bank, 151 U. S. 420, 38 L. ed. 218, 14 Sup. Ct. Rep. 390; Thames v. Herbert, 61 Ala. 346; Nettles v. Nettles, 67 Ala. 601; Brown v. Wright, 58 Ark. 20, 21 L.R.A. 467, 22 S. W. 1022; Booth v. Lenox, 45 Fla. 191, 34 So. 566; Sasser v. Sasser, 73 Ga. 275; Bell v. Stewart, 98 Ga. 669, 27 S. E. 153; Burt v. Kuhnen, 113 Ga. 1143, 39 S. E. 414; Slocum v. Slocum, 9 Ill. App. 142; Krebaum v. Cordell, 63 Ill. 23; Holmes v. Clifford, 95 Ill. App. 245; Barnett v. Goings, 8 Blackf. 284, 44 Am. Dec. 766; Malady v. McEnary, 30 Ind. 273; Dayton v. Fisher, 34 Ind. 356; Davis v. Davis, 43 Ind. 561; Tracy v. Kelley, 52 Ind. 535; Derry v. Derry, 74 Ind. 560; Goldsberry v. Gentry, 92 Ind. 193; Radcliffe v. Radcliffe, 96 Ind. 482; Mitchell v. Colglazier, 106 Ind. 466, 7 N. E. 199; Pierce v. Hower, 142 Ind. 626, 42 N. E. 223; English v. Law, 27 Kan. 242; Mosteller v. Mosteller, 40 Kan. 658, 20 Pac. 464; Howard v. Howard, 52 Kan. 469, 34 Pac. 1114; Miller v. Edwards, 7 Bush. 394; Mallory v. Mallory, 5 Bush. 464; Rath v. Rankins, 17 Ky. L. Rep. 1120, 33 S. W. 832; Brooks v. Dent, 1 Md. Ch. 523; Gittings v. Winter, 101 Md. 194, 60 Atl. 630; House v. Harden, 52 Miss. 860; Greaves v. Atkinson, 68 Miss. 598, 10 So. 73; Bowen v. McKean, 82 Mo. 594; Broughton v. Brand, 94 Mo. 169, 7 S. W. 119; Owings v. Wiggins, 133 Mo. 630, 34 S. W. 877; Alkire Grocer Co. v. Ballenger, 137 Mo. 369, 38 S. W. 911; McLeod v. Venable, 163 Mo. 536, 63 S. W. 847; Irick v. Clement, 49 N. J. Eq. 590, 27 Atl. 434; Mayer v. Kane, 69 N. J. Eq. 733, 61 Atl. 374; Methodist Episcopal Church v. Jaques, 1 Johns. Ch. 450; Cunningham v. Bell, 83 N. C. 328; Kirkpatrick v. Holmes, 108 N. C. 206, 12 S. E. 1037; Ross v. Hendrix,

§ 1161a. **Protection of wife's rights.**—Where land is purchased by a husband with money belonging to his wife, and the title is placed in his name without her consent, the trust arising in her favor will be protected against the claims of the creditors of the husband, unless the debts were contracted on the faith of his ownership of the property.[5] It is not essential, to create a resulting trust in favor of a wife, that the purchase money should have been paid at the time the land was purchased, but the trust will arise if it be paid as installments or as encumbrances fall due, in conformity with a contract of purchase and under an agreement that she is to recover so much as she pays for.[6] But if a wife lends money,which constitutes part of her separate estate, to her husband to complete the payment due for a tract of land, and he agrees that the debt shall be a charge upon the land until paid, the debt at his death is not entitled to priority or lien over other unsecured claims against his estate.[7] Nor, where there has been a lapse of several years during which the wife has remained silent, and she has not asserted her claim until after her husband's death, and it appears that the contribution made by the husband greatly exceeded that made by the wife, although he may have promised to take the deed in her name, a resulting trust will not be decreed.[8]

110 N. C. 403, 15 S. E. 4; Sessions v. Trevitt, 39 Ohio St. 259; Linnville v. Smith, 6 Or. 202; Rupp's Appeal, 100 Pa. 531; Heath v. Slocum, 115 Pa. 549, 9 Atl. 259; Logan v. Eva, 144 Pa. 312, 22 Atl. 757; Light v. Zeller, 144 Pa. 570, 22 Atl. 1029; Light v. Zeller, 144 Pa. 582, 22 Atl. 1025; Young v. Senft, 153 Pa. 353, 25 Atl. 778; Miller v. Baker, 166 Pa. 414, 45 Am. St. Rep. 680, 31 Atl. 121; Lloyd v. Woods, 176 Pa. 63, 34 Atl. 926; Dunbach v. Bishop, 183 Pa. 602, 39 Atl. 38; Burnett v. Campbell County, 1 Tenn. Ch. App. 18; John v. Battle, 58 Tex. 591; Blum v. Rogers, 71 Tex. 676, 9 S. W. 595; Berry v. Wiedman, 40 W. Va. 36, 52 Am. St. Rep. 866, 20 S E. 817; Standard Mencantile Co. v. Ellis, 48 W. Va. 309, 37 S. E. 593.

[5] Hews v. Kenney, 43 Neb. 815.

[6] Gilchrist v. Brown, 165 Pa. St. 295, 44 Am. St. Rep. 664.

[7] Loftis v. Loftis, 94 Tenn. 232.

[8] Schierloh v. Schierloh, 72 Hun, 150.

Where a husband took the title to property in his own name, which was purchased with his wife's funds, he assuring her that he had made provision for her protection, she may after his death assert her claim, and the statute of limitations will not begin to run against her until the trust has been repudiated.[9] If a husband buys property with his wife's money, a resulting trust is presumed, and if he claims that she intended to make a gift, he has the burden of proof.[1]

§ 1162. **Trust funds, generally.**—The preceding sections are but illustrations of the general rule that when any person occupying the position of a trustee purchases land with trust funds, taking a deed in his own name, the beneficiary may claim the benefit of the purchase. This rule prevails with respect to all who occupy a fiduciary character. Thus, an administrator or executor, purchasing land with the property of the estate, holds as a trustee for those beneficially interested in the estate.[2] So with respect to the committee of a lunatic,[3] or to the trustee of a corporation.[4]

[9] Smith v. Smith, 132 Iowa, 700, 109 N. W. 194, 119 Am. St. Rep. 581.

[1] Berry v. Weidman, 40 W. Va. 36, 52 Am. St. Rep. 866; Evans v. Welborn, 74 Tex. 530, 15 Am. St. Rep. 858; Grantham v. Grantham, 34 S. C. 504, 27 Am. St. Rep. 839; Hanley v. Legg, 129 Ala. 619, 30 So. 34, 87 Am. St. Rep. 81; Miller v. Baker, 166 Pa. St. 414, 45 Am. St. Rep. 680; Beam v. Bridges, 108 N. C. 276, 23 Am. St. Rep. 59.

[2] Stow v. Kimball, 28 Ill. 93; Dodge v. Cole, 97 Ill. 338, 37 Am. Rep. 111; Garrett v. Garrett, 1 Strob. Eq. 96; Buck v. Uhrich, 16 Pa. St. 490; White v. Drew, 42 Mo. 561; Barker v. Barker, 14 Wis. 131; Schaffner v. Grutzmacher, 6 Clark, 137; Williams v. Hollingsworth, 1 Strob. Eq. 103, 47 Am. Dec. 527; Harper v. Archer, 28 Miss. 212; Wallace v. Duffield, 2 Serg. & R. 521, 7 Am. Dec. 660; Seaman v. Cook, 14 Ill. 501. And see Roberts v. Opp, 56 Ill. 34; Musham v. Musham, 87 Ill. 80; Fox v. Doherty, 30 Iowa, 334; Kirkpatrick v. McDonald, 11 Pa. St. 387; Hancock v. Titus, 39 Miss. 224; Valle v. Bryan, 19 Mo. 423; Neill v. Keese, 13 Tex. 187; Harrisburg Bank v. Tyler, 3 Watts & S. 373; Wilhelm v. Folmer, 6 Pa. 296.

It is sufficient if the general character of the trust fund can be identified.[5] A person died leaving surviving him a widow and four children, and the widow administered on his estate and managed it for thirty-seven years. She at first, in the joint names of herself and children, and subsequently in her own name, with their assent and knowledge, invested and reinvested the proceeds, and she furnished all the supplies for the family, they all living together. It was held that the widow was to be treated as a trustee in these investments for those interested in the estate.[6] If a trustee purchase an interest, the retention of which by him would materially affect the trust property, he holds it in trust for the *cestui que trust*.[7] Where trust land is exchanged by a trustee

[3] Buffalo R. R. Co. v. Lamson, 47 Barb. 533; Reid v. Fitch, 11 Barb. 399; Turner v. Pettigrew, 6 Humph. 438. See Hannett's Appeal, 72 Pa. St. 337.

[4] Methodist Episcopal Church etc. v. Wood, 5 Ohio, 283; Church v. Sterling, 16 Conn. 388.

[5] Campbell v. Walker, 5 Ves. 678; Sanderson v. Walker, 13 Ves. 601; United States v. Waterborough, Davies, 154; Overseers of the Poor v. Bank of Virginia, 2 Gratt. 544, 44 Am. Dec. 399; De Bevoise v. Sanford, Hoff. Ch. 194; Downes v. Grazebrook, 3 Mer. 200; McLarren v. Brewer, 51 Me. 402. And see Thompson's Appeal, 22 Pa. St. 16.

[6] Seaman v. Cook, 14 Ill. 501. "Any application or appropriation of these funds to her sole use and benefit would be, by our law, a violation of her trust, and it will not lie in her mouth, or avail to allege a breach of confidence and a violation of trust and duty, as the ground of title to her principal's estate. For if these investments were not made for the use of the principals, but her own, it was a breach of trust, a misapplication of their money, and a violation of her duty. This the law will not presume to have been the intention, but will treat it as a resulting trust to the owners of the money." See, also, Wallace v. Duffield, 2 Serg. & R. 529, 7 Am. Dec. 660.

[7] Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Settembre v. Putnam, 30 Cal. 490; Campbell v. Campbell, 21 Mich. 438; Van Epps v. Van Epps, 9 Paige, 237; Dickinson v. Codwise, 1 Sand. Ch. 226; Holmes v. Campbell, 10 Minn. 401; Heath v. Page, 63 Pa. St. 108, 3 Am. Rep. 533; Hall v. Vanness, 49 Pa. St. 457; Harold v. Lane, 53 Pa. St. 269; Torrey v. Bank of Orleans, 9 Paige, 649; Clark v. Cantwell, 3 Head, 302; Holt v. Holt, 1 Ch. Cas. Ch. 190; Tanner v. Elworthy, 4 Beav. 487; Geddings v. Geddings, 3 Russ. 241; Nesbitt v. Tredennick, 1 Ball & B. 46. Where a trustee pays half the pur-

for other land with the beneficiary's consent, the trust arising may be established by parol evidence.[8]

§ 1163. **Attorney's knowledge of defect in judicial proceedings.**—Where an attorney conducts a suit to obtain the title to land for his client, the title, however, by reason of defects in the proceedings not passing, and the attorney, after the relation of attorney and client had ceased, having discovered such defects, purchases the property for the benefit of another, the original client and such purchaser are to be deemed strangers. Hence, in the absence of actual fraud, the legal title is not held in trust.[9]

§ 1164. **Investment of stolen money.**—Where a clerk steals goods or money from the store of his employer, and invests the same in land, it is held that the employer can hold neither the clerk nor his representatives, after his death, as trustees, so as to secure a conveyance to himself of the legal title.[1] "It is not at all," said Ruffin, C. J., "like the cases of dealings with trust funds by trustees, executors, guardians, factors, and the like, in which the owner of the fund may elect to take either the money or that in which it was invested. For, in all those cases, the legal title, if we may use the expression, of the fund, is in the party thus misapplying it. He has been intrusted with the whole possession of it, and that for the purpose of laying it out for the benefit of the equitable owner; and, therefore, all the benefit and profit the trustee ought, in the nature of his office, and from his relation to his *cestui que trust,* to account for

chase price of land with trust funds, but subsequently accounts for the same the land is not subject to a resulting trust: In re Ricker's Estate, 14 Mont. 153.

[8] Francis v. Cline, 96 Va. 201, 31 S. E. 10.

[9] Learned v. Haley, 34 Cal. 608.

[1] Campbell v. Drake, 4 Ired. Eq. 94; Pascoag Bank v. Hunt, 3 Edw. Ch. 583.

to that person. But the case of a servant or shopkeeper is very different. He is not charged with the duty of investing his employer's stock, but merely to buy and sell at the counter. The possession of goods or money is not in him but in his master; so entirely so that he may be convicted of stealing them, in which both a *cepit* and *asportavit* are constituents. This person was, in truth, guilty of a felony in possessing himself of the plaintiff's effects for the purpose of laying them out for his own lucre; and that fully rebuts the idea of converting him into a trustee. If that could be done, there would be at once an end to punishing thefts by shopmen. If, indeed, the plaintiff could actually trace the identical money taken from him into the hands of a person who got it without paying value, no doubt he could recover it, for his title was not destroyed by the theft. But we do not see how a felon is to be turned into a trustee of property merely by showing that he bought it with stolen money. If it were so there would have been many a bill of the kind. But we believe there never was one before, and therefore we cannot entertain this." [2]

§ 1165. **Comments.**—Of course, there are some difficulties connected with this question. A suit to charge the purchaser with a trust under these circumstances, renders it necessary to inquire into the commission of a criminal offense. But it would seem on well-established equitable principles, where it can be proven that the identical property was used in the purchase of the land, that the purchaser should be held to be a trustee. The general rule in regard to stolen property is that the owner is not divested of his title, and his rights to a recovery are not impaired by a transfer to a *bona fide* purchaser.[3] And it seems to us that

[2] In Campbell v. Drake, 4 Ired. Eq. 94. But see Wills, Fargo & Co. v. Robinson, 13 Cal. 133.

[3] Bassett v. Spofford, 45 N. Y. 387, 6 Am. Rep. 101; Newton v. Porter, 5 Lans. 417; Silsbury v.

if the identity of the stolen property with the consideration for the purchase can be proven, the person who has converted stolen property into real estate should be considered as holding such land for the owner, to the same extent as if the original stolen property had never left his possession. The question seems to be one of evidence, of proof, rather than one of the existence of an equitable right, which, we think, in the interests of justice ought not to be denied.[4]

§ 1166. **Surrender of contract for purchase of real estate.**—A entered into an agreement with the subagent of the trustees of an estate for the purchase of a piece of land, and after making a part payment and improving a portion of the land, sold his right to B, who, in the year following, died, leaving as his heirs a widow and minor children. B's widow surrendered the original contract made by A, the right to which was purchased by her husband, and had a new contract for the purchase of the land executed to her in her own name. She transferred the contract thus obtained to C, who surrendered this one likewise, and took out a new contract in his own name. It was held that by taking the new agreement the widow occupied the relation of trustee for the heirs of her husband, and that her vendee having knowledge of the condition of the title, and of A's possession, stood on the same footing, which was not altered by the surrender of the contracts, and the execution of new ones by the owner of the legal title.[5] And where a widow in possession of premises for which a deed had been made to her husband, but which is defective for want of a proper description, has a deed executed to her to cure such defect without the

McCoon, 3 Comst. 379, 53 Am. Dec. 307; Thompson v. Parker, 3 Mason, 382; Hoffman v. Carow, 22 Wend. 285.

[4] See Bank of America v. Pollock, 4 Edw. Ch. 215. And see the late case of Grouch v. Hazelhurst Lumber Co. (Miss., Nev. 12, 1894), 16 So. Rep. 496.

[5] Hall v. Vanness, 49 Pa. St. 457.

payment of any new consideration, she holds the title thus acquired in trust for her husband's heirs.[6]

§ 1167. **Tenants in common.**—Where a person claiming and exercising acts of ownership over a piece of land dies, and his possession descends to his heirs as tenants in common, and one of such heirs, who is also executor of the decedent's will, secures a deed in his own name from a person claiming to have a perfect title, such purchaser cannot hold the land against his tenants in common.[7] But if the tenants in common have title to the land in fee, and one of them buys an outstanding claim of title which is void, an implied trust as to such void claim in favor of his cotenants cannot be raised in the absence of an agreement that such purchase should be for the use of his cotenants.[8] Where a tenant for life in possession purchases an adverse title, the purchase will be considered as having been made for the benefit of himself and remainderman or reversioner. He cannot retain it for his exclusive benefit upon contribution from others holding by way of remainder or reversion.[9]

§ 1168. **Deed to wife or child.**—Where the person who pays the consideration for the purchase of land takes a deed in the name of his wife, or one or more of his children, or of some person to whom he owes some moral or legal obligation, the rule is that it will be presumed that this was done as an advancement. It has already been pointed out that the reason on which is based the equitable principle of resulting trusts is that the party, by the payment of the money,

[6] Campbell v. Campbell, 21 Mich. 438.

[7] Keller v. Auble, 58 Pa. St. 410, 98 Am. Dec. 297.

[8] Mandeville v. Solomon, 33 Cal. 38. "It will be of no value to the plaintiff," said the court, "if transferred to him, and the court will therefore refuse to order so vain a thing as the transfer of an undivided half of nothing."

[9] Whitney v. Salter, 36 Minn. 103, 1 Am. St. Rep. 656.

intended some benefit for himself, notwithstanding the deed was not taken in his own name, but in that of a stranger. But when the deed is made to some person to whom he is under an obligation to provide, this reason can no longer be urged. The contrary presumption results that he intended the transaction to be what it in form is—a conveyance to the grantee for the latter's sole use and benefit.[1] "It is a

[1] Stanley v. Brannon, 6 Blackf. 193; Dickenson v. Davis, 44 N. H. 647; Thompson v. Thompson, 1 Yerg. 97; Welton v. Devine, 20 Barb. 9; Knouff v. Thompson, 16 Pa. St. 357; Douglass v. Price, 4 Rich. Eq. 322; Fleming v. Donahoe, 5 Ohio, 255; Miller v. Blose, 30 Gratt. 744; Guthrie v. Gardner, 19 Wend. 414; Shaw v. Read, 47 Pa. St. 96; Shepherd v. White, 10 Tex. 72; Murless v. Franklin, 1 Swanst. 17; Lamplugh v. Lamplugh, 1 P. Wms. 111; Elliott v. Eliott, 2 Ch. Cas. Ch. 231; Grey v. Grey, 2 Swanst. 597; Sidmouth v. Sidmouth, 2 Beav. 454; Dyer v. Dyer, 2 Cox, 93; Christy v. Courtenay, 13 Beav. 96; Baker v. Leathers, 3 Ind. 557; Tremper v. Barton, 18 Ohio, 418; Cartwright v. Wise, 14 Ill. 417; Bennett v. Camp, 54 Vt. 36; Woodman v. Morrell, 2 Freem. 33; Graff v. Rohrer, 35 Md. 327; Jackson v. Matsdorf, 11 Johns. 91, 6 Am. Dec. 355; Whitten v. Whitten, 3 Cush. 191; Dudley v. Bosworth, 10 Humph. 12, 51 Am. Dec. 690; Thomas v. Chicago, 55 Ill. 403; Gray v. Gray, 13 Neb. 453; Bartlett v. Bartlett, 13 Neb. 456; Wheeler v. Kidder, 105 Pa. St. 270; Dummer v. Pitcher, 2 Mylne & K. 612; Garfield v. Hatmaker, 15 N. Y. 475; Johnson v. Johnson, 16 Minn. 512; Maxwell v. Maxwell, 109 Ill. 588; Kline's Appeal, 39 Pa. St. 463; Murphy v. Nathans, 46 Pa. St. 508; Wallace v. Bowers, 28 Vt. 638; Drew v. Martin, 32 Law J. Ch. 367; Jennings v. Selleck, 1 Vern. 467; Ebran v. Dancer, 2 Ch. Cas. Ch. 26; Tucker v. Burrow, 2 Hem. & M. 525; Benfer v. Drew, 1 P. Wms. 780; Christ's Hospital v. Budgin, 2 Vern. 683; Glaister v. Hewer, 8 Ves. 199; Kingdom v. Bridges, 2 Vern. 67; Jencks v. Alexander, 11 Paige, 619; Lady Gorges' Case, Cro. Car. 550, 2 Swanst. 600; Bedwell v. Froome, 2 Cox, 97; Back v. Andrew, 2 Vern. 120; Stevens v. Stevens, 70 Me. 92; Rumboll v. Rumboll, 2 Eden, 15, 17; Kilpin v. Kilpin, 1 Mylne & K. 556; Soar v. Foster, 4 Kay & J. 160; Beckford v. Beckford, Lofft, 490; Goodright v. Hodges, 1 Watk. Cop. 228; Mumma v. Mumma, 2 Vern. 19; Finch v. Finch, 15 Ves. 50; Wait v. Day, 4 Denio, 439; Proseus v. McIntyre, 5 Barb. 424; Reid v. Fitch, 11 Barb. 399; Fatheree v. Fletcher, 31 Miss. 265; Pole v. Pole, 1 Ves. 76; Partridge v. Havens, 10 Paige, 618; Page v. Page, 8 N. H. 187; Bodine v. Edwards, 10 Paige, 504; Astreen v. Flanagan, 3 Edw. Ch. 279; Frances v. Wilkinson, 147 Ill. 370; Scott v. Calladine, 79 Hun, 79.

general rule, that when a father purchases land and takes a deed to a child, it is *prima facie* an advancement to the child, the law presuming such to be the intention of the father. But this presumption may be rebutted, and wherever it expressly appears that the parent intended that the conveyance should not be considered such, then the child takes a trust estate."[2] This principle applies also where the child is an adopted one.[3] Where a title bond for land is executed to father and son upon the obligation of both for the purchase money, the son has an equitable estate in an undivided half of the land, which will be an advancement to him to that extent, if the whole of the purchase money is subsequently paid by the father.[4] Any written acknowledgment by a son in whose name a deed has been taken for land purchased by the father will rebut the presumption that the conveyance was not intended as an advancement.[5] The law will not imply a trust in favor of a husband paying for lands conveyed to his wife.[6] If the title is taken in the wife's name the presumption is that the transfer was intended as an advancement, and not a trust.[7] Where an obligation, either

[2] Fleming v. Donahoe, 5 Ohio, 255, 256. Where a father conveys land to the husband of his daughter in consideration of love and affection for her, no trust is created in favor of herself or her heirs: Higbee v. Higbee, 123 Mo. 287. See, also, Acker v. Priest, 92 Iowa, 610, 61 N. W. Rep. 235.

[3] Astreen v. Flanagan, 3 Edw. Ch. 279.

[4] Thompson v. Thompson, 1 Yerg. (9 Tenn.) 97.

[5] Shepherd v. White, 10 Tex. 72. Where a father had conveyed land to one of his children, having been fraudulently induced to do so by representations that the child would hold it in trust for the other children, and subsequently executed another deed to the same child, in the entire absence of any fraud, it was held that such child, by virtue of the second deed, took the land free from any trust in favor of the other children: Thompson v. Marley, 102 Mich. 476, 60 N. W. Rep. 976.

[6] Danforth v. Briggs, 89 Me. 316, 36 Atl. 452.

[7] Dorman v. Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Deuter v. Deuter, 214 Ill. 308, 73 N. E. 453; Chambers v. Michael, 71 Ark. 373, 74 S. W. 516; Rowe v. Johnson, 33 Colo. 469, 81 Pac. 268.

legal or moral, to provide for the grantee rests upon a person, the fact that he advances money for the purchase of land in the name of such grantee does not raise a presumption of a resulting trust.[8] If under such circumstances a deed is taken in the name of the wife, those who claim that a resulting trust as against the wife's heirs, was created, have the burden of proof to rebut the presumption that an advancement was intended.[9] So, where a father paying the consideration for a tract of land has the deed made to his son, it is presumed that he intended a gift or advancement, but satisfactory evidence may overcome this presumption.[1] But it will be necessary in such a case to allege and show facts other than the payment of the purchase money by the father, to rebut the presumption.[2] Where a widow conveyed land to some of her children, the other children who claim that the purchase price was obtained from the proceeds of personalty bequeathed to the widow for life, with remainder to all the children without distinction, have the burden of showing this fact.[3]

§ 1169. Illustrations.—A wife had a power of attorney from her husband by which she had authority to receive and collect all money and other property due to him for her own use. She received money under this power of attorney, and with it purchased land, taking the deed in her own name. After her husband's death, the heirs at law of the husband brought a bill in equity against her for a conveyance of the land so purchased, alleging these facts, and also that there

[8] McCartney v. Fletcher, 11 App. D. C. 1.

[9] Dorman v. Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210.

[1] Hoon v. Hoon, 126 Iowa, 391, 102 N. W. 105.

[2] Hoon v. Hoon, *supra*.

[3] Webb v. Webb, 130 Iowa, 457, 104 N. W. 438. See, also, Emfinger v. Emfinger, 137 Ala. 337, 34 So. 346; Cunningham v. Cunningham, 125 Iowa, 681, 101 N. W. 470; Brown v. Brown, 62 Kan. 666, 64 Pac. 599; Proctor v. Rand, 94 Me. 313, 47 Atl. 537; Helvie v. Hoover, 11 Okl. 687, 69 Pac. 958.

was no intention on the part of the husband that such purchase should be a provision for the wife or her separate property. On demurrer to the bill it was held that the allegations mentioned did not show a resulting trust in favor of the husband or his heirs.[4] A and his wife conveyed a tract of land for the expressed consideration of one thousand dollars to B. On the next day B and wife reconveyed the same land for the same expressed consideration to A's wife. B prepared both these deeds at A's request for the purpose of conveying the land to A's wife. B also at the same time prepared a will which was properly executed by A's wife, devising this same land to her husband, A, for his natural life, and at his death to her son by a former marriage. She died before A. Four years after the execution of the original deeds A died, leaving a will in which he declared that by B's mistake the deeds and will referred to did not carry out his intention, which he stated was to convey only a life estate to his wife, and he directed that proceedings be commenced to cancel the deeds. His executor and devisees brought a suit for this purpose alleging the mistake, and charging fraud and undue influence on A's wife and her son in procuring the deeds, and prayed that the deeds be set aside, and that the court declare a resulting trust in favor of A and his devisees. It was held that notwithstand-

[4] Whitten v. Whitten, 3 Cush. 191. Said Fletcher, J: "The moral obligation of a parent to provide for his children is the foundation of this exception, or rather of this rebutter of a presumption, since it is not only natural, but reasonable, to presume that a parent, by purchasing in the name of a child, means a benefit to the latter in discharge of this moral obligation, and also as a token of parental affection: 2 Story's Eq., § 120. The like presumption exists in the case of a purchaser by a husband in the name of his wife, and of securities taken in her name. Indeed, Mr. Justice Story says, that the presumption is stronger in the case of a wife than in that of a child. It is, therefore, an established doctrine, that where the husband pays for land conveyed to the wife, there is no resulting trust for the husband; but the purchaser will be regarded and presumed to be an advancement and provision for the wife."

ing no consideration passed, there was no resulting trust in favor of A and his devisees, and that the declarations in A's will could not be received in evidence to show his intention in having the deeds made.[5] As a father who purchases land with his own money, and has the deed executed to his idiot son, cannot subsequently claim a resulting trust therein, and that he did not intend it for his son's benefit, but for his own use, so a purchaser of such land from the father occupies no better position than his grantor, and it not entitled to any relief in equity.[6]

§ 1170. **Parol agreement.**—Where land is purchased by a father, but by his direction, for the purpose of defrauding his creditors, a deed is made to his son, while the father has no resulting trust, yet the fact that he paid the whole of the purchase money constitutes a good moral or conscientious consideration for a subsequent parol agreement between the father and grantee and another son for the partition of the land between the two sons; the grantee in the original deed will not be permitted to repudiate this agreement, and claim the whole land under his deed, where for several years the two sons have acted upon this agreement, and recognized the interest of each other in their respective divisions, and, in consequence of and reliance upon such agreement and division, have made expenditures.[7]

[5] Groff v. Rohrer, 35 Md. 327. Where one who has paid for land causes the deed to be made to his brother, an intended gift is probable, and hence it does not necessarily follow that a trust will result: Printup v. Patton, 91 Ga. 422.

[6] Cartwright v. Wise, 14 Ill. 417. "The policy of the law," said the court, "requires that such an advancement thus made to such a party should be held to be irrevocable by the father. A contrary rule would open too wide a door for the revocation of advancements to those who have such a peculiar claim upon the bounty and protection of a father. The very idea of selecting an idiot for a trustee is absurd. He must be incapable of executing or discharging any duty in relation to it; and the very suggestion indicates insanity, or a contemplated fraud on the part of the father."

[7] Proseus v. McIntyre, 5 Barb. 424.

Where a husband purchases land, and has the deed made to the wife for the sole purpose of providing a home for her in case she should survive him, his purpose being known by and assented to by her, and there being a mutual understanding between them that in the event he survived her, the title to the land should vest in him and should not descend to her heirs, no trust, it is held, arises in favor of the husband, although it was the intention of both husband and wife to have the proper instrument in writing prepared and executed for the purpose of effecting such understanding.[8]

§ 1171. **Where no obligation to provide exists.**—But the fact that a deed is made to some relative of the person paying the purchase money does not rebut the presumption of trust, where there is no obligation on the part of the person paying the money to provide for the grantee, as, if the deed be made to a brother,[9] or to a sister.[1] Where a woman cohabiting with a man to whom she has not been legally married, purchases land with her own money, and takes a deed in the name of the man, she is entitled to enforce a trust, as the parties are in law strangers to each other.[2]

§ 1172. **Presumption rebutted.**—While it is now an established principle, as has been shown, that where a deed has been taken in the name of an infant child, the presumption is, that the conveyance was intended as an ad-

[8] Johnson v. Johnson, 16 Minn. 512.

[9] Edwards v. Edwards, 39 Pa. St. 369; Maddison v. Andrew, 1 Ves. 58; Foster v. Foster, 34 L. J. Ch. 428.

[1] Field v. Lonsdale, 14 Jur. 995; Keaton v. Cobb, 1 Dev. Ch. 439, 18 Am. Dec. 595. And see as to other relations, Edwards v. Field, 3 Madd. 237; Lamplugh v. Lamplugh, 1 P. Wms. 111; Jackson v. Feller, 2 Wend. 465; Taylor v. Alston, 2 Cox, 97; In re Visme, 2 De Gex & S. 17; McGovern v. Knox, 21 Ohio St. 547, 8 Am. Rep. 80; Garrett v. Wilkinson, 2 De Gex & S. 244.

[2] McDonald v. Carr, 150 Ill. 204.

vancement,[3] yet this presumption, however, may be rebutted by evidence of such facts as show that it was not the intention of the grantor to make an advancement. If the deed is made to the son by his procurement, without the knowledge or consent of the parent, the son cannot set up title to the land in himself as an advancement. If the deed, however, was made with the consent of the parent, the presumption of advancement may be rebutted by declarations of the parties, and by circumstances contemporaneous with the transaction.[4] It has been held that a bill by a husband to establish a resulting trust in land bought by his wife with money furnished

[3] Murless v. Franklin, 1 Swanst. 17; Williams v. Williams, 32 Beav. 370; Grey v. Grey, 2 Swanst. 600; Redington v. Redington, 3 Ridg. App. 190; Kilpin v. Kilpin, 1 Mylne & K. 542; Mumma v. Mumma, 2 Vern. 19; Stileman v. Ashdown, 2 Atk. 480; Christy v. Courtnay, 13 Beav. 96; Paschall v. Hinderer, 28 Ohio St. 568; Fox v. Fox, 15 Irish Ch. 89; Dyer v. Dyer, 2 Cox, 98; Collinson v. Collinson, 3 De Gex, M. & G. 409; Hayes v. Kingdom, 1 Vern. 34; Dummer v. Pitcher, 2 Mylne & K. 272; Skeats v. Skeats, 2 Younge & C. Ch. 9; Back v. Andrew, 2 Vern. 120; Taylor v. Taylor, 1 Atk. 386; Lloyd v. Read, 1 P. Wms. 607; Scroope v. Scroppe, 1 Ch. Cas. Ch. 27; Finch v. Finch, 15 Ves. 43; Thompson v. Thompson, 1 Yerg. 97. At one time it was considered that very slight circumstances would rebut this presumption. See Elliott v. Elliott, 2 Ch. Cas. Ch. 231; Binion v. Stone, 2 Freem. 169; Dickinson v. Shaw, 2 Cox, 95; Rumboll v. Rumboll, 2 Eden, 17; Grey v. Grey, 2 Swanst. 600; Lloyd v. Read, 1 P. Wms. 608; Finch v. Finch, 15 Ves. 43; Pole v. Pole, 1 Ves. 76; Murless v. Franklin, 1 Swanst. 13. But such is not the view now taken.

[4] Peer v. Peer, 3 Stockt. Ch. 432. And the presumption as to an advancement may be rebutted or supported by evidence of antecedent or contemporaneous facts: Williams v. Williams, 32 Beav. 370; Persons v. Persons: 25 N. J. Eq. 250; Taylor v. Taylor, 4 Gilm. 303; Dudley v. Bosworth, 10 Humph. 12, 51 Am. Dec. 690; Butler v. M. Ins. Co., 14 Ala. 777; Christy v. Courtnay, 13 Beav. 96; Tucker v. Burrow, 2 Hem. & M. 524; Hayes v. Kindersley, 2 Smale & G. 194; Shales v. Shales, 2 Freem. 252; Baker v. Leathers, 3 Ind. 558; Reddington v. Reddington, 3 Ridg. App. 177; Hall v. Hall, 1 Con. & L. 120; Jackson v. Matsdorf, 11 Johns. 91, 6 Am. Dec. 355. And see Stone v. Stone, 3 Jur. N. S., 708; Devoy v. Devoy, 3 Smale & G. 403; Hubble v. Osborne, 31 Ind. 249; Williams v. Williams, 32 Beav. 372; Tremper v. Barton, 18 Ohio, 418.

by him, stating that he sent her the money from a foreign country, with instructions to purchase the premises and have the deed made to her, so that in case of death or accident to him while abroad she and her children might have a home, but that she was only a nominal purchaser, acting really as his agent, and that the property was bought for and belonged to him, and was considered by them as his and not hers, and that she made no claim to it, and that it was not his intention that she should have any beneficial interest except as his trustee, does not contain sufficient averments to show a resulting trust.[5] If the deed is made to a wife or child for the purpose of defrauding creditors, a trust arises which the creditors can enforce.[6] The presumption that arises that an advancement was intended, where the conveyance is taken in the name of a wife or child, is not one of law but of fact as to intention and competent evidence may overcome it.[7]

§ 1173. **Married woman as agent of husband.**—If a deed is made to one who pays no part of the purchase money, the purchase price being paid by a married woman as agent of her husband, and the grantee named in the deed

[5] Cairns v. Colburn, 104 Mass. 274. See Cartwright v. Wise, 14 Ill. 417. See, also, Williard v. Williard, 56 Pa. St. 119; Jeans v. Cook, 24 Beav. 521; Pole v. Pole, 1 Ves. 76.

[6] Lush v. Wilkinson, 5 Ves. 384; Rucker v. Abell, 8 Mon. B. 566, 48 Am. Dec. 406; Townsend v. Westacott, 2 Beav. 340; Newell v. Morgan, 2 Harris, 225; Stileman v. Ashdown, 2 Atk. 477; Christ's Hospital v. Budgin, 2 Vern. 684; Doyle v. Sleeper, 1 Dana, 531; Elliott v. Horn, 10 Ala. 348, 44 Am. Dec. 488; McCartney v. Bostwick, 32 N. Y. 53; Creed v. Lancaster Bank, 1 Ohio St. 1; Abney v. Kingsland, 10 Ala. 355; 44 Am. Dec. 491; Guthrie v. Gardner, 19 Wend. 414; Crozier v. Young, 3 Mon. 158; Jencks v. Alexander, 11 Paige, 619; Demaree v. Driskill, 3 Blackf. 115; Gowing v. Rich, 1 Ired. 553; Watson v. Le Row, 6 Barb. 487; Cutter v. Griswold, Walk. Ch. 437; Kimmel v. McRight, 2 Pa. St. 38; Bell v. Hallenback, Wright, 751; Parish v. Rhodes, Wright, 339.

[7] Deck v. Tabler, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837. See, also, Johnson v. Ludwick, 58 W. Va. 464, 52 S. E. 489.

gives her a receipt for the money, and also executes and delivers to her a written promise to convey to her on demand the land described in the deed, and the parties always treat the property as belonging to the husband, the grantee holds such land in trust for the husband. After the death of the husband intestate he may relieve himself from his trust by conveying the land to the heirs at law of the husband, and the fact that one object of having the deed made to the grantee was to protect the land from attachment by the creditors of the husband is immaterial.[8] If the land is purchased by a son with his own money on the understanding that the deed is to be made to him, but through mistake the deed is made to the father, the latter holds the legal title to the land in trust for the son, and if he conveys the property to the son, the conveyance cannot be deemed fraudulent.[9]

§ 1174. **Payment of purchase money by alien.**—If the law forbids an alien to hold land, he cannot do indirectly what the law will not permit him to do directly. Hence, if he pays the purchase money, but the deed is taken in the name of a stranger, no resulting trust arises.[1] "A resulting trust is the creature of equity. It is raised for the benefit of the party who, upon principles of justice and the circumstances of the case, is entitled to the subject. Being raised for his benefit, there can be no motion for raising it, when

[8] Perkins v. Nichols, 11 Allen, 542. See Persons v. Persons, 25 N. J. Eq. 250; Peer v. Peer, 3 Stockt. Ch. 432; Higgins v. Higgins, 13 Abb. N. C. 13.

[9] Fairhurst v. Lewis, 23 Ark. 435.

[1] Phillips v. Crammond, 2 Wash. C. C. 441; Hubbard v. Goodwin, 3 Leigh, 492; Taylor v. Benham, 5 How. 233, 270, 12 L. ed. 130, 148; Leggett v. Dubois, 5 Paige, 114, 28 Am. Dec. 413; Phillpotts v. Phillpotts, 10 Com. B. 85; Farley v. Shippen, Wythe, 139; Childers, 1 De Gex & J. 482. No resulting trust can arise when contrary to policy of the law, or to some express law: Ford v. Lewis, 10 Mon. B. 127; Cutler v. Tuttle, 19 N. J. Eq. 562; Groves v. Groves, 3 Younge & J. 163; Redington v. Redington, 3 Ridg. App. 181; Ex parte Yallop, 15 Ves. 67; Camden v. Anderson, 5 Term Rep. 709; Ex parte Houghton, 17 Ves. 251; Proseus v. McIntyre, 5 Barb. 424.

that will pervert it to his prejudice. That which is designed as a boon will not be changed into a forfeiture. To raise the trust, and thereby forfeit the estate, would be to commit the offense and make the alien bear the penalty."[2] But where an attorney employed by a firm composed of aliens, to collect a debt due to the firm, compromised the indebtedness by taking land in payment, but on account of the alienage of the partners took the deed for the land in his own name, without any directions from them, so that he might sell the land and convert it into money, and informed them by letter of what had been done, and promised to sell the land as soon as possible, but died before a sale had been effected, and his heirs sold the land after his death, acting on the belief that the land was theirs, it was held that the proceeds of sale such were personal property belonging to the partnership.[3] But if the disability is removed, the alien may enforce the trust. The naturalization has a retroactive effect.[4]

[2] Hubbard v. Goodwin, 3 Leigh, 492, 512, per Tucker, P. To the same effect are the dicta of the Chancellor in Leggett v. Du Bois, 5 Paige, 114, 118, 28 Am. Dec. 413: "The law will never cast the legal or equitable estate upon a person who has no right to hold it, although an estate may, by an express contract or conveyance, be vested in an alien, until office found, for the benefit of the people of the State. Where an alien, therefore, purchases land and takes an absolute conveyance in the name of the citizen, without any agreement or declaration of a trust, the law will not raise a trust in favor of the alien purchaser who cannot hold the land, any more than it would cast it by descent upon an alien heir who cannot hold it against the State. The result in such a case must be, either that the nominal grantee takes the land, discharged of any trust by mere implication of law, or that there is a resulting trust in behalf of the people of the State, which they alone can enforce against the grantee in the deed."

Where a slave purchased land with the assent of his master and the deed was made to a free person, and the slave afterward obtained his freedom, it was held that a resulting trust in his favor might be enforced: Leiper v. Hoffman, 26 Miss. 615.

[3] Anstice v. Brown, 6 Paige, 448. See McCaw v. Galbraith, 7 Rich. 74.

[4] Jackson v. Beach, 1 Johns. Cas. 399; Osterman v. Baldwin, 6 Wall. 116, 18 L. ed. 730.

§ 1175. **Payment when title passes.**—A resulting trust is never created by the agreement of the parties, but always by implication of law, independently of any agreement.[5] In order to create a resulting trust, the money must have been advanced and invested at the time the purchase is made. The trust arises from the execution of the deed and conveyance of title, and the parties must be in such a situation that a trust will arise from the transaction itself the instant at which the title passes.[6] A resulting trust cannot be established by evidence that the grantee made an oral promise to convey the land to one whenever the latter should repay to the grantee, with interest, the money advanced for the purchase, when no valid consideration for such promise appears, and it is not shown that any part of the purchase money was the money of the party seeking to enforce a trust.[7] An oral agreement for the purchase of two parcels of land on joint account was made between two parties A. & B. By this agreement A. was to pay eight-tenths of the purchase price of the first parcel by conveying to the owner land belonging to him, and B was to pay the remaining two-tenths. The excess of

[5] Sheldon v. aHrding, 44 Ill. 68.

[6] Buck v. Swazey, 35 Me. 41, 56 Am. Dec. 681; Case v. Codding, 38 Cal. 191, 193; Barnard v. Jewell, 97 Mass. 87; Kendall v. Mann, 11 Allen, 15; Hunt v. Friedman, 63 Cal. 510; Miller v. Blose, 30 Gratt. 744; Williard v. Williard, 56 Pa. St. 119; McClure v. Doak, 6 Baxt. (Tenn.) 364; Tunnard v. Littell, 23 N. J. Eq. 264; Davis v. Wetherell, 11 Allen, 19; Forsythe v. Clark, 3 Wend. 657; White v. Carpenter, 2 Paige, 218; Rhea v. Tucker, 56 Ala. 450; Wheeler v. Kirtland, 23 N. J. Eq. 13; Nixon's Appeal, 63 Pa. St. 279; Pinnock v. Clough, 16 Vt. 500, 42 Am. Dec. 521; Botsford v. Burr, 2 Johns. Ch. 408; Cross's Appeal, 97 Pa. St. 471; Steere v. Steere, 5 Johns. Ch. 1, 9 Am. Dec. 256; Graves v. Dugan, 6 Dana, 331; Kelly v. Johnson, 28 Mo. 249; Jackson v. Moore, 6 Cow. 706; McGowen v. McGowen, 14 Gray, 119, 74 Am. Dec. 668; Page v. Page, 8 N. H. 187; Du Val v. Marshall, 3 Ark. 230; Gerry v. Stimson, 60 Me. 186; Fickett v. Durham, 109 Mass. 419; Taliaferro v. Taliaferro, 6 Ala. 404; Wallace v. Marshall, 9 Mon. B. 148; Gee v. Gee, 2 Sneed, 395; Connor v. Lewis, 16 Me. 268; Rogers v. Murray, 3 Paige, 390; Freeman v. Kelly, 1 Hoff. Ch. 90; Dudley v. Batchelder, 53 Me. 403; Foster v. Trustees, etc., 3 Ala. 302.

[7] Barnard v. Jewett, 97 Mass. 87.

three-tenths over A's half paid by him, it was agreed, should be applied toward his share of the price to be paid for the second parcel. The title to the first parcel was taken in the name of both jointly, and A conveyed his land to the grantor as he had agreed. Subsequently B bought the second parcel with his own money, and took the deed for it in his own name. From these facts, no resulting trust, the court held, arose in favor of A in the second parcel.[8] Where a deed absolute in form is made, expressing no trust, but the conveyance is intended to be in trust for the grantor and his wife, no resulting trust arises from the subsequent payment of money by the grantor's children.[9] But the acceptance of a promissory note by the grantor instead of money, may, under some circumstances, be regarded as a payment.[1] In the case just cited, A purchased a tract of land and caused it to be conveyed to B, who signed a note with him as surety for the purchase money. Subsequently, A assigned his interest to C, as trustee, for the benefit of A's creditors. Still later, B not being satisfied, A requested D to take a deed of the land and hold it for A, and to pay B the amount of his lien. This was done, and C afterward brought a suit to compel D to convey to him the land, tendering to him the amounts of his, D's, payments to B, with interest. The court held that the resulting trust with which the land was chargeable in favor of A inured also to the benefit of C.[2] Where a husband procures his wife to join with him in a mortgage of her land, under an oral agreement that if the land was sold to pay the debt, the husband should convey to his wife his land, and subsequently the mortgaged premises

[8] Fickett v. Durham, 109 Mass. 422. Said Ames, J: "The defendant buys the estate with his own funds, and upon his own credit, and although it may be that *ex æquo et bono*, he ought to allow the plaintiff to share in the advantages of the purchase, we think the court cannot compel him to do so upon this bill, without exceeding its jurisdiction."

[9] Gerry v. Stimson, 60 Me. 186.

[1] Buck v. Pike, 11 Me. 9.

[2] Buck v. Pike, 11 Me. 9.

were sold, the wife joining in the deed, and from the proceeds the mortgage debts and other debts of the husband were paid, and, on the same day, the premises were sold, the husband in pursuance of his oral agreement conveyed his land to a trustee for his wife's use, but the trust deed was registered after the levy of an execution upon the land by a creditor of the husband, it was held that the lien of the execution was superior to the rights of the wife under the conveyance.[3]

§ 1176. **Gift or loan to cestui que trust.**—If the party supplying the purchase money intends it as a gift or a loan to the *cestui que trust,* this is sufficient to raise a resulting trust. It is not necessary that the money advanced should come directly from the *cestui que trust.*[4] Where a minor makes the first payment for the purchase of a tract of land according to the terms of the purchase, and is willing to give notes and a mortgage on the property for the balance due, but the vendor, for the purpose of avoiding the question of the vendee's minority, executes a deed to the mother of such minor, and takes her notes and mortgage, with the understanding between all the parties concerned in the transaction that the minor son is to pay the notes, and he pays the annual interest on the notes, improves the land, and pays the notes at their maturity, though such payment is made subsequently to the mother's death, a resulting trust arises in his favor, and he is entitled to a decree conveying the legal title of the heirs of the grantee to him.[5]

[3] McClure v. Doak, 6 Baxt. (Tenn.) 364.

[4] Kelly v. Johnson, 28 Mo. 249; Dudley v. Batchelder, 53 Me. 403.

[5] Fleming v. McHale, 47 Ill. 282. And see Morey v. Herrick, 18 Pa. St. 123; Cutter v. Tuttle, 19 N. J. Eq. 562; Lounsbury v. Purdy, 18 N. Y. 515; Aveling v. Knipe, 19 Ves. 441; Page v. Page, 8 N. H. 187; Runnells v. Jackson, 1 How. (Miss.) 358; Honore v. Hutchings, 8 Bush. 687. And see, also, Gibson v. Foote, 40 Miss. 788; Crop v. Norton, 9 Mod. 235; White v. Carpenter, 2 Paige, 217; Henderson v. Hoke, 1 Dev. & B. Ch. 119.

§ 1177. **Agreement to convey to another.**—As the party claiming the benefit of a resulting trust must, at the time the purchase is made, have paid some part of the purchase money, it follows that if one party buys the land, paying his own money for it, and taking the deed in his own name, the fact that he had made an agreement that another party might purchase from him will not convert the transaction into a resulting trust.[6] An allegation of a verbal agreement that one party was to be jointly interested with another in a purchase, is insufficient to show a resulting trust, in the absence of any allegation that the former paid any portion of the consideration at the time at which the purchase was made.[7] Where a guardian of minor children purchased a tract of land which at one time the father of the children owned, on the representation to the vendor that he, the guardian, desired to secure the land for the children, but took the deed in his own name, and paid his own money to the vendor, it was held that no express trust would arise in favor of the children, for, as the representations made by the guardian were by parol, such a trust was within the prohibition of the statute of frauds.[8] Nor would the law in such a case, imply a trust because the children for whose benefit the guardian pretended that he desired to purchase the land had no interest or claim or expectation of interest in the land, the title to which, though once vested in the father of the minors, had been transferred to another.[9] Where a father purchased land, the deed being executed to himself, and paid the purchase price with the exception of a small amount which was paid by his son, and it was understood that the son should have the land, and he took passession of it and erected improvements, the father speaking

[6] Reeve v. Strawn, 14 Ill. 94. See McCue v. Gallagher, 23 Cal. 51.

[7] Roberts v. Ware, 40 Cal. 634. See White v. Sheldon, 4 Nev. 280. And see Russell v. Allen, 10 Paige, 249. But see Towle v. Wadsworth, 147 Ill. 80.

[8] Rogers v. Simmons, 55 Ill. 76

[9] Rogers v. Simmons, 55 Ill. 76

of the land as that of the son, and saying that he would convey or devise it to him, but died without doing so, a trust does not result to the son by reason of his payment of the small part of the consideration, in the absence of evidence that the deed was made to the father without the son's consent.[1] Where A borrowed money from B with which to buy land, B reserving an option to take an interest, but declining to become interested in the title at the time, and did not give A notice of his intention to take an interest or offer to pay any money beyond the loan made to A, but waited till the transaction proved to be a profitable one, when he sought to establish a trust in A for his benefit, it was held that he could not do so.[2] A deed was made to a son in law which stated the consideration to be his marriage, and the natural love and affection that the grantor had for his daughter and the grantee. The deed stated, after the consideration clause, that the grantor made the conveyance for the purpose of advancing the grantee in life. No trust in the land conveyed, the court held, arose in favor of the daughter.[3]

§ 1177a. Deed to assignee for benefit of creditors.— A deed reciting that the grantor " for and in consideration of the conditions of the assignment made this day for the benefit of the creditors" of the grantor conveyed land to a grantee. The court held that this recital conclusively established the fact that the grantee acquired the property in trust and that

[1] Thorne v. Thorne, 18 Ind. 462.

[2] Loomis v. Loomis, 28 Ill. 454. And see Kisler v. Kisler, 2 Watts, 323, 27 Am. Dec. 308; Duffy v. Masterson, 44 N. Y. 557; Williard v. Williard, 56 Pa. St. 119; Green v. Cook, 2 Ill. 196; Dorsey v. Clark, 4 Har. & J. 551; Jackson v. Ringland, 4 Watts & S. 149; Walker v. Brungard, 13 Smedes & M. 723; Peebles v. Reading, 8 Serg. & R. 484; Ensley v. Ballentine, 4 Humph. 233; Lathrop v. Hoyt, 7 Barb. 60; Sample v. Coulson, 9 Watts & S. 62; Smith v. Smith, 27 Pa. St. 180.

[3] Thompson v. Thompson, 18 Ohio St. 73.

parol evidence was inadmissible to show that the grantor intended to make an absolute conveyance of the property for the purpose of paying the claim of the grantee and those of other creditors. If the grantor should never execute an assignment as contemplated, the legal title to the land conveyed would be held by the grantee in trust for the grantor and in case of his death for his heirs.[4] If a gift is made upon trust void, partially or entirely, a trust will arise in favor of the donor, if no other disposition of the land is made.[5]

§ 1178. **Resulting trust not converted into express trust by agreement.**—The fact that the grantee agrees verbally with the party paying the consideration, that the former would, upon demand, execute a deed to the latter, does not make the trust express, as distinguished from one implied, so as to exclude parol proof.[6] Where a husband purchases real estate, and has the deed therefor made to his wife, under an express agreement between them that she shall, at his request, convey to him the land to which she thus holds the legal title, she has no interest which, in the event of her death while holding the legal title, will, as against the husband, descend to her heirs.[7] "It cannot be that the consent of the trustee to hold the title for the benefit of the *cestui que trust,* or an agreement so to do, in case of a resulting trust, will change its character. By the agreement the trustee simply assents to an obligation imposed by the law; the trust would exist without the agreement by operation of law. The agreement cannot destroy the effect of the conditions under which the law presumes the estate is held by the trustee." [8]

[4] McDermith v. Voorhees, 16 Colo. 402, 25 Am. St. Rep. 286.

[5] McHugh v. McCole, 97 Wis. 166, 40 L.R.A. 724, 72 N. W. 631.

[6] Bayles v. Baxter, 22 Cal. 575.

[7] Cotton v. Wood, 25 Iowa, 43, and cases cited.

[8] Cotton v. Wood, 25 Iowa, 43, 46, per Beck, J.

§ 1179. **Part payment under agreement to convey.**—While evidence of a parol agreement by one to purchase land for another is inadmissible where the former has paid the whole of the purchase money and taken the deed in his own name, yet if the party claiming the benefit of the trust has paid any portion of the purchase money at the time of the execution of the deed, it is competent to prove a verbal agreement which will have the effect to deprive the grantee of all beneficial interest in the land, and to charge the premises with a trust in favor of the one for whom the grantee agreed to purchase it.[9]

§ 1180. **Advancing portion of money.**—Where a bargain is made between the owner and another for the purchase of a tract of land, with the knowledge of a third person who stands by and becomes a party to the transaction, by advancing a part of the money so as to enable the vendee to complete the bargain, such third person, if he subsequently, without the vendee's knowledge, purchases from the vendor a portion of the same land, for which he receives a deed, and which is placed on record before the deed to the first vendee, holds the title in trust for such first vendee.[1] And the person who has, under these circumstances, advanced a part of the money, if he sells the land to a *bona fide* purchaser without notice, becomes liable for the damage sustained.[2]

§ 1181. **Agreement to purchase by two or more parties.**—Where two or more persons have agreed among themselves to purchase a tract of land, but one of the number pays the whole of the purchase price, and has the deed made out in his favor, the others cannot claim a resulting trust.[3]

[9] Hidden v. Jordan, 21 Cal. 92. See Meason v. Kaine, 63 Pa. St. 335.

[1] Mercier v. Hemme, 50 Cal. 606.

[2] Mercier v. Hemme, 50 Cal. 606.

[3] Coppage v. Barnett, 34 Miss. 621; Brooks v. Fowle, 14 N. H. 248; Fowke v. Slaughter, 3 Marsh.

But where A purchased a piece of real estate, paid a part of the consideration, and had the deeds made to B, his brother, who executed a mortgage to secure the balance of the purchase money remaining unpaid, and subsequently buildings were erected upon the land, to which B contributed his personal attention and money, and afterward A signed a document acknowledging that he had received from B, in settlement of accounts, three mortgages on the premises, which mortgages, however, were never recorded or paid, but were returned to B and destroyed, it was held that these circumstances created a resulting trust in A's favor, and that any declarations that he had purchased for B must, in order to bind him, have been made contemporaneously with the purchase, and that this resulting trust was not divested by the receipt for the valueless mortgages given by A some months after the erection of the buildings.[4] A party uniting with others to purchase land, and agreeing to conduct the negotiations, and to buy the land for the lowest price possible, is bound, from the position of trust which he has assumed, to exercise good faith toward his associates, and must share with them all the profits of the transaction.[5]

§ 1182. **Parol evidence to establish trust.**—The provisions of the statute of frauds apply only to trusts created by agreement of the parties, and do not apply to such trusts as the law implies by reason of the situation or probable intent of the parties.[6] Parol evidence, therefore, is admissible

A. K. 56, 13 Am. Dec. 133; Butler v. Rutledge, 2 Cold. 4; Edwards v. Edwards, 39 Pa. St. 369. See Cook v. Bronaugh, 8 Eng. 183. But see Leggett v. Leggett, 88 N. C. 108.

[4] Edwards v. Edwards, 39 Pa. St. 369.

[5] King v. Wise, 43 Cal. 629.

[6] Smith v. Sackett, 5 Gilm. 544; Ward v. Armstrong, 84 Ill. 151; Foote v. Bryant, 47 N. Y. 544; Black v. Black, 4 Pick. 234; Bryant v. Hendricks, 5 Iowa, 256; Ross v. Hegeman, 2 Edw. Ch. 373; Judd v. Hasely, 22 Iowa, 428; Larkin v. Rhodes, 5 Port. 196; Scheerer v. Scheerer, 109 Ill. 11; Summers v. Moore, 113 N. C. 394; Jordan v. Garner, 101 Ala. 411; Gates v. Card, 93 Tenn. 334; Myers v. Jackson,

to show the facts from which a resulting trust will arise.[7] Where the owner of the legal title has agreed to convey it upon the performance of certain conditions, and does convey

135 Ind. 136; Howard v. Howard, 52 Kan. 469; Plumb v. Cooper, 121 Mo. 668; Snider v. Johnson, 25 Or. 328; Frances v. Rhoades, 146 Ill. 635; Cooksey v. Bryan, 2 App. D. C. 557. The existence of a parol contract under which a person was to buy land and hold it for the joint benefit of himself and another, may be established by the evidence of the *cestui que trust*, and by the admission of the trustee that his original intention was to purchase for their joint benefit, but that he changed his mind before the purchase without notifying the *cestui que trust* of the alteration in his intention: Towle v. Wadsworth, 147 Ill. 80.

[7] Foote v. Bryant, 47 N. Y. 544; Kane v. O'Conners, 78 Va. 76; Caldwell v. Caldwell, 7 Bush, 515; Verplank v. Caines, 1 Johns. Ch. 57; Livermore v. Aldrich, 5 Cush. 431; Elliott v. Armstrong, 3 Blackf. 199; Boyd v. McLean, 1 Johns. Ch. 582; Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; Knox v. McFarren, 4 Cal. 586; Murry v. Sell, 23 W. Va. 475; Page v. Page, 8 N. H. 187; Witts v. Horney, 59 Md. 584; Botsford v. Burr, 2 Johns. Ch. 405; Morgan v. Clayton, 61 Ill. 35; Cooth v. Jackson, 6 Ves. 39; Pugh v. Bell, 1 Marsh. J. J. 399; Swinburne v. Swinburne, 28 N. Y. 568; Hunter v. Town of Marlboro, 2 Wood. & M. 168; Larkins v. Rhodes, 5 Port. 196; Moore v. Moore, 38 N. H. 382; Hanson v. First Presbyterian Church, 1 Stockt. Ch. 441; Olive v. Dougherty, 5 Iowa, 393; Boyd v. McLean, 1 Johns. Ch. 582; Miller v. Stokely, 5 Ohio St. 194; Farringer v. Ramsey, 2 Md. 365; Paine v. Wilcox, 16 Wis. 202; Cotton v. Wood, 25 Iowa, 43; Lipscomb v. Nichols, 6 Colo. 290; Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617; Letcher v. Letcher, 4 Marsh. J. J. 590; Parmlee v. Sloan, 37 Ind. 469; Greer v. Baughman, 13 Md. 257; Vendever v. Freeman, 20 Tex. 333, 70 Am. Dec. 391; Clarke v. Quackenboss, 27 Ill. 260; Stall v. Cincinnati, 16 Ohio St. 169; Phelps v. Seeley, 22 Gratt. 573; Childs v. Griswold, 19 Iowa, 362; Shepard v. Pratt, 32 Iowa, 296; Hyden v. Hyden, 6 Baxt. (Tenn.) 406; Blyholder v. Gibson, 18 Pa. St. 134; Strimpfler v. Roberts, 18 Pa. St. 283, 57 Am. Dec. 606; Mitchell v. O'Neale, 4 Nev. 504; Baumgartner v. Guessfeld, 38 Mo. 36; Farrell v. Lloyd, 69 Pa. St. 239; Willis v. Willis, 2 Atk. 71; Heiskell v. Powell, 23 W. Va. 717; Scoby v. Blanchard, 3 N. H. 179; Powell v. Bronson etc. Mfg. Co., 3 Mason, 347; Jennison v. Graves, 3 Blackf. 441; Snelling v. Utterback, 1 Bibb. 609, 4 Am. Dec. 661; Byers v. Wackman, 16 Ohio, 440; Faris v. Dunn, 7 Bush, 276; Blair v. Bass, 4 Blackf. 540; Peiffer v. Lytle, 58 Pa. St. 386; McGinity v. McGinity, 6 Pa. St. 38; Nixon's Appeal, 63 Pa. St. 279; Bayles v. Baxter, 22 Cal. 575; Malin v. Malin, 1 Wend. 626; Peabody v. Tarbell, 2 Cush.

it at the purchaser's request, for his benefit, to a third person, this may be evidence of payment by the beneficiary, so as to raise a resulting trust, which may be taken by his creditors.[8] For the purpose of establishing the trust, evidence that the person who paid the State for a warrant was a clerk in the land-office, had but a small amount of property and had paid large sums for a great number of warrants to which he never asserted any claim, is admissible.[9] But the character of the transaction cannot be shown by agreements and letters between the party paying the purchase money and other parties.[1] But the admissions of the grantee are admissible for the purpose of proving who the person is, by whom the purchase money was paid.[2] A jury are authorized to find that a father holds land in trust, where it is shown that he had not sufficient means, that the son had, that the father at about the time he left home said that he was going to a certain place near which the land was situated for the purpose of buying land for the son, that the latter then delivered money to the father, and that this occurred about

226; Lloyd v. Carter, 17 Pa. St. 216; Dismukes v. Terry, Walk. Ch. 197; Millard v. Hataway, 27 Cal. 119; Smith v. Burnham, 3 Sum. 438; Barron v. Barron, 24 Vt. 375; Lyford v. Thurston, 16 N. H. 399; Cooper v. Skeel, 14 Iowa, 578; Groves v. Groves, 3 Younge & J. 163; Bartlett v. Pickersgill, 1 Eden, 515; Lench v. Lench, 10 Ves. 517; Harder v. Harder, 2 Sandf. Ch. 17; Peebles v. Reading, 8 Serg. & R. 484. See Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498. In some of the early cases it was held that parol evidence could not be received to control the recitals of the deed as to the payment of the consideration: See Kirk v. Webb, Prec. Ch. 84; Hooper v. Eyles, 2 Vern. 480; Deg v. Deg, 2 P. Wms. 414; Heron v. Heron, Prec. Ch. 163; Cox v. Bateman, 2 Ves. 19; Skitt v. Whitmore, Freem. 280; Ambrose v. Ambrose, 1 P. Wms. 321; Kinder v. Miller, Prec. Ch. 172; Newton v. Preston, Prec. Ch. 103. And see Barbin v. Gaspard, 15 La. Ann. 539; Groesbeck v. Seeley, 13 Mich. 329; Connor v. Follansbee, 59 N. H. 124.

[8] Lyford v. Thurston, 16 N. H. 399.

[9] Strimpfler v. Roberts, 18 Pa. St. 283, 57 Am. Dec. 606.

[1] Strimpfler v. Roberts, 18 Pa. St. 283, 57 Am. Dec. 606.

[2] Baumgartner v. Guessfeld, 38 Mo. 36.

the time the land was bought.[3] So where the trustee exchanges the land held in trust for other land, with the beneficiary's consent, the trust thus arising may be established by parol evidence.[4]

§ 1183. **Convincing proof required.**—As it is sought in attempting to establish a resulting trust to raise an equity superior to the deed, and thus give it an effect not apparent upon its face, the proof that one other than the grantee is beneficially interested must be clear and convincing. "We recognize the doctrine to the fullest extent, and such is the uniform holding in all the cases, that where a right or title is claimed against a writing, in this or any other class of cases, where it is permitted at all, it must be sustained by proof of the most convincing and irrefragable character. The courts have been deeply impressed with the danger of this kind of proof, as tending to perjury and the insecurity of paper titles. Kent and other eminent judges regret that the doctrine was ever introduced, as it opens a wide door to frauds and perjuries, which the statute was intended to close. It has, therefore, been uniformly required, in this class of cases, that the payment of the money of the person who

[3] Farrell v. Lloyd, 69 Pa. St. 239.

[4] Frances v. Cline, 96 Va. 201, 31 S. E. 10. That a parol trust may be established by parol evidence, see, also, Childs v. Jordan, 106 Mass. 321; Marsh v. Davis, 33 Kan. 326, 6 Pac. 612; Corey v. Morrill, 71 Vt. 51, 42 Atl. 976; Polk v. Boggs, 122 Cal. 114, 54 Pac. 536; Webb v. Foley, 49 S. W. 40; Irwin v. Ivers, 7 Md. 308, 63 Am. Dec. 420; Brooks v. Union Trust & Realty Co., 146 Cal. 134, 79 Pac. 843; Booth v. Lenox, 45 Fla. 191, 34 So. 566; Branstetter v. Mann, 6 Idaho, 580, 57 Pac. 433; Kringle v. Rhomberg, 120 Iowa, 472, 94 N. W. 1115; Dorman v. Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Price v. Kane, 112 Mo. 412, 20 S. W. 609; Curd v. Brown, 148 Mo. 82, 49 S. W. 990; Chicago, B. & Q. R. Co. v. First Nat. Bank, 59 Neb. 348, 80 N. W. 1030, affirming 58 Neb. 548, 78 N. W. 1064; Galbraith v. Galbraith, 190 Pa. 225, 42 Atl. 683; Eaves v. Vial, 98 Va. 134, 34 S. E. 978; Miller v. Miller, 99 Va. 125, 37 S. E. 1092; McClintock v. Loisseau, 31 W. Va. 865, 2 L.R.A. 816, 8 S. E. 612; Bright v. Knight, 35 W. Va. 40, 13 S. E. 63.

claims to be a *cestui que trust* should be clearly proved. The same rule as to quantity and sufficiency of proof applies in this case as in a bill filed to convert a sale or deed, apparently absolute, into a mortgage or conditional sale." [5] Expressions of a similar character may be found in numerous other cases. "While parol proof is admissible to establish a trust of this sort, it is important to understand that such proof must be strong and convincing." [6] It is said, "the authorities are clear that the payment of the purchase money by the *cestui que trust* must be clearly proved, otherwise you render insecure titles depending on deeds and other written documents." [7] "The cases uniformly show," says Chancellor Kent, "that the courts have been deeply impressed with the danger of this kind of proof, as tending to perjury and the insecurity of paper title; and they have required the payment by the *cestui que trust* to be clearly proved." [8] "This rule is based on the soundest legal principles, for the parol proof must of necessity be the testimony of witnesses as to what the parties have said or verbally agreed to—a class of testimony notoriously weak; and the fact to be overturned is a writing, the best evidence as to where the legal title is." [9]

[5] McCammon v. Pettitt, 35 Tenn. (3 Sneed) 242, 246, per Caruthers, J; Pillar v. McConnell, 141 Ind. 670, 40 N. E. Rep. 689; Reed v. Painter, 129 Mo. 674, 31 S. W. Rep. 919; Hogeboom v. Robertson, 41 Neb. 795; McRae v. McRae, 78 Md. 270; Bourke v. Callanan, 160 Mass. 195; Koster v. Miller, 149 Ill. 195; Hensler v. Hensler, 5 Tex. Civ. App. 367. The fact of payment by the beneficiary, it is said, must be proven beyond a reasonable doubt: Logan v. Johnson, 72 Miss. 185, 16 So. Rep. 231.

[6] Thomas v. Standiford, 49 Md. 181, 184.

[7] Dorsey v. Clarke, 4 Har. & J. 551, 557, per Dorsey, J.

[8] Boyd v. McLean, 1 Johns. Ch. 582, 590.

[9] Hyden v. Hyden, 6 Baxt. (Tenn.) 406, 407, per Freeman, J. See, also, Faringer v. Ramsay, 2 Md. 375; Sidle v. Walter, 5 Watts, 389; Lench v. Lench, 10 Ves. 517; Greer v. Baughman, 13 Md. 257; Keller v. Keller, 45 Md. 269; Brawner v. Staup, 21 Md. 328; Slocumb v. Marshall, 2 Wash. C. C. 397; Cottington v. Fletcher, 2 Atk. 155; Newton v. Preston, Prec. Ch. 103; Enos v. Hunter, 4 Gilm. 211; Millard v. Hathaway, 27 Cal. 119;

The execution of a quitclaim deed to a third person by the person claiming to be the beneficiary of a resulting trust does not tend to prove the existence of any interest in him.[1] In a case where a father in law by an absolute deed, conveyed land to his son-in-law, evidence was given to the effect that the grantor had declared that he intended the land conveyed for his bodily heirs, and that the grantee had declared that he possessed no property and also that the claim of ownership of the land was made by the grantee's wife, but the court said that this evidence was not sufficiently of that clear and convincing character necessary to establish a resulting trust in favor of the wife.[2] Nor will a resulting trust be raised in favor of a wife by the testimony of the husband alone, that he used her funds held by him as her separate estate to purchase the land.[3] It is said that to establish a resulting trust the evidence should be so clear and convincing as to leave no well-founded doubt upon the subject.[4] No

O'Hara v. O'Neil, 2 Eq. Cas. Abr. 475; Carey v. Callan, 6 Mon. B. 44; Ambrose v. Ambrose, 1 P. Wms. 321; Nelson v. Warrall, 20 Iowa, 469; Laughlin v. Mitchell, 14 Fed. Rep. 382.

[1] Cunningham v. Cunningham, 125 Iowa, 681, 101 N. W. 470.

[2] Rogers v. Rogers, 52 S. C. 388, 29 S. E. 812.

[3] Levy v. Acklen, 2 Tenn. Ch. App. 201. That the evidence by parol to establish a resulting trust must be clear and satisfactory, see Gilbert Bros. & Co. v. Lawrence Bros., 56 W. Va. 281, 49 S. E. 155; Heil v. Heil, 184 Mo. 665, 84 S. W. 45; Crosby v. Henry, 76 Ark. 615, 88 S. W. 449; Herlihy v. Coney, 99 Me. 469, 59 Atl. 952; Bendy v. Mudford, 76 Ark. 615, 88 S. W. 999; Doll v. Gifford, 13 Colo. App. 67, 56 Pac. 676; Luckhart v. Luckhart, 120 Iowa, 248, 94 N. W. 461; Goodman v. Crowley, 161 Mo. 657, 61 S. W. 850; Viers v. Viers, 175 Mo. 444, 75 S. W. 395; Ulrici v. Boeckler, 72 Mo. App. 661; Graham v. Spence, 71 N. J. Eq. 183, 63 Atl. 344; Smith v. Stevenson, 204 Pa. 194, 53 Atl. 746; Laning v. Darling, 209 Pa. 254, 58 Atl. 477; Burnett v. Campbell Co., 1 Tenn. Ch. App. 18; Helstrom v. Rodes, 30 Utah, 122, 83 Pac. 730; Kline v. Kline's Creditors, 103 Va. 263, 48 S. E. 882.

[4] Rice v. Rigley, 7 Idaho, 115, 61 Pac. 290. See, also, Dooley v. Pinson, 145 Ala. 659, 39 So. 664; Foster v. Beidler, 79 Ark. 418, 74 S. W. 516; Chambers v. Michael, 71 Ark. 373, 74 S. W. 516; Marshall v. Fleming, 11 Colo. App. 515, 53 Pac. 620; Deaner v. O'Hara, 36 Colo. 476, 85 Pac. 1123; St. Louis etc. Ry.

trust will be established where the facts can reasonably be explained on a theory other than of a resulting trust.[5]

§ 1184. **Parol evidence to rebut resulting trust.**—It is hardly necessary to remark that it is proper to rebut any presumption that may arise from the transaction as to a resulting trust by parol evidence.[6] Where A contracts for the purchase of real estate, pays the purchase money, but subsequently consents by parol that the deed should be made by the owner to B in consideration of the latter assuming certain liabilities for A, the deed, when made, is to be regarded as the deed of A himself. B acquires the title, and may rebut by parol evidence any equity claimed by A.[7] And the same result follows where the grantee is to pay the purchase money at some future time, as where A purchases land with his own money, but, before the execution of the deed, enters into a verbal contract with B by which the deed from the

Co. v. Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. 483; Owensby v. Chewning, 171 Mo. 226, 71 S. W. 122; Curd v. Brown, 148 Mo. 82, 49 S. W. 990.

[5] Pickler v. Pickler, 180 Ill. 168, 54 N. E. 311. See, also, Doane v. Durham, 64 Neb. 125, 89 N. W. 640; Hillman v. Allen, 145 Mo. 638, 47 S. W. 509; Brinkman v. Sunken, 174 Mo. 709, 74 S. W. 763; Mulock v. Mulock, 156 Mo. 431, 57 S. W. 122; Luric v. Sabath, 208 Ill. 401, 70 N. E. 323.

[6] Elliott v. Armstrong, 2 Blackf. 199; Tryon v. Huntoon, 67 Cal. 325; Bayles v. Baxter, 22 Cal. 575; Garrick v. Taylor, 29 Beav. 79; Sewell v. Baxter, 2 Md. Ch. 448; Squire v. Harder, 1 Paige, 494, 19 Am. Dec. 446; Hays v. Quay, 68 Pa. St. 263; McCue v. Gallagher, 23 Cal. 51; White v. Carpenter, 2 Paige, 217; Byers v. Danley, 27 Ark. 77; Rider v. Kidder, 10 Ves. 364; Benbow v. Townsend, 1 Mylne & K. 506; Jackson v. Morse, 16 Johns. 199, 8 Am. Dec. 306; Creed v. Lancaster Bank, 1 Ohio St. 1; Bellasis v. Compton, 2 Vern. 294; Pinney v. Fellows, 15 Vt. 525; Steere v. Steere, 5 Johns. Ch. 18, 9 Am. Dec. 256; Baker v. Vining, 30 Me. 126, 50 Am. Dec. 617; Rundle v. Rundle, 2 Vern. 252; Lane v. Dighton, Amb. 409; Beechler v. Major, 2 Drew. & S. 431; Jackson v. Feller, 2 Wend. 465; Taylor v. Taylor, 1 Atk. 386.

[7] Myers v. Myers, 25 Pa. St. 100. "Such evidence," said the court, "is in support of the written title, and not in opposition to it." See, also, Jackson v. Morse, 16 Johns. 198, 8 Am. Dec. 306.

grantor is executed to B directly, on B's promise to pay at some future time to A the purchase money. A cannot claim a resulting trust in the land conveyed.[8] Where a brother executed a declaration of trust that his father had given him a certain sum of money with which to purchase land for the use of his sister, and promised in the declaration of trust to convey fifty acres, which he described, for her separate use, and had given a receipt stating that he had purchased the whole tract of one hundred acres "which was intended for his sister," and there was evidence to show that he did not claim any of the land till his father's death, and other circumstances showing a trust in the whole tract, it was held that he might rebut the presumption of a trust in the whole by his own testimony that the receipt contained a mistake in stating that all the land was for his sister, and by other evidence that there was an understanding in the family that fifty acres only were to be held in trust by him.[9] A grantor who has conveyed land with a covenant of warranty is estopped from asserting that he had an interest in the purchase money from which a resulting trust might arise.[1]

§ 1185. **Benefit inconsistent with the trust.**—"The trust which results to the purchaser by operation of law, must be a pure, unmixed trust of the ownership and title of the land or estate itself, and not an interest in the proceeds of the land, nor a lien upon it as a security for an advance or other demand, nor an equity or a right to a sum of money to be raised out of the land, or upon the security of it. These rights are the subjects of the contracts or agreements of the parties, and may form the substance of express trusts, but they require for their subsistence that the title and legal estate of the premises, which yields the aliment that sustains them, should reside, not nominally but potentially, in the

[8] McCue v. Gallagher, 23 Cal. 51.
[9] Hays v. Quay, 68 Pa. St. 263.
[1] Squire v. Harder, 1 Paige, 494, 19 Am. Dec. 446.

trustee. The sole operation of pure and simple trusts is to vest the estate in the actual purchaser, in exclusion of the nominal grantee, and not to regulate the equitable rights and interests of those for whose benefit the legal owner may be under a moral obligation to hold or apply it."[2] Accordingly, where money for the purchase of land was furnished by three persons jointly, and it was agreed that two of them should take the title in fee, and the third, in consideration of the money advanced by her, should have wood from the land during her life, and the deed was taken in the name of one of the two, no trust results in favor of the third person.[3] And if the parties express a trust in writing at the time of the transaction, this supersedes any resulting trust which might otherwise arise.[4] An owner of a farm and a person intending to purchase it, agreed that in consideration of the conveyance, the latter would support the owner and his wife during their lives, and after the grantor's death would pay to his estate a stipulated sum. The owner, in compliance with this agreement, conveyed the farm in fee, and the grantee executed a deed thereof to the grantor and his wife for their lives. But, when requested, the grantee refused to give an obligation of any character to support the grantor and his wife, or to pay the sum determined upon to his estate after his decease. These facts, it was held, did not create a resulting trust.[5]

§ 1186. **Professional services.**—The rendition of professional services forms a sufficient consideration, it is held, to raise a resulting trust in favor of the person rendering the services.[6] An owner, however, of overdue promissory

[2] Dow v. Jewell, 21 N. H. 470, 488, per Gilchrist, C. J.

[3] Dow v. Jewell, 21 N. H. 470.

[4] See Alexander v. Warrance, 17 Mo. 230; Clark v. Burnham, 2 Story, 1; Dennison v. Goehring, 7 Pa. St. 175, 47 Am. Dec. 505; Anstice v. Brown, 6 Paige, 448; Mercer v. Stark, Walker, 451, 12 Am. Dec. 583; Leggett v. Dubois, 5 Paige, 114, 28 Am. Dec. 413.

[5] Hunt v. Moore, 6 Cush. 1.

[6] White v. Sheldon, 4 Nev. 280.

notes, desirous of collecting the money due on them, and having no means to pay attorney's fees and costs, arranged with an attorney to take the notes for collection. The notes were indorsed to the attorney under an agreement by which he was to furnish money to pay costs and disbursements, to bring suit on the notes in his own name, and should be reimbursed out of the porceeds of the notes when collected, for his fees and outlays, and the attorney gave to the owner a receipt stating that the notes were received for collection. The attorney commenced actions in his own name, secured judgment, had an execution issued which was returned unsatisfied, and subsequently made an agreement with a brother of one of the defendants in the judgment, the result of which was that the brother conveyed to the attorney a tract of land, and the attorney assigned the judgment to him, and also paid him eight hundred dollars, the attorney at all times being solvent and willing to pay the original owner of the notes whatever was due him on settlement. It was held that the attorney did not hold the land conveyed to him, in trust for his client, and that the latter was entitled to recover only the money due him on a fair settlement.[7]

[7] Robles v. Clarke, 25 Cal. 317. Said Sawyer, J., in delivering the opinion of the court: "What is there on the part of the defendant in this transaction that is objectionable on the score of the strictest principles of good morals, or in any respect inconsistent with his duty to his client? Had he immediately tendered plaintiff in cash the balance credited to him, the most rigid casuist could find nothing in the transaction of which he could complain. The defendant would have performed to its fullest extent the object of the trust. Had the judgment been a lien on the property, and had he purchased it at a sale on the execution for a sum less than the amount coming to his client on the judgment, and sought to retain the benefit of the purchase for himself, his interest and his duty would have conflicted; for, in that case, it would have been his interest to obtain the land at as low a rate as possible, while it would have been his duty to get as much as possible out of the land, until sufficient should be realized to liquidate the amount due to the client. But this was not his position. The chance for making the money on the judgment was desperate. An opportunity occurred, wherein by advancing a consider-

§ 1187. **Conveyance of legal title only.**—When a person who has in himself both the legal and equitable title to property, conveys or devises the legal estate, intending to convey this title only, a trust will result to him as to the estate not transferred. When the question of the intention of the party conveying is not expressed, and becomes a matter of presumption, parol evidence is admissible to ascertain his intention.[8] Where a party in possession without right is deprived of possession, without, however, depriving him of any right of possession at law resulting from his actual prior possession, the wrongdoer, if he purchases the title from the lawful owner, does not hold the title in trust.[9]

§ 1188. **Laches of cestui que trust.**—The rule is equity is that the court will not give its aid to enforce a resulting

able sum of money himself, and taking upon his own shoulders all the risks of a purchase of the lands in the condition stated, upon which he had no judgment lien, he could secure his own interest in the judgment, and, at the same time, fulfill both the letter and spirit of his trust, and he embraced it. In this we can see no breach of duty, or misapplication of trust funds within the principle of any case that has been brought to our notice, unless the fact that the amount due plaintiff was not immediately tendered to him in cash by defendant changes the aspect of the case."

[8] See Barrett v. Buck, 12 Jur. 771; Levet v. Needham, 2 Vern. 138; Hogan, Strayhorn, 65 N. C. 279; Wych v. Packington, 3 Brown Ch. 44; Fletcher v. Ashburner, 1 Brown Ch. 501; Sewell v. Denny, 10 Beav. 315; Cooke v. Dealey, 22 Beav. 196; Halford v. Stains, 16 Sim. 488; Trimmer v. Bayne, 7 Ves. 520; Petit v. Smith, 1 P. Wms. 7; Gladding v. Yapp, 5 Mod. 56; Cook v. Hutchinson, 1 Keen, 50; Langham v. Sandford, 17 Ves. 435; Docksey v. Docksey, 2 Eq. Cas. Abr. 506; 3 Brown Parl. C. 39; Walton v. Walton, 14 Ves. 318; North v. Crompton, 1 Ch. Cas. Ch. 196; 2 Vern. 253; Lake v. Lake, 1 Wils. 313; Barnes v. Taylor, 27 N. J. Eq. 265; Williams v. Jones, 10 Ves. 77; Nourse v. Finch, 1 Ves. Jr. 344; 1 Perry on Trusts, § 150; Lewin on Trusts, 115. Parol evidence cannot be received to affect a trust created by writing: Ralston v. Telfair, 2 Dev. Eq. 255; White v. Evans, 4 Ves. 21; Hughes v. Evans, 13 Sim. 496; Langham v. Sandford, 17 Ves. 435; Love v. Gaze, 8 Beav. 472; Gladding v. Yapp, 5 Mod. 59; White v. Williams, 3 Ves. & B. 72; Walton v. Walton, 14 Ves. 322.

[9] Scott v. Umbarger, 41 Cal. 410.

trust after the lapse of a long period of time, and in the absence of any explanation of the laches of the *cestui que trust*. "Long and unexplained delay is a material circumstance against the establishment of implied trusts in real estate when parol evidence alone is relied upon for this purpose." [1]

§ 1189. **Deed without consideration.**—It was thought at one time that if a man conveyed land without consideration a trust would result.[2] But it is now settled law that a trust does not result to the grantor merely because there was no consideration for the conveyance.[3] Where a husband

[1] Sunderland v. Sunderland, 19 Iowa, 325, 329, per Dillon, J; Strimpfler v. Roberts, 18 Pa. St. 283, 57 Am. Dec. 606; Brown v. Guthrie, 27 Tex. 610; Haines v. O'Connor, 10 Watts, 315, 36 Am. Dec. 180; Peebles v. Reading, 8 Serg. & R. 484; Trafford v. Wilkinson, 3 Tenn. Ch. 701; Newman v. Early, 3 Tenn. Ch. 714; Clegg v. Edmonson, 8 De Gex, M. & G. 787; Buckford v. Wade, 17 Ves. 97; King v. Purdee, 6 Otto, 90, 24 L. ed. 666; Groves v. Groves, 3 Younge & J. 172; Douglass v. Lucas, 63 Pa. St. 9; Graham v. Donaldson, 5 Watts, 451; Miller v. Blose, 30 Gratt. 744; Best v. Campbell, 62 Pa. St. 478; Delane v. Delane, 7 Brown Parl. C. 279; Lewis v. Robinson, 10 Watts, 338. See Smith v. Patton, 12 W. Va. 541; Midner v. Midner, 26 N. J. Eq. 299; Jennings v. Shacklett, 30 Gratt. 765.

[2] Cecil v. Butcher, 2 Jacob & W. 573; Tolar v. Tolar, 1 Dev. Eq. 456, 18 Am. Dec. 598; Souerbye v. Arden, 1 Johns. Ch. 240; 2 Story Eq. Jur. § 1199; 1 Perry on Trusts, § 161; Lewin on Trusts, 116.

[3] Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142; Bunn v. Winthrop, 1 Johns. Ch. 329; Hogan v. Jaques, 19 N. J. Ch. 123, 97 Am. Dec. 644; Lloyd v. Spillett, 2 Atk. 150; Hutchins v. Lee, 1 Atk. 447; Young v. Peachy, 2 Atk. 257; Jackson v. Cleveland, 15 Mich. 94, 90 Am. Dec. 266; Graff v. Rohrer, 35 Md. 327; Ownes v. Ownes, 23 N. J. Eq. (8 Green. C. E.) 60. And see Randall v. Phillips, 3 Mason, 383; Rathbun v. Rathbun, 6 Barb. 98; Leman v. Whitley, 4 Russ. 423; Graves v. Graves, 29 N. H. 129; Philbrook v. Delano, 29 Me. 410; Morris v. Morris, 2 Bibb, 311; Alison v. Kurtz, 2 Watts, 187; Movan v. Hayes, 1 Johns. Ch. 339; Wilkinson v. Wilkinson, 2 Dev. Eq. 376; Miller v. Wilson, 15 Ohio, 108; Farrington v. Barr, 36 N. H. 861; Gerry v. Stimson, 60 Me. 186; Squire v. Harder, 1 Paige, 494, 19 Am. Dec. 446; Titcomb v. Morrill, 10 Allen, 15; Cairns v. Colburn, 104 Mass. 274; Bartlett v. Bartlett, 14 Gray, 278; Whitton v. Whitton, 3 Cush. 191; Jackson v. Caldwell, 1 Cowen, 622; Walker v. Locke, 5 Cush. 90. But

and his wife were about to separate, and the husband, for the purpose of avoiding questions of dower, had certain property conveyed by an absolute deed, expressing a valuable consideration to a third person, it was held that where there was no assertion of fraud, mistake, or contrivance, the absence of a consideration was not sufficient to create a resulting trust in favor of the grantor.[4] Where two partners

see Blodgett v. Hildreth, 103 Mass. 486; Haigh v. Kaye, Law R. 7 Ch. 469; McKinney v. Burns, 31 Ga. 295; Hickman v. Hickman, 55 Mo. App. 303; Weiss v. Heitkamp, 127 Mo. 23, 29 S. W. Rep. 709.

[4] Jackson v. Cleveland, 15 Mich. 94, 90 Am. Dec. 266. "The case stands," said Mr. Justice Campbell, in delivering the opinion of the court, "upon the simple question whether such a deed, because made without any consideration in fact, involves a resulting trust in favor of the grantor. This deed contains a recital of consideration, and declares the uses in the ordinary form in favor of the grantee, his heirs and assigns in fee. It is in the form which would have been used had the land been bought and paid for, and it is designed upon its face to represent the grantee as an ordinary purchaser. The object, in fact, was to vest in him an indefeasible legal estate, whatever may have been the equities. And the intention to do this was not left subject to revocation, as the recording of the deed was made with an express purpose of having Cleveland enabled to convey, as he did convey, to the first person who became a purchaser of a portion of the estate. The equity, therefore, which is relied on in this cause depends upon the establishment of a principle that a voluntary deed, where no consideration in fact passes to the grantor, is subject to a trust in his favor, and no beneficial title vests in the grantee. This claim is not sustained by any authority. a voluntary deed which purports to be for the beneficial use of the grantee, and which was made deliberately, and without mistake or contrivance, does not differ from any other deed in binding the grantor, and can only be attacked by those having superior equities which the grantor had no right to cut off—as creditors and the like. The only case approaching it is where an equity is raised against a grantee in favor of the person who paid the purchase money. This trust is now abolished by our statutes, where the person paying the money has consented to the deed being thus made. And it could always be rebutted by showing that the land was intended to vest beneficially: Phillips v. Crammond, 2 Wash. C. C. 441, 445, 446; Benbow v. Townsend, 1 Mylne & K. 506; Maddison v. Andrew, 1 Ves. Sr. 58. And in Delane v. Delane, 4 Brown Parl. C. 258, it was held that a person paying purchase money, and allowing the deed to be made to another, precluded himself

are in debt, and one of them executes an absolute deed expressing a valuable consideration of both his individual property to the other and his interest in the partnership property to the other, for the purpose of enabling the latter to raise money by mortgaging the same to pay the debts of the firm no express trust is created, and none is implied by law.[5] But

from setting up any such trust by holding such person out as the real owner, and witnessing a lease made by him as such. Upon this principle the action of Jacob Jackson, in procuring Cleveland to deed the parcel sold, would have rebutted such a trust, had this been the case of a purchase by one person in the name of another, and had the statute left such trusts to be enforced. The presumed intention to claim the title is rebutted by acquiescence in the assertion of ownership. This doctrine of resulting trusts has never been applied to mere voluntary conveyances. Mere want of consideration has never raised resulting trusts out of these: Young v. Peachy, 2 Atk. 256; Lloyd v. Spillet, 2 Atk. 148; Leman v. Whittey, 4 Russ. 423; Sturtevant v. Sturtevant, 20 N. Y. 30, 75 Am. Dec. 371. There is a class of cases which were referred to upon the argument, which depend upon the common-law rule that a feoffment without consideration, and which declared no uses, created a resulting use to the grantor; or, in other words, was practically no conveyance. But this doctrine has been held to be merely technical at law and in equity, and not at all dependent upon any question of consideration. It rests upon the principles underlying the second great class of resulting trusts, where a trust results in the residue of all estates after the uses or trusts upon which they are conveyed are exhausted. And accordingly, either the mention of a consideration, although nominal, or the declaration of uses, will prevent any trust resulting, and confirm the title in the feoffee: Lloyd v. Spillet, 2 Atk. 148; Saunders on Uses and Trusts, 334, 335; 2 Fonblanque's Equity, 133; 1 Spence, Eq. 449, 450, 451, and cases cited. A court of chancery has never ventured against the expressed will of the donor, appearing on the face of the deed, to 'take the use from the donee, and give it back to the donor. *In other words, uses annexed to a perfect gift, however gratuitous, were enforced':* 1 Spence, Eq. 450. We have found no authority which would justify us in raising a trust in the present case. Jackson saw fit to leave Cleveland untrammeled by any obligation. Whether he has abused confidence, as there is great reason to believe, or whether he was, as he claims, made a beneficiary to cut off others, is not material."

[5] Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142.

where the consideration for the execution of a deed from a son to his father is a verbal agreement by a father to make a will, and devise to the son certain property, and the father dies without having fulfilled his agreement, it has been held on the ground of the nullity of the agreement, and, therefore, the execution of the conveyance without consideration express or implied, that a trust results in favor of the son by implication of law, and that he may, on showing that the transaction was not a gift, set aside the conveyance and recover the property.[6]

§ 1190. **Payment for improvements.**—When the person holding the legal title in trust has expended money in the payment of taxes or the making of necessary improvements, he is entitled to hold the estate until he has been repaid. Where a person paid all of the purchase money for a tract of land, but the deed was made to himself and his sister, on the understanding and agreement that she should pay to him one-half of the sum paid as the purchase price, and he paid the taxes and made permanent improvements to the land by the erection of buildings and clearing up the land, it was held that she was not entitled to have half the land set off to her, without paying to her brother half of the purchase money, and also paying for half of the improvements.[7]

[6] Russ v. Mebius, 16 Cal. 350.

[7] Maloy v. Sloans, 44 Vt. 311. It was also held in this case that a suit at law for partition might be perpetually enjoined if the sum due was not within the time and in the manner ordered by a court of equity. The performance of a resulting trust is made by the transfer of the title to the *cestui que trust:* Millard v. Hathaway, 27 Cal. 119.

CHAPTER XXXIII.

FIXTURES PASSING BY DEED.

§ 1191. Definition of the term.
1192. General rule between grantor and grantee.
1193. Comments.
1194. Purchaser at sale on execution.
1195. Partition by tenants in common.
1196. Mortgagee considered a purchaser.
1196a. Some instances of this rule.
1197. General rule as to fixtures passing by deed.
1198. Instances.
1199. Notice of fixtures.
1200. Conveyance of structure passing title to land.
1201. Land necessary to use of structure.
1202. Agreement for removal.
1203. Chattels not annexed to the realty.
1204. Same subject continued—Illustrations.
1205. Use on the land.
1206. Temporary removal.
1207. Articles constructively annexed.
1208. Machinery in mills.
§ 1209. Removal without injury.
1210. Comments.
1211. Proper test for considering machinery fixtures.
1212. Value added to realty.
1213. English view of movable machinery.
1214. American cases.
1215. Different view.
1216. Effect of statute.
1217. Right to remove under contract of purchase.
1218. Application of rule.
1219. Reason for rule.
1220. Some illustrations.
1220a. Buildings.
1221. Word "fixtures" in deed.
1222. Contract of purchase—Payment of rent.
1223. Question of intention considered.
1224. Same subject continued.
1224a. Evidence of conversations.
1225. Gas Fixtures.
1226. Manure.
1227. Permanent severance.
1228. Temporary severance.
1229. Severance by act of God.
1230. Stoves, furniture, etc.

§ 1191. **Definition of the term.**—Various definitions have been given of the term "fixtures," and it is difficult to select or frame one that would cover all cases, or that would not be subject to objection. In its most general signification, the word embraces everything which has, by artificial means, been permanently attached to the freehold.[1] Mr. Ferard says: "The term 'fixtures' is used by writers with various significations; but it is always applied to articles of a personal nature, which have been affixed to land. On some occasions, no further idea is intended to be conveyed by the term than the simple fact of annexation to the freehold; and hence have arisen the popular expressions of landlord's fixtures, and tenant's fixtures; of removable and irremovable fixtures. The name of fixtures is also sometimes applied to things expressly to denote that they cannot be legally removed; as when they have been annexed to a house, etc., and the party who has affixed them is not at liberty afterward to sever and take them away. Thus, it is said, that an article shall fall in with the lease to the landlord, or descend to the heir with the inheritance because it is a fixture. There is, however, another sense in which the term "fixtures" is very frequently used, and which it is thought expedient to adopt in the following treatise, viz., as denoting those personal chattels which have been annexed to land, and which may be afterward severed and removed by the party who has annexed them, or his personal representatives, against the will of the owner of the freehold."[2] Another definition given is: "Per-

[1] Fixtures are "chattels or articles of a personal nature which have been affixed to the land": Tomlin's Law Dict. Fixtures. See Merritt v. Judd, 14 Cal. 59.

[2] Ferard on Fixtures, 1, 2. In Teaff v. Hewitt, 1 Ohio St. 511, 524, 59 Am. Dec. 634; s. c. 1 Am. Law Reg. (O. S.) 723, Mr. Chief Justice Bartley says: "The term 'fixture' has been used by various writers and in numerous reported decisions, as denoting personal chattels annexed to the land, which may be severed and removed against the will of the owner of the freehold by the party who has annexed them, or his personal representatives: Amos & Ferard on the Law of Fixtures, 2; Gibbon's Man-

sonal chattels affixed to real estate, which may be severed and removed by the party who has affixed them, or by his personal representative against the will of the owner of the

ual of the Law of Fixtures, 5; Grady's Law of Fixtures, 1; 2 Bouvier's Institutes of American Law, 162; 2 Kent's Com. 344. There may be some propriety in this definition of the term when confined in its application to the relation of landlord and tenant, or tenant for life or years, and remainderman or reversioner, to which several of the elementary writers have confined their attention. But it does not appear to express the accurate meaning of the term in its general application. An article attached to the realty, but which is removable against the will of the owner of the land, has not lost the nature and incidents of chattel property. It is still movable property, passes to the executor, and not to the heir on the death of the owner, and may be taken on execution and sold as other chattels, etc. A removable fixture, as a term of general application, is a solecism—a contradiction in words. There does not appear to be any necessity or propriety in classifying movable articles, which may be for temporary purposes somewhat attached to the land, under any general denomination distinguishing them from other chattel property. A tree growing upon the soil, or any other article belonging to the freehold, may be converted into a chattel by a severance from the land. It is an ancient maxim of the law that whatever becomes fixed to the realty, thereby becomes accessory to the freehold, and partakes of all its legal incidents and properties, and cannot be severed and removed without the consent of the owner. *Quicquid plantatur solo, solo cedit,* is the language of antiquity in which the maxim has been expressed the term 'fixture,' in the ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and the legal incidents of the property; and it appears to be not only appropriate, but necessary to distinguish this class of property from movable property, possessing the nature and incidents of chattels. It is in this sense that the term is used in far the greater part of the adjudicated cases: Co. Lit., 53*a*, 4; 2 Smith's Leading Cases, 114; Chancellor Kent's note *a;* 2 Kent's Com., 345; Dudley v. Ward, Ambl. 113; Elwes v. Mawe, 3 East, 57. It is said that this rule has been greatly relaxed by exceptions to it, established in favor of trade, and also in favor of the tenant, as between landlord and tenant. And the attempt to establish the whole doctrine of fixtures upon these exceptions to the general rule, has occasioned much confusion and misunderstanding on this subject. Amos and Ferard, in their treatise on the law of fixtures, mention the division of the subject into removable and irremovable fixtures, and give a definition of each class. See Amos & Ferard on Fixtures, p. 11. And they remark 'that it is difficult

freehold."[3] In the language of Baron Parke, the term "fixtures" "is used more generally with reference to such inanimate things of a personal nature as have become affixed or annexed to the realty, but which may be severed, disunited, or removed by the party, or his personal representatives, who has so affixed them without the consent of the owner of the freehold."[4]

§ 1192. **General rule between grantor and grantee.**— Between landlord and tenant, the rule that a chattel attached to the freehold becomes a part of the realty, is applied with less strictness than it is when the question arises between grantor and grantee. A deed conveys not only the land described, but everything appurtenant to it. "The general rule of law is, that whatever is once annexed to the freehold becomes parcel thereof, and passes with the conveyance of the estate. Though the rule has been in modern times greatly relaxed, as between landlord and tenant, in relation to things affixed for the purposes of trade and manufacture, and also in relation to articles put up for ornament or domestic use, it remains in full force as between vendor and vendee. As a general thing, a tenant may remove what he has added,

to determine in which of the above senses it is most frequently employed.' This classification of fixtures may be essential to a correct understanding of the double sense in which the term has been frequently used in the authorities, but it would not seem to be needed for any other purpose."

[3] 1 Bouv. Law Dict. tit. Fixtures.

[4] In Hallen v. Runder, 1 Cromp. M. & R. 266, 276; s. c., 9 Tyrw. 959. For other authorities in which definitions have been given, see Pickerell v. Carson, 8 Iowa, 544; Prescott v. Wells, 3 Nev. 82; Sheen v. Rickie, 5 Mees. & W. 175; Beardsley v. Ontario Bank, 31 Barb. 619, 629; Rogers v. Gilinger, 30 Pa. St. 185, 72 Am. Dec. 694; Coddington v. Beebe, 29 N. J. 550; Climie v. Wood, Law R. 3 Ex. 257; Voorhees v. Freeman, 2 Watts & S. 106, 37 Am. Dec. 490; Providence Gas Co. v. Thurber, 2 R. I. 22, 55 Am. Dec. 621; Minnesota Co. v. St. Paul Co., 2 Wall. 609, 645, n; Hoyle v. Plattsburgh etc. R. R. Co., 51 Barb. 45; McGorrisk v. Dwyer, 78 Iowa, 279, 16 Am. St. Rep. 440; Hutchins v. Masterson, 46 Tex. 551, 26 Am. Rep. 286.

when he can do so without injury to the estate, unless it has become by its manner of addition an integral part of the original premises. But not so a vendor; as against him, all fixtures pass to his vendee, even though erected for the purposes of trade and manufacture, or for ornament, or domestic use, unless specially reserved in the conveyance." [5] "In the whole range of jurisprudence," says Tarbell, J., "there is, perhaps, no subject more difficult of definite rules than the matter of fixtures. The common-law rule, it is true, is precise, and were there no exceptions thereto, would be conclusive upon this case. But many exceptions have been sustained in favor of tenants for the benefit of trade, and for the protection and encouragement of modern improvements in machinery. In favor of tenants the greatest liberality is indulged, while as between vendor and vendee, and mortgagor and mortgagee, the strictest construction obtains." [6] The general rule may be stated

[5] Sands v. Pfeiffer, 10 Cal. 258, 264, per Field, J. It was held in that case that the engine and boiler permanently attached to a flour mill which had its foundation in the ground was a fixture, and passed to the purchaser of the premises under a decree of foreclosure of a mortgage. In Crane v. Brigham, 11 N. J. Eq. (3 Stockt.) 29, 34, it is said: "The rule with regard to fixtures has been much relaxed, as between tenant for life or in tail and remainderman, and also as between landlord and tenant; but as between heir and executor, grantor and grantee, the rule has undergone no change." A church organ built into a church as a part of the structure is a fixture: Chapman v. Union Mut. L. Ins. Co., 4 Ill. App. 29; Rogers v. Crow, 40 Mo. 91, 93 Am. Dec. 299. But seats used in a church and not permanently attached are furniture merely: Chapman v. Union Mut. Life Ins. Co., 4 Ill. App. 29.

[6] In Tate v. Blackburne, 48 Miss. 1, 4. In Degraffenreid v. Scruggs, 4 Humph. 451, 455, 40 Am. Dec. 658, Green, J., delivering the opinion of the court, said: "The original rule of the common law was that everything which was affixed to the freehold was subjected to the law governing the freehold. But in later times this rule has been greatly relaxed in favor of tenants, and in relation to fixtures erected for the purpose of trade. But as between executor annd heir, and between the vendor and vendee, the original rule prevails that whatever is affixed to the freehold passes with it." See, also, Preston v. Briggs, 16 Vt. 128; Laflin v. Griffiths, 35 Barb. 58; Childress v. Wright, 2 Cold. 352; Despatch Line

to be that, unless the parties otherwise provide, all fixtures at-

of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Holmes v. Tremper, 20 Johns. 30, 11 Am. Dec. 238; Murdock v. Gifford, 18 N. Y. 31; Burnside v. Twitchell, 43 N. H. 393; Snedeker v. Warring, 12 N. Y. 174; Lathrop v. Blake, 23 N. H. 64; Johnson v. Wiseman, 4 Met. (Ky.) 359; Robinson v. Preswick, 3 Edw. Ch. 246; Hawes v. Lathrop, 38 Cal. 493; McKiernan v. Hesse, 51 Cal. 594; Wolff v. Sampson, 123 Ga. 400, 51 S. E. 335. In Miller v. Plumb, 6 Cowen, 665, 16 Am. Dec. 456, Woodworth, J., said: The more important question is whether the potash kettles, being affixed to the freehold, passed with the land. If they did, the court below erred; and the judgment must be reversed, unless the case falls within some of the qualifications or exceptions to the general rule. That rule appears to be well established; whatever is affixed to the freehold becomes part of it, and cannot be removed. Exceptions have been admitted between landlord and tenant; between tenant for life or in tail and the reversioner; yet the rule still holds between heir and executor. (Bul. N. P. 34.) In Holmes v. Tremper, 20 Johns. 30, 11 Am. Dec. 238, Chief Justice Spencer says: 'When a farm is sold without any reservation, the same rule would apply as to the right of the vendor to remove fixtures, as exists between the heir and executor.'"

In Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 251, the subject of what are fixtures, and what rule should prevail between grantor and grantee, was exhaustively considered. It was said by Mr. Justice McKee in the course of the opinion of the court: "What is accessory to real estate is according to the rule of the common-law part of it, and passes with it by alienation. That rule has been, in the growth of the law, greatly modified as between landlord and tenant, for the encouragement of trade, manufacture, agriculture, and domestic convenience; and courts recognize and enforce the right of removal by a tenant, of chattels annexed to the freehold for such purposes. But the rule which is applicable to persons in that relation does not apply as between heir and executor, vendor and vendee. As between the latter the rule of the common law is still applicable, except so far as it may be modified by statutory regulation upon the subject. So that chattels attached to the freehold by the owner, and contributing to its value and enjoyment, pass by the grant of the freehold, if the grantor had power to convey: Tourtellot v. Phelps, 4 Gray, 378. And after conveyance they cannot be severed by the vendor or any one else than the owner. As between vendor and vendee, therefore, the rule for determining what is a fixture is always construed strongly against the seller. Many things pass by a deed of a house, being put there by the owner and seller, which a tenant who had put them there might have removed, and they will be regarded as fix-

tached, even though the attachment is slight, to the freehold pass by the deed to the grantee.[7]

tures, which pass to the vendee, although annexed and used for purposes of trade, manufacture or for ornament or domestic use. Thus, potash kettles appertaining to a building for manufacturing ashes (Miller v. Plumb, 6 Cowen, 665, 16 Am. Dec. 456); a cotton-gin fixed in its place (Bratton v. Clausen, 2 Strob. 478); a steam engine to drive a bark mill (Oves v. Oglesby, 7 Watts, 106); kettles set in brick in dyeing and print works (Despatch Line v. Bellamy Mfg. Co., 12 N. H. 207, 37 Am. Dec. 203); iron stoves fixed to the brickwork of chimneys (Goddard v. Chase, 7 Mass. 432); wainscot work, fixed and dormant tables, engines and boilers used in a flour-mill and attached to it (Sands v. Pfeiffer, 10 Cal. 259); a steam en-engines and boilers used in a flour-of timber and bedded in a quartz ledge, and used for the purpose of working the ledge (Merritt v. Judd, 14 Cal. 59); a conduit or water-pipe to conduct water to a house (Philbrick v. Ewing, 97 Mass. 134); hop-poles in use on a hop farm (Bishop v. Bishop, 11 N. 123. 62 Am. Dec. 68); statutes erected for ornament, though only kept in place by their own weight (Snedeker v. Warring, 12 N. Y. 170); in fact, whatever the vendor has annexed to a building for the more convenient use and improvement of the premises, passes by his deed. The true rule deduced from all the authorities, says the Supreme Court of Virginia, seems to be this, that when the machinery is permanent in its character, and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential for the purposes for which the building is used will be considered as a fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either: Green v. Phillips, 26 Gratt. 752, 21 Am. Rep. 323; Shelton v. Ficklin, 32 Gratt. 735." See, also, Wilson v. Steel, 13 Phila. 153; Stillman v. Flenniken, 58 Iowa, 450, 43 Am. Rep. 120; Wolff v. Sampson, 123 Ga. 400, 51 S. E. 335.

[7] Leonard v. Clough, 133 N. Y. 292, 16 L.R.A. 305, 31 N. E. 93, reversing 14 N. Y. S. 339; Bishop v. Bishop, 11 N. Y. 123, 62 Am. Dec. 68; Weston v. Weston, 102 Mass. 514; Bryan v. Lawrence, 50 N. C. 337; Mitchell v. Billingsley, 17 Ala. 391; Isham v. Morgan, 9 Conn. 374, 23 Am. Dec. 361; Seymour v. Watson, 5 Blackf. (Ind.) 555, 36 Am. Dec. 556; Redlon v. Barker, 4 Kan. 445, 96 Am. Dec. 180; Hill v. Mundy, 89 Ky. 36, 4 L.R.A. 674, 11 S. W. 956; Farrar v. Stackpole, 6 Me. 154, 19 Am. Dec. 201; Richardson v. Borden, 42 Mass. 71, 2 Am. Rep. 595; Tate v. Blackburne, 48 Miss. 1; Cohen v. Kyler, 27 Mo. 122; Rogers v. Crow, 40 Mo. 91, 93 Am. Dec. 299; Burnside v. Twitchell, 43 N. H. 390; Cavis v. Beckford, 62 N. H. 229, 13 Am. St Rep. 554; Roberts

§ 1193. **Comments.**—The relaxation in favor of tenants is placed upon grounds that do not apply to grantors. The tenant has not the control of the land, and to refuse him permission to remove chattels affixed by him during his tenancy to the realty, for the purpose of trade, manufacture, or agriculture, would, in many instances, work serious and unnecessary hardship upon him. But considerations of this character, obviously, have no application to a grantor. The latter exercises complete control over the land, and all fixtures attached to it. The law considers the fixtures as realty, and if he chooses to sell without reserving the right to remove them, he has no just cause for complaint if that effect is given to his deed which its terms import.

§ 1194. **Purchaser at sale on execution.**—The same rule that prevails with reference to determining whether fixtures pass by a conveyance made by a private person also applies where a sale is made by virtue of legal process. Where a purchaser of land at an execution sale claimed certain property as fixtures on the ground that they were attached to the realty, the court observed: "This is a sale by the owner through the instrumentality of the sheriff, and the doctrine in regard to fixtures applicable to it is that which governs between vendor and purchaser." [8] Parol evidence is inadmissible to show that certain buildings were reserved by mutual consent from sale, the judgment debtor having the right to remove them, when the return of the officer does not show such an exception.[9] A steam engine, with its fixtures, was held to be realty, and to pass by a sale of the freehold

v. Dauphin Deposit Bank, 19 Pa. St. 71; Cole v. Roach, 37 Tex. 413.

[8] Farrar v. Chauffetete, 5 Denio, 529.

[9] In a case in Maine, an offer was made to show that the creditor's attorney, considering certain buildings on the land as of little value, directed the officer not to set them off, but to appraise sufficient land exclusive of the buildings to satisfy the execution, which he did; that at the time livery of seisin was made, the attorney de-

upon execution.[1] So a marine railway, consisting of iron and wooden rails, endless chain, gear, wheels, and ship cradle, was held to pass by a levy and sale of the realty upon execution.[2]

§ 1195. **Partition by tenants in common.**—The rule is the same when the question arises on a partition made by

clared that the buildings did not belong to the creditor, but to the execution debtor, who might remove them when he chose; that the buildings were accidentally omitted from the officer's return, and that they stood on blocks without any foundation sunk into the ground. The court held that there was no difference between a conveyance by legal process and a conveyance by deed in the rules of construction, and that parol evidence was inadmissible to show that the buildings were excepted: Waterhouse v. Gibson, 4 Greenl. 230. Weston J., delivering the opinion of the court, said: "In determining whether the barn and shop in question belonged to the plaintiff, we must regard the levy of Brooks upon the land of his execution debtor, Jack, as having the same effect as if the latter had passed the land to the former by deed. Jack was the owner of the buildings as well as of the land, and if he had conveyed the land by deed, without any exception or reservation, we entertain no doubt that the buildings thereon standing would have passed. . . . The levy operating upon the buildings as well as the land, it was not competent to show that the former was excepted by parol testimony. This would be materially to vary and modify by parol the effect of written evidence which by law is clearly inadmissible."

[1] Oves v. Ogelsby, 7 Watts, 106. See, also, Stillman v. Flenniken, 58 Iowa, 450, 43 Am. Rep. 120.

[2] Strickland v. Parker, 54 Me. 263. See, also, Trull v. Fuller, 28 Me. 545; Moore v. Smith, 24 Ill. 512; Payne v. Farmers' etc. Bank, 29 Conn. 415; Symonds v. Harris, 51 Me. 14, 81 Am. Dec. 553; Boyle v. Swanson, 6 La. Ann. 263; Powell v. Monson etc. Mfg. Co., 3 Mason, 459; Taylor v. Plunkett, 56 Atl. 384, 4 Pennewill, 467; Off v. Finkelstein, 100 Ill. App. 14, judgment affirmed, 200 Ill. 40; 65 N. E. 439; Thomson v. Smith, 111 Iowa, 718, 50 L.R.A. 780, 83 N. W. 789, 82 Am. St. Rep. 541; Second Nat. Bank of Colfax v. Hatch, 64 Pac. 727, 24 Wash. 421. Chairs, stage appliances, drop curtain etc., of opera house pass to the execution purchaser: Murray v. Bender, 63 L.R.A. 783, 125 Fed. 705, 60 C. C. A. 473. Also see Bender v. King, 111 Fed. 60: Corn Mill, Bigler v. Brashear, 11 Rob. 484; Carding Machine, Baker v. Davis, 19 N. H. 325; Dynamos and Exciters, New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., 157 N. Y. 689; 51 N. E. 1092; Reynolds v. New York Security & Trust Co., Id.

cotenants. Where two persons were tenants in common of a piece of land, and one of them with the consent of the other erected at his sole expense a store, permanently annexing it to the freehold, it was held in an action of partition that the store could not be treated as the separate property of the cotenant who erected it.[3] "The question is one between tenants in common, the owners of the fee; and is, we think, to be decided on the same principle, as if partition had been effected by the parties through mutual deeds of bargain and sale. As between such parties, the doctrine of fixtures making a part of the freehold, and passing with it, is more extensively applied than between any others." [4]

§ 1196. **Mortgagee considered a purchaser.**—The rule that applies between grantor and grantee also applies between

[3] Baldwin v. Breed, 16 Conn. 60. Williams, C. J., delivering the opinion of the court, said: "The title of a purchaser or creditor ought not to be qualified or impaired, for want of an inquiry as to which of the tenants in common planted the trees, set the hedges, or erected the fences or buildings; no authority has been shown and no usage proved in support of such a claim. And when we consider the extreme uncertainty as to title which would result from the adoption of such a principle, and the embarrassments which would attend the purchaser and the creditors, together with the anxious care which our law has shown in making as public as possible the title to real estate, we cannot consent to incorporate the principle contended for, unless compelled by authority. . . . In the absence, then, of any special agreement between the parties, we think neither a court of law nor a court of chancery could treat this store as the separate property of one of these tenants in common. And the remark of Tilghman, C. J., in Lyle v. Ducomb, 5 Binn. 588, is entirely applicable to this case: 'The idea of separating the building from the ground on which it stands is altogether novel, and cannot be carried into effect without great difficulty.'"

[4] Cowen, J., in Walker v. Sherman, 20 Wend. 636, 638. See, also, Parsons v. Copeland, 38 Me. 537; Plumer v. Plumer, 30 N. H. (10 Fost.) 558, 569. In Plumer v. Plumer, *supra*, it was held that where a partition of real estate is made under the decree of the court, all the incidents and appurtenances attached to the several parts of the land, pass to the persons to whom they have assigned, unless a different order is made.

mortgagor and mortgagee. The mortgagor is the owner of the fee. The reason that causes the ancient rule that a chattel affixed to the realty becomes a part of it, to be enforced in all its rigor against a grantor, applies with equal force when fixtures are erected by a mortgagor. He has the power of exempting them from the operation of his mortgage, if he so desires. If he does not do so, the general terms of description in the instrument are to be construed by the same rules as if they were inserted in an absolute conveyance. In a case where a steam-engine and boilers, and the engines and frames adapted to be moved and used by the steam-engine by means of connecting wheels, were held to be a part of realty, as between mortgagor and mortgagee, Chief Justice Shaw observed: "A different rule may exist in regard to the respective rights of tenant and landlord, tenant for life, and remainderman or reversioner, and, generally, when one has a temporary, and not a permanent interest in land. In those cases, the rule as to what shall constitute fixtures is much relaxed in favor of those who make improvements on the real estate of others, for the purposes of trade or other temporary use and enjoyment.[5] But the case of mortgagor and mortgagee stands upon a different footing. The mortgagor, to most purposes, is regarded as the owner of the estate; indeed, he is so regarded to all purposes, except so far as it is necessary to recognize the mortgagee, as legal owner, for the purposes of his security. The improvements, therefore, which the mortgagor, remaining in the possession and enjoyment of the mortgaged premises, makes upon them, in contemplation of law he makes for himself, and to enhance the general value of the estate, and not for its temporary enjoyment; whereas, a tenant, making the same improvements upon the estate of another, with a view to its temporary enjoyment, must be presumed to do it for himself, and not for the purpose of enhancing the value of the freehold. This rule, of course,

[5] Citing Gaffield v. Hapgood, 17 Pick. 192, 28 Am. Dec. 290.

will apply only to that class of improvements consisting of articles added, and more or less permanently affixed to the realty, in regard to which it is doubtful whether they are thereby made part of the realty or not, and when that question is to be decided by the presumed intent of the party making them. Take, for instance, the case of a dye kettle set in brickwork, which is for the time annexed to the freehold, but which may be removed without essential injury to the building, and so as to leave the premises in as good a condition as if it had not been set. If so set by an owner of the fee for his own use, it would, we think, be regarded as a fixture, an addition made to the realty by its owner as an improvement, and would pass to the heir by descent, or to the devisee by will. But if the same addition had been made by a tenant for years, for the purpose of carrying on his own business, we think he would have a right to remove it, provided he exercise that right whilst he has the rightful possession of the estate, that is, before the expiration of his term. . . . It is obvious that this question cannot arise where there is any express stipulation in the mortgage deed, declaring either that such improvements to be made, and which are in their nature equivocal, shall or not be deemed fixtures and be bound as part of the realty. The question is, what is the reasonable and legal construction of a deed, granting an estate or mortgage in the usual terms, where there is no stipulation on the subject? Such a deed must, of course, include all additions which become *de facto* part of the realty, and which are not in their nature equivocal; because a title to the whole includes every part. In regard to articles doubtful in their nature, we have already stated as our opinion, that if added by the mortgagor it is to be considered as done by way of permanent improvement, for the general benefit of the estate, and not for its temporary enjoyment.[6] One of the objects, and indeed one of the most usual purposes of

[6] Citing Hunt v. Hunt, 14 Pick. 386, 25 Am. Dec. 400.

mortgaging real estate, is to enable the owner to raise money to be expended on its improvement. If such improvements consist in actual fixtures, not doubtful in their nature, they go, of course, to the benefit and security of the mortgagee, by increasing the value of the pledge. The expectation of such improvement and such increased value often enters into consideration of the parties, in estimating the value of the property to be bound, and its sufficiency as security for the money advanced. And we think the same rule must apply to those articles which, in their own nature, are doubtful, whether actual fixtures or not, on the ground of the presumed intention of the parties. A presumption arises from the relation in which they stand, that such improvements are intended to be permanent, and not temporary, and that the freehold and the improvements intended to be made upon it are not to be severed, but to constitute one entire security. The mortgage is usually but a collateral security for money which the mortgagor binds himself to pay, and is, therefore, a hypothecation only, and not an alienation of the mortgaged estate. And in this respect the distinction between the tenant for years and the mortgagor is broad and obvious. The tenant for years can have no benefit from his improvements after the expiration of his term, but by removal; but the mortgagor has only to pay his debt, as he is bound to do, and as it is presumed he intends to do, and then he has all the benefit of his improvements in the enhanced value of the estate to which they have been annexed. The latter, therefore, may be presumed to have intended to annex the improvements to the freehold, and make them permanent fixtures; whilst the former must be presumed, from his obvious interest, to erect the improvements for his own temporary accommodation during his term, intending to remove them before its expiration." [7]

[7] In Winslow v. Merchants' Ins. Co., 4 Met. 306, 310, 312, 38 Am. Dec. 368. In Laflin v. Griffiths, 35 Barb. 58, the owner of a piece of real estate erected on it a keg factory, and placed in the factory ma-

Even where the fixtures are attached after the execution of the mortgage the title of the mortgagor to them will be superior to that of a judgment creditor.[8] Where a sale was ordered made under a trust deed to secure the payment of an indebtedness it was held that the machinery placed in a paper mill became a fixture and a part of the freehold, and should be sold as a part of the realty.[9] The right to fixtures of a receiver appointed for the mortgagor is subordinate to the right of the mortgagee.[1]

chinery for the purpose of carrying on his business. He executed a mortgage upon the premises, and, as this was not paid when it became due, the mortgagee took possession. A year prior to this a creditor had recovered a judgment against the owner of the fee, and the execution was levied upon a part of the machinery and implements of the factory, which were removed from the building by means of levers. The court held that the articles of machinery were fixtures, and passed to the mortgagee; Gould, J., delivering the opinion of the court, and saying: "In considering this case, and determining whether the articles in question were or were not fixtures, we are to follow the decision in Snedeker v. Warring, 2 Kern, 174, holding the same rule, as between mortgagor and mortgagee, that would be held as between grantor and grantee. And this, whether the mortgagee were or were not in possession of the premises. Nor can there be any doubt, if the property before detached were fixtures, that the person having the title to the realty could sue for the specific recovery of the things themselves, or in trespass for the damages to the freehold."

In Cullwick v. Swindell, 3 Eq. Cas. L. R. 248, 251. See, also, Cullwick v. Swindell, 3 Eq. Cas. L. R. 249; Robinson v. Preswick, 3 Edw. Ch. 246; Coleman v. Stearns' Mfg. Co., 38 Mich. 30; Main v. Schwarzwaelder, 4 Smith, E. D. 273; Longstaff v. Meagoe, 2 Ad. & E. 167; Quinby v. Manhattan etc. Co., 24 N. J. Eq. 260; Rogers v. Brokaw, 26 N. J. Eq. 563; Clark v. Reyburn, 1 Kan. 281; Harris v. Haynes, 34 Vt. 220; Gale v. Ward, 14 Mass. 352, 7 Am. Dec. 223; McKim v. Mason, 3 Md. Ch. 186; Lathrop v. Blake, 3 Fost. 46; Sparks v. State Bank, 7 Blackf. 469; Rice v. Adams, 4 Har. (Del.) 332; Corliss v. McLagin, 29 Me. 115; Preston v. Briggs, 16 Vt. 124.

[8] New York Security etc. Co. v. Saratoga Gas etc. Light Co., 157 N. Y. 689, 51 N. E. 1092, affirming 88 Hun, 569, 34 N. Y. S. 890.

[9] Hill v. Farmers' & Mechanics' Nat. Bank, 97 U. S. 450, 24 L. ed. 1051.

[1] Feder v. Van Winkle, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628. A mortgagee is considered a purchaser as to fixtures:

§ 1196a. **Some instances of this rule.**—Where a contrary intention does not appear it will be presumed as between the mortgagor and mortgagee that upholstered turnover theater chairs, arranged in an auditorium in rows in the customary manner, and made fast to the floors by screws, are a part of the realty.[2] Although chattels may be severed from a building without injury and used elsewhere, still if they have been placed in an annex to the building with the object of accomplishing the purposes for which the building was erected or to which it has been adopted, with the intention of increasing permanently the value of the building, they become, as between the owner and a mortgagee, fixtures

Bigler v. Newburgh Nat. Bank, 97 N. Y. 630, affirming 26 Hun, 520; McFadden v. Allen, 50 Hun, 361, 3 N. Y. S. 356; Snedeker v. Warring, 12 N. Y. 170; Bishop v. Bishop, 11 N. Y. 123, 62 Am. Dec. 68; Johnston v. Philadelphia Mortg. Co., 129 Ala. 515, 30 So. 15, 87 Am. St. Rep. 75; Atlantic Safe Deposit etc. Co. v. Atlantic City Laundry, 64 N. J. Eq. 140, 53 Atl. 312; Delaware etc. R. Co. v. Oxford Iron Co., 36 N. J. Eq. 452; Knickerbocker Trust Co. v. Penn. Cordage Co., 66 N. J. Eq. 305, 58 Atl. 409; McRea v. Troy Cent. Nat. Bank, 66 N. Y. 489; Hamlin v. Parsons, 12 Minn. 108, 90 Am. Dec. 284; Woodham v. Crookston First Nat. Bank, 48 Minn. 67, 50 N. W. 1015, 31 Am. St. Rep. 622; Burnside v. Twitchell, 43 N. H. 380; Sturgis Nat. Bank v. Levanseler, 115 Mich. 372, 73 N. W. 399; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620; Corliss v. McLagin, 29 Me. 115; Arnold v. Crowder, 81 Ill. 56, 25 Am. Rep. 260; Dudley v. Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368; Mutual Ben. L. Ins. Co. v. Huntington, 57 Kan. 744, 48 Pac. 19; Hopewill Mills v. Taunton Sav. Bank, 150 Mass. 519, 6 L.R.A. 249, 23 N. E. 327, 15 Am. St. Rep. 235; Muehling v. Muehling, 181 Pa. St. 483, 37 Atl. 527, 59 Am. St. Rep. 674; Sturgis v. Warren, 11 Vt. 433. It is held that chandeliers in a club house are affected by the lien of a mortgage: Berliner v. Piqua Club Assn., 32 Misc. (N. Y.) 470, 66 N. Y. S. 691, but it is also held that chandeliers in a theater are not to be considered fixtures as against a purchaser of them: New York L. Ins. Co. v. Allison, 107 L. ed. 179, 46 C. C. A. 229: as against a mechanic's lien on a house they have been held not to be fixtures: McFarlane v. Foley, 27 Ind. App. 484, 60 N. E. 357, 87 Am. St. Rep. 264.

[2] New York Life Ins. Co. v. Allison, 107 Fed. 179, 46 C. C. A. 229. See, also, Filley v. Christopher, 39 Wash. 22, 80 Pac. 834, 109 Am. St. Rep. 853.

and a part of the realty.[3] If permanent improvements are placed upon the land either by the mortgagor or one claiming under him, they are subject to the lien of a mortgage, and if there be subsequent mortgagees they can claim only the surplus, if there be any remaining, after the satisfaction of the first mortgage lien.[4] A mortgage upon a mill will cover all things used in it which are a part of its complete system, essential to its operation and which have been placed in it with the intention that they should be permanently attached.[5] Nursery trees planted by the mortgagor constitute a part of the realty.[6] Electric light fixtures of a hotel are a part of the realty.[7] Even if placed upon the property after the execution of the mortgage, chattels cannot be removed during the existence of the mortgage without the consent of the mortgagee.[8] A hot water heating apparatus and hot water tank and fixtures become merged in the realty.[9] But curtains, window screens, screen doors, a sideboard, a windmill, globes for electric and gas lights, and gas and electric fixtures attached to the property do not become a part of the realty covered by a mortgage.[1] A mortgagor in possession of the property mortgaged cannot, without the mortgagee's consent, authorize another to erect buildings on the mortgaged property and remove them.[2]

[3] Knickerbocker Trust Co. v. Penn. Cordage Co., 66 N. J. Eq. 305, 58 Atl. 409, 105 Am. St. Rep. 640.

[4] Mutual Benefit Life Ins. Co. v. Huntington, 57 Kan. 744, 48 Pac. 19.

[5] Cook v. Condon, 6 Kan. App. 574, 51 Pac. 587.

[6] Du Bois v. Bowles, 30 Colo. 44, 69 Pac. 1067.

[7] Canning v. Owen, 22 R. I. 624, 48 Atl. 1083, 84 Am. St. Rep. 858.

[8] Ekstrom v. Hall, 90 Me. 186, 38 Atl. 106; Great Western Mfg, Co. v. Bathgate, 15 Okl. 87, 79 Pac. 903.

[9] Young v. Hatch, 99 Me. 465, 59 Atl. 950.

[1] Hall v. Law Guarantee & Trust Soc. etc., 22 Wash. 305, 60 Pac. 643, 79 Am. St. Rep. 935.

[2] Ekstrom v. Hall, 90 Me. 186, 38 Atl. 106. See for various cases as between mortgagor and mortgagee: Broadees v. Smith, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61; Meriam v. Brown, 128 Mass. 391; Best v. Hardy, 123 N. C. 226, 31 S. E. 391; Blue v. Gunn, 114 Tenn.

§ 1197. General rule as to fixtures passing by deed.— As a general rule, all fixtures annexed to the realty pass by a deed of the land. Thus, a dyehouse and dye kettles secured in brickwork become a part of the realty, and are transferred by a deed of the land without express words.[3] Between vendor and vendee, a bathing tub and lead waterpipes fastened to the walls and floor of a building by nailing are fixtures, and pass by a deed of the land on which they are placed. "The necessary pipes for conducting water through the apartments of a dwelling-house and into a bathroom add greatly to the value, comfort, and convenience of the building, and a purchaser who appreciated such things would be sadly disappointed after he had received his deed, to find the house stripped of such fixtures."[4] A purchaser is entitled to a furnace so placed in a house, that its removal would necessarily cause the brickwork of the house adjoining the furnace to be disturbed, and a portion of the ceiling to fall.[5] Potash kettles set in an arch of mason work with a chimney, the arches being set upon a platform but not fastened to the building, were held to pass by a deed of the premises.[6] In a case in North Carolina, stills, put up for distilling, incased in brick and mortar work; a large copper kettle, put up for cooking food for hogs, which was also incased in brick and mortar work; and rough plank, put into a ginhouse to spread cotton

414, 69 L.R.A. 892, 87 S. W. 408, 108 Am. St. Rep. 912; Fuller-Warren Co. v. Harter, 110 Wis. 80, 53 L.R.A. 603, 85 N. W. 698, 84 Am. St. Rep. 867; Condit v. Godwin, 95 N. Y. S. 1122, 107 App. Div. 616; McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 12; Carpenter v. Walker, 140 Mass. 416, 5 N. E. 160; Studley v. Ann Arbor Sav. Bank, 112 Mich. 81, 70 N. W. 426; Lyle v. Palmer, 42 Mich. 314, 3 N. W. 921; Lord v. Detroit Sav. Bank, 132 Mich. 510, 93 N. W. 1063; Shepard v. Blossom, 66 Minn. 421, 69 N. W. 221, 61 Am. St. Rep. 431; Homestead Land Co. v. Becker, 96 Wis. 206, 71 N. W. 117; National Bank of Sturgis v. Levanseler, 115 Mich. 372, 73 N. W. 399.

[3] Noble v. Bosworth, 19 Pick. 314.

[4] Cohen v. Kyler, 27 Mo. 122.

[5] Main v. Schwarzwaelder, 4 Smith, E. D. 273; Mather v. Frazer, 2 Kay & J. 536.

[6] Miller v. Plumb, 6 Cowen, 665, 16 Am. Dec. 456.

seed upon, though not nailed down—were all held to be fixtures that pass by a deed conveying the fee.[7] A deed of the premises will convey shelves, drawers, and counter-tables, put up by the owner to fit the building for the use of a retail dry goods and grocery store, and without which the building is not adapted to the business.[8] Where a hotel is conveyed for

[7] Bryan v. Lawrence, 5 Jones (N. C.), 337. See Union Bank v. Emerson, 15 Mass. 159; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Bullard v. Hopkins, 128 Ia. 703, 105 N. W. 197. A stone derrick fastened by a post in the ground and by guy ropes, though it is capable of removal from point to point, is not a fixture: Honeyman v. Thomas, 25 Or. 539. A gasoline engine placed on a stone foundation in a building for the purpose of operating machinery and grinding feed is a part of the realty and passes under a deed thereof: State Security Bank v. Hoskins, 130 Iowa, 339, 8 L.R.A.(N.S.) 376, 106 N. W. 764, also see, Atlantic Safe Deposit & Trust Co. v. Atlantic City Laundry Co., 64 N. J. Eq. 140, 53 Atl. 212; Feder v. Van Winkle, 53 N. J. Eq. 370, 51 Am. St. Rep. 628, 33 Atl. 399; Temple Co. v. Penn. Mut. L. Ins. Co., 69 N. J. L. 36, 54 Atl. 295. Massive machinery for manufacturing brick fastened to brick foundations and sunk in the ground become a part of the freehold and pass with a deed thereof; Fisk v. People's Nat. Bank, 59 Pac. 63, 14 Colo. App. 21.

[8] Tabor v. Robinson, 36 Barb. 483. Brown, J., delivering the opinion of the court, said: "The question is between vendor and vendee, and is to be determined by the rules which prevail and apply between persons in that relation. The shelves and drawers the witness said were put in after the usual way. There were stancils—which I take to have been standards or supports—fastened to the wall, and the shelves shoved into them. They were put and used for a dry goods and grocery store. There were four or five counter-tables, one of them 13 feet 9 inches long by 2 or 3 feet wide, tacked to the floor to make them stay there. They were put up, the witnesses said, to stay there. Another witness said the tables were nailed by putting a nail through the leg. Another said they were nailed, and had a cleat nailed down by the side of the legs, and they had been moved about the store a number of times. The qualities of a fixture are that it must be essential to the business of the erection, and attached to it in some way, or mechanically fitted so as, in ordinary understanding, to make a part of the building itself. It must be permanently attached, or the component part of some erection, structure or machine which is attached to the freehold, and without which the erection, structure, or machine would be imperfect and incomplete. Physical annexation is not indispensable.

hotel purposes, with the appurtenances, without reservation, a hotel sign attached to a post placed firmly in the ground, seven or eight feet from the building, spiked to a sidewalk in front of the hotel, being placed in that position with intent that it should remain a permanent sign for the hotel, and being so attached as to be immovable without force, is also transferred by the deed.[9] Land, at common-law, includes

Ponderous articles may be annexed by force of their own weight, and many others might be enumerated which are really portable and movable, and are moved about from time to time, and which are nevertheless a part of the freehold. For example, rail fences upon a farm, the keys and padlocks upon buildings, parts of the machinery of mills of various kinds, etc. These are carried about from place to place, but they are essential and indispensable parts of the machinery or structure, or of the farm, and necessary to its use and enjoyment. As between vendor and purchaser, they are fixtures. The shelves, drawers, and counter-tables, in the present case, were put up by the owner to fit the building for the use of a retail dry goods and grocery store. Without them the building was not adapted to the business. They were made to fit the building which the defendant contracted to sell, and not fit for any other building. And when he removed them, the shelves, certainly, and the drawers and counter-tables, probably were little better than so much lumber. They were for these reasons fixtures, and a part of the freehold; and the defendant did wrong to remove them. The purchaser had every right to think he would receive them with his deed." See, also, Johnstone v. Philadelphia etc. Co., 129 Ala. 515, 30 So. 15, 87 Am. St. Rep. 75; Brigham v. Overstreet, 128 Ga. 447, 10 L.R.A.(N.S.) 452, 57 S. E. 484.

[9] Redlon v. Barker, 4 Kan. 445, 96 Am. Dec. 180. Safford, J., delivering the opinion of the court, said: "Let us suppose for a moment that the hotel sign—the property in dispute—had been in some way actually attached to the building at the time of the sale by Barker to Redlon, Rowley, and Jones, could it be maintained for a moment that it did not pass to the grantees under the terms of the sale as set forth? In that case it would have been a part of the building itself, requiring force to remove it, and appurtenant thereto. Besides, taking into consideration the purposes for which the building was used, it was something very necessary to a successful carrying on of the business. The building was 'Barker's Hotel,' and these words were on the sign at the time of the sale. The grantees purchased it for a hotel, with all the appurtenances thereunto belonging, and intending to keep it as such. They did so keep it, and for three months, under the name of Barker's Hotel. Under such a state of facts, and

all buildings of a permanent nature standing on it, and where there is no notice that some other person is the owner, they pass, as between grantor and grantee, with the land.[1] Where there is no agreement to the contrary a conveyance of the freehold passes all fixtures whether actually or constructively annexed to the freehold.[2] Where an intention does not appear that they shall not pass, a deed of the realty will convey store fixtures attached to a building by the owner at the time of its erection, by means of fastenings put into the wall, the object of placing in the building being more completely for the purpose for which it was erected.[3] Whether a

under the supposition above stated, can it be doubted that the sign would have passed with the premises to the grantees? We think not. But the sign, instead of being attached to the building itself, was fastened to a signpost in front of and within seven or eight feet of it, a sidewalk being between the post and the hotel. The post was sunk firmly into the ground, and the sign attached to it so as to require force to remove it. Does the fact of its being so placed render it less a part of, or less appurtenant to, the hotel premises than it would have been if actually attached to the building as above supposed? It performed the same office, and was just as necessary to the business carried on, and to be carried on, in the building in the one case as in the other. And we think that if the terms of sale would have passed the property in the sign to the grantees in the first instance, it would also pass it in the last. But it is claimed that when Barker demanded the sign from plaintiffs in error it was detached from the signpost and was without doubt a chattel, and no part of the real estate. This may all be true; but how can the rights of the parties be thereby affected? It having passed to the purchasers of the hotel once, they most certainly had the right to remove it, or let it alone as they pleased. Supposing Redlon, Rowley, and Jones had seen proper to remove some of the doors or windows, or other parts of the building, to a carpenter's or paint shop for the purpose of being repaired or painted, would that act of theirs have given Barker any right to claim them as his own? None will assert this for a moment. And yet their acts in relation to the sign were of the same character precisely."

[1] Union Cent. Life Ins. Co. v. Tillery, 152 Mo. 421, 54 S. W. 220, 75 Am. St. Rep. 480.

[2] Wolff v. Sampson, 123 Ga. 400, 51 S. E. 335.

[3] Johnston v. Philadelphia Mortgage & Trust Co., 129 Ala. 515, 30

person intended that an article should be attached to the freehold may be inferred from the nature of the article itself, as well as the relation and situation of the parties, the manner and the purpose of the annexation.[4] There should be a unity of title in the real property and the article claimed to be a fixture.[5] Where no agreement exists with the owner, a person who erects such structures as are ordinarily attached to land is presumed to intend that they shall be permanent annexations.[6] It is proper to take into consideration as pertinent, but, not controlling circumstances, the injury that the

So. 15, 87 Am. St. Rep. 75. See, also, for various cases involving the question of fixtures between grantor and grantee: Alper v. Tormey, 1 Cal. App. 634, 82 Pac. 1063; State Security Bank v. Hoskins, 130 Iowa, 339, 8 L.R.A.(N.S.) 376, 106 N. W. 764; Wolf v. Sampson, 123 Ga. 400, 51 S. E. 335; Pomeroy v. Bell, 118 Cal. 635, 50 Pac. 683; Fisk v. Peoples' Nat. Bank, 14 Colo. App. 21, 59 Pac. 63; Sherrick v. Cotter, 28 Wash. 25, 68 Pac. 172, 92 Am. St. Rep. 821; Robertson v. Parrish, 39 S. W. 646; Alberson v. Elk Creek Gold Min. Co., 39 Or. 552, 65 Pac. 978; Union Inv. Co. v. McKinney, 35 Ind. App. 594, 74 N. E. 1001; Fischer v. Johnson, 106 Iowa, 181, 76 N. W. 658; State Security Bank v. Hoskins, 130 Iowa, 339, 8 L.R.A.(N.S.) 376, 106 N. W. 764; Bullard v. Hopkins, 128 Iowa, 703, 105 N. W. 197; Wentworth v. S. A. Woods Mach. Co., 163 Mass. 28, 39 N. E. 414; Palmateer v. Robinson, 60 N. J. L. 433, 38 Atl. 957; Moore v. Moran, 64 Neb. 84, 89 N. W. 629; Dodge City Water & Light Co. v. Alfalfa Irrigation & Land Co., 64 Kan. 247, 67 Pac. 462; John Spry Lumber Co. v. The C. H. Green, 76 Mich. 320, 43 N. W. 576; Watson v. Alberts, 120 Mich. 508, 79 N. W. 1048; Climer v. Wallace, 28 Mo. 556, 75 Am. Dec. 135; Causey v. Empire Plaid Mills, 119 N. C. 180, 25 S. E. 863; Curry v. Schmidt, 54 Mo. 515; Lansing Iron & Engine Works v. Wilbur, 111 Mich. 413, 69 N. W. 667; Harris v. Hackley, 127 Mich. 46, 86 N. W. 389; McCrilles v. Cole, 25 R. I. 156, 55 Atl. 196, 105 Am. St. Rep. 875; Ice Light & Water Co. v. Lone Star Engine & Boiler Works, 15 Tex. Civ. App. 694, 41 S. W. 835; Mundine v. Pauls, 28 Tex. Civ. App. 46, 66 S. W. 254; Straw v. Straw, 70 Vt. 240, 39 Atl. 1095.

[4] Fifield v. Farmers' Nat. Bank, 148 Ill. 163, 39 Am. St. Rep. 166.

[5] Schellenberg v. Detroit Heating etc. Co., 130 Mich. 439, 57 L.R.A. 632, 91 N. W. 47, 97 Am. Dec. 489. See, also, on the question of intention: Filley v. Christopher, 39 Wash. 22, 80 Pac. 834, 109 Am. St. Rep. 853.

[6] Wood v. Holly Mfg. Co., 100 Ala. 326, 46 Am. St. Rep. 56.

removal of the article may cause the freehold and the value which the article may possess after it is removed.[7]

§ 1198. **Instances.** A grantor conveyed a house and land by a deed of warranty, and, at the time the conveyance was made, the only supply of water to the premises was through a pipe laid across the land of a third person to a highway. Here it joined a branch leading from the main pipe of an aqueduct company. The grantor at the time of his conveyance had the right, under a contract with the aqueduct company, and, on the payment of an annual compensation, to draw water from the main pipe through this branch for his own use and to dispose of it to others. Originally, the pipe from the house to the branch was laid, for the purpose of conveying water to the house, by a tenant of the grantor, under an oral license from the third person, over whose land it passed, and was bought of the tenant by the grantor at the expiration of his tenancy. After the execution of his deed, the grantor cut off this pipe at the boundary of the land which he had conveyed, and dug it up from there to its junction with the branch in the highway, and carried it off. The grantee brought an action against the grantor, and it was held that the pipe which had been dug up and carried off was a fixture appurtenant to the house, and passed to the grantee by the grantor's deed, but that the deed conveyed no right of drawing water from that pipe from the branch on the highway.[8] Gas fittings, for the reason that

[7] Filley v. Christopher, 39 Wash. 22, 80 Pac. 834, 109 Am. St. Rep. 853.

[8] Philbrick v. Ewing, 97 Mass. 133. In section 453, the effect of a trust deed becoming void on the happening of a contingency was considered. In the case cited in that section, a tract of land with a building thereon was conveyed to trustees for the purpose of maintaining and establishing a school. The trustees made an addition to the building and caused the whole to be insured for a certain sum, and the building having been destroyed by fire, the amount of the loss was paid to the trustees. The trust deed contained a provision that if the design to establish and

they are permanently attached to the freehold and, therefore, constitute a part of it, will, as distinguished from

maintain a school should prove unsuccessful, the trustees should pass a resolution to that effect, and thereupon the title should revert to the grantor. After the fire, the trustees passed a resolution of this nature, and also executed a reconveyance of the premises to the grantor. As this case involves, to some extent, the question of fixtures, the court deciding that the grantor was entitled to the proceeds realized from the policy of insurance, we deem it not improper, in this place, to call attention to this case on this point. The case referred to is Hawes v. Lathrop, 38 Cal. 493, in which Mr. Justice Rhodes, in delivering the opinion of the court, said (p. 497): "The addition to the house, which was erected by the trustees, was not personal property, but it became, like the house to which it was attached, a part of the realty. The strictness of the earlier rule requiring the structure to be attached to the soil, in order to become a fixture, is being relaxed in this country, in consequence of the manner in which very many buildings that are intended to be permanent, are erected. But the addition was, in this case, attached to the main building in such a manner that it constituted a part of the main building. The trustees, therefore, held the 'addition' by the same tenure that they held the lot and main building; and had the property reverted to the plaintiff before the fire, the 'addition' would have passed to him with the lot, without any special words of conveyance. The insurance of the building covered the 'addition' as well as the main building, and if the plaintiff is entitled to any part of the fund paid by the insurer on account of the loss, he is entitled to the whole. The trustees held the fund in their fiduciary, and not in their private, capacity. The persons to whom they paid the larger part of the money had made donations to the trustees for the benefit of the school, but without any conditions, and they had neither a legal nor equitable claim to the fund. Nor did any claim exist in favor of the persons to whom portions of the fund were paid on account of a loss of furniture sustained by one, or a personal injury sustained by the other. Upon the passage of the resolution referred to, the title to the real estate reverted to the plaintiff, and the trustees had no further duties to perform in maintaining the school, and, clearly, it would be unnecessary, and not within the scope of their duties, to expend any further sum of money for that purpose. The duties of the defendants as trustees having terminated upon the adoption of the resolution, it became their duty to pay over to the person entitled to it the insurance money in their hands. It is not and could not be claimed that the defendants are entitled to it; it could not be claimed on behalf of the school, for that no longer existed; and we are unable to see

gas-fixtures, pass by a deed of the premises.[9] So will shafting when the means by which it is suspended are fixed and permanent.[1] So will waterwheels and gearing.[2] A deed of the realty will convey hydraulic presses and steam and water pipes, if they are fastened to the freehold.[3] A threshing ma-

how anyone except the plaintiff can make out a plausible claim to it. Had the building with the addition remained upon the lot at the time of the adoption of the resolution, it would have vested in the plaintiff; and had the trustees expended the insurance money in rebuilding, before the adoption of the resolution, the new building would have reverted to the plaintiff with the lot, and it would seem just and equitable that the plaintiff should be entitled to the insurance money remaining in the hands of the trustees when the design for the school failed. It represented, in their hands, the insured building. Had the deed made it the duty of the trustees to keep the building insured, and in case of a loss, to appropriate the insurance money to the erection of another building, there would be no difficulty in holding that, as between the parties to the deed, the money would in equity be treated as land. The trustees did not exceed their duty in effecting the insurance, and it would have been their duty, had not the project for the maintenance of the school failed, to have rebuilt; but they, not having rebuilt, and having determined that it was impracticable to maintain the school, the money stands in the stead of the building, and in equity, vested in the plaintiff, upon the termination of the trust, in the same manner as would the building had they expended the money in the erection of a building."

[9] Ex parte Acton, 4 L. T., N. S., 261; Ackroyd v. Mitchell, 3 L. T. N. S., 236; Ex parte Wilson, 2 Mont. & A. 61.

[1] Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742; Corliss v. McLagin, 29 Me. 115; Harris v. Haynes, 34 Vt. 220; Longbottom v. Berry, Law R. 5 Q. B. 123; s. c. 39 Law J. (N. S.) Q. B. 37; Hill v. Wentworth, 28 Vt. 428; Bowen v. Wood, 35 Ind. 268; Ex parte Montgomery, 4 Ir. Ch. 520; Quinby v. Manhattan etc. Co., 24 N. J. Eq. 260; Mather v. Fraser, 2 Kay & J. 536; s. c. 2 Jur., N. S., 900; Allison v. McCune, 15 Ohio, 726, 45 Am. Dec. 605. In Wade v. Johnston, 25 Ga. 331, the court say that when an article can be removed without material injury to the freehold or the article itself, it is a chattel, and not a freehold. And see Farrar v. Chauffetete, 5 Denio, 527.

[2] Davenport v. Shants, 43 Vt. 546; Corliss v. McLagin, 29 Me. 115; McCluney v. Lemon, Hayes, 154; Bowen v. Wood, 35 Ind. 268.

[3] Crane v. Brigham, 11 N. J. Eq. 29; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203. See Longbottom v. Berry, Law R. 5 Q. B. 123; s. c. 39 L. J. (N. S.)

chine attached by bolts and screws to posts placed in the ground will pass as a fixture.[4] A building becomes a part of the realty if erected upon the lands of another, with no agreement that the same is to be held and regarded as personal property, and it will pass with a conveyance of the land.[5]

Q. B. 37, 44; Baker v. Davis, 19 N. H. 325; Bond v. Coke, 71 N. C. 97. A deed of the land will convey steam engines: Gary v. Burquieres, 12 La. Ann. 227. But see Randolph v. Gwynne, 7 N. J. Eq. 88, 51 Am. Dec. 265. The poles, wires, and lamps of an electric light company pass as fixtures: Keating Implement etc. Co. v. Marshall Electric Light etc. Co., 74 Tex. 605; Regina v. North Staffordshire Ry. Co., 3 El. & E. 392. And see, further, as to electric lighting apparatus, Vail v. Weaver, 132 Pa. St. 363, 19 Am. St. Rep. 598; New York Security Co. v. Saratoga Gas. Co., 34 N. Y. Sup. 890; Havens v. West Side Electric Light Co., 44 N. Y. St. Rep. 589, 17 N. Y. Sup. 580. Embankment, ties and rails pass by deed of the real property, Van Husan v. Omaha Bridge & Terminal Ry. Co., 92 N. W. 47, 118 Iowa, 366. They are not to be considered trade fixtures but as part and parcel of the land itself, Omaha Bridge & Terminal Ry. Co. v. Whitney, 99 N. W. 525, 68 Neb. 389.

[4] Wiltshear v. Cottrell, 1 El. & B. 674; s. c. 22 Law J. 177. Iron pipes used for heating purposes will pass as fixtures: Quinby v. Manhattan etc. Co., 24 N. J. Eq. 260; Ex parte Wilson, 2 Mont. & A. 61. A windlass which was firmly fastened in a slaughterhouse passes by a conveyance: Capen v. Peckham, 35 Conn. 88. The machinery of a sash factory will pass as a fixture: Green v. Phillips, 26 Gratt. 752, 21 Am. Rep. 323. So will locks and doors: Pettengill v. Evans, 5 N. H. 54. An awning with its frames and a marble meat slab attached to a counter will pass by a conveyance: Re Hitchings, 4 Nat. Bank. Reg. (2d ed.) 384. The machinery of a paper mill will pass also: Bowen v. Wood, 35 Ind. 268. So will the malt mill and other machinery of an innkeeper employed in his business: Warmsley v. Milne, 7 Com. B., N. S., 115. Sawmill machinery will also pass: Davenport v. Shants, 43 Vt. 546. A cotton-gin which is fastened to a house by nails and braces will pass: Degraffenreid v. Scruggs, 4 Humph. 451, 40 Am. Dec. 658. A bell placed in a tower of a factory will pass: Alvord Carriage Mfg. Co. v. Gleason, 36 Conn. 86. But a bell placed upon two posts for temporary use, and not fastened to them, will not pass as a fixture: Cole v. Roach, 37 Tex. 413. See, also, Weston v. Weston, 102 Mass. 514. Dry kiln, planing machine, matching machine pass as fixtures: Studley v. Ann Arbor Savings Bank, 112 Mich. 181, 70 N. W. 426.

[5] Richtmyer v. Morss, 3 Keyes, 349; s. c. 4 Abb. N. Y. App. 55. See, also, Pea v. Pea, 35 Ind. 387; Cole v. Stewart, 11 Cush. 181; But-

§ 1199. **Notice of fixtures.**—Where the grantee has notice of the right of another to remove annexations to the land, they do not pass by a deed.[6] If a purchaser at an execution sale has notice that another person has the right to remove a house erected on the land, he is not entitled to damages for the removal.[7] Some countenance has been given to the proposition that a purchaser would be bound by an agreement for the removal of fixtures, even if he had no notice of it.[8] But on this point Mr. Chief Justice Perley, of New Hampshire, in delivering the opinion of the court, said: "We are not yet prepared to acquiesce in such a doctrine. Primarily, and in the absence of notice to the contrary, the purchaser would seem to have a right to suppose that he was buying with all the incidents and appurtenances which the law, as a general rule, annexed to his purchase; and we should hesitate before we held that he could be affected by a private agreement not brought to his knowledge, which changed the

ler v. Page, 7 Met. 40, 39 Am. Dec. 757. As to grist mills, see Potter v. Cromwell, 40 N. Y. 287, 100 Am. Dec. 485; Gardner v. Finley, 19 Barb. 387; Place v. Fagg, 4 Man. & R. 277; s. c. 7 Law J. K. B. 195. As to cider mills and press, see Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780; Moore v. Moran, 64 Neb. 84, 89 N. W. 629; Fischer v. Johnson, 76 N. W. 658, 106 Iowa, 181, holding that where corncribs are erected by one having no estate in the land, an agreement that the structures shall remain the property of the person making them will be implied in the absence of any other facts and circumstances tending to show a different intention.

[6] Davis v. Buffum, 51 Me. 160; Coleman v. Lewis, 27 Pa. St. 291; Wilgus v. Gettings, 21 Iowa, 177; Haven v. Emery, 33 N. H. 66; Sowden v. Craig, 26 Iowa, 156, 96 Am. Dec. 125; Pierce v. Emery, 32 N. H. 484; Morris v. French, 106 Mass. 326; Mitchell v. Freedley, 10 Pa. St. 198; Hensley v. Brodie, 16 Ark. 511; Hunt v. Bay State Iron Co., 97 Mass. 279; Walker v. Schindel, 58 Md. 360.

[7] Coleman v. Lewis, 27 Pa. St. 291.

[8] See Mott v. Palmer, 1 Comst. 564; Ford v. Cobb, 20 N. Y. 344; Russell v. Richards, 10 Me. 429, 26 Am. Dec. 254, 11 Me. 371, 26 Am. Dec. 532; Goddard v. Gould, 14 Barb. 662; Tapley v. Smith, 18 Me. 12; Hilborne v. Brown, 12 Me. 162; Hensley v. Broder, 16 Ark. 511; Sheldon v. Edwards, 35 N. H. 279; Crippen v. Morrison, 13 Mich. 34.

natural and legal character of the property. But if the purchaser buy with notice of the agreement, and of the party's rights under it, he will be bound by it."[9] And in the same strain is the language of Mr. Justice Foster of Massachusetts: "Upon the question whether the character of property can be changed by agreement from realty to personalty as against a bona fide jurchaser without notice, there is not entire harmony of the authorities; but we regard the better opinion as being that such a purchaser must have notice of the agreement before he acquires title, or he will be entitled to claim and hold everything which appears to be, and by its ordinary nature is, a part of the realty. To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles."[1] B

[9] In Haven v. Emery, 33 N. H. 66, 69.

[1] In delivering the opinion of the court in Hunt v. Bay State Iron Co., 97 Mass. 279, 283. See, also, Powers v. Dennison, 30 Vt. 752; Thropp's Appeal, 70 Pa. St. 395; Fortman v. Goepper, 14 Ohio St. 565; Brennan v. Whitaker, 15 Ohio St. 446; Fryatt v. Sullivan, 5 Hill, 116; Davenport v. Shants, 43 Vt. 546; Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675; Bringholff v. Munzenmaier, 20 Iowa, 513; Trull v. Fuller, 28 Me. 545; Landon v. Platt, 34 Conn. 517; Bratton v. Clawson, 2 Strob. 478; Dostal v. McCadden, 35 Iowa, 318; Pierce v. George, 108 Mass. 78, 11 Am. Rep. 310; Dame v. Dame, 38 N. H. 429, 75 Am. Dec. 195; Oliver v. Vernon, 6 Mod. 179; Crippen v. Morrison, 13 Mich. 23; Yater v. Mullen, 23 Ind. 562, 24 Ind. 277; King v. Wilcomb, 7 Barb. 263. See, also, generally, on the question of notice of fixtures, McCracken v. Hill, 7 Ind. 30; Wilshear v. Cottrell, 1 El. & B. 672; Raymond v. White, 7 Cowen, 319; Ex parte Scarth, 1 Mont. D. & D. 240; Tifft v. Horton, 53 N. Y. 377, 13 Am. Rep. 537; Frankland v. Moulton, 5 Wis. 1; Voorhees v. McGinnis, 48 N. Y. 278; Gooding v. Riley, 50 N. Y. 400; Eastman v. Foster, 8 Met. 19; Farmers' Loan & Trust Co. v. St. Jo. Ry. Co., 3 Dill. 412; Potts v. New Jersey Arms Co., 17 N. J. Eq. 395; Ex parte Daglish, Law R. 8 Ch. 1072; Hawtry v. Butlin, Law R. 8 Q. B. 290; Meux v. Allen, fiths, Law R. 1 Com. P. 349; Mather 23 Week. R. 526; Branton v. Grif- v. Fraser, 2 Kay & J. 536; Begbie v. Fenwick, Law R. 8 Ch. 1075, n;

where a tenant is in possession, his possession is notice of his rights.[2]

§ 1200. **Conveyance of structure passing title to land.**—Courts have frequently decided that a conveyance of a building or barn used as a term of description, will convey also the land upon which the building or structure may be erected.[3] Referring to the cases in which this principle has been announced, and the reason upon which it is founded, Bigelow, J., observes: "These authorities rest upon the sound and reasonable rule that whenever land is occupied and improved by buildings or other structures, designed for a particular purpose, which comprehends its pratical use and enjoyment, it is aptly designated and conveyed by a term which described the purpose to which it is thus appropriated." [4]

§ 1201. **Land necessary to use of structure.**—But only so much of the land as is necessary to the use of the structure will pass by implication by a conveyance of the structure itself, and this rule applies also to an exception contained in a deed. Thus, a person granted by deed to another a tract of land bounded on all sides by land of other persons named in the deed, but excepted from the operation of the deed "the

s. c. 24 L. T., N. S., 58; Boyd v. Shorrock, Law R. 5 Eq. 72, S. C. 37 L. J. Ch. 144.

[2] Wing v. Gay, 36 Vt. 261, 268; Dubois v. Kelly, 10 Barb. 508. See in this connection, however, Powers v. Dennison, 30 Vt. 752; Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675. And see Slack v. Gay, 22 La. Ann. 387.

[3] Forbush v. Lombard, 13 Met. 109; Langworthy v. Coleman, 18 Nev. 440; Whitney v. Olney, 3 Mason, 280; Blake v. Clarke, 6 Greenl. 436, 4 Cruise Dig. (Greenl. ed.) tit. 32, p. 21, § 40, n: Hammond v. Abbott, 166 Mass. 517, 44 N. E. 620; Bowden v. Hunt, 123 Mich. 295, 82 N. W. 52, 6 Detroit Leg. N. 1054; Wade v. Odle, 21 Tex. Civ. App. 656, 64 S. W. 786.

[4] In Johnson v. Rayner, 6 Gray, 107, 110. In Wooley v. Groton, 2 Cush. 305, it is held that by the grant or exception in a deed of a "town pound," the land on which it stands is conveyed or excepted as a parcel, and not as an appurtenance.

mills and water privileges," then owned by the grantor. At the time of the execution of the deed there was about an acre of ground, lying common and unfenced as a millyard; this acre tract was used for the storage of timber, and for passing and repassing to and from the mills, and a portion of it was afterward used by the owners of the mills for a garden; the owners also used it as a site for builings not connected with the mills. It was decided that the land which had been used for a garden and for such buildings was not included in the exception of the grantor's deed.[5] A deed which describes the northerly boundary of the premises conveyed as "four feet north from the northerly side of the building, now standing on said premises," includes the land on the northerly side of the building to the distance of four feet from the eaves, as the latter are the extreme part of the building.[6]

[5] Forbush v. Lombard, 13 Met. 109. Wilde, J., delivering the opinion of the court, said (p. 114): "We think the rule of construction is well established, that by the grant of a mill, the land under the mill and adjacent thereto, so far as necessary to its use, and commonly used with it, will pass by implication: Blake v. Clark, 6 Greenl. 436. And the same rule of construction applies to an exception in a grant. But to justify such an implication, it should be made to appear that the land adjacent was necessary for the use of the mill; and this was not proved at the trial. On the contrary, it was proved and admitted that the land claimed by the defendant as a mill yard has been used for purposes disconnected with the mills. A dwelling-house and barn have been erected thereon, and part thereof has been used as a barnyard, and for raising garden vegetables. And this action is brought for erecting three other small buildings within the limits of the millyard, so called, and continuing the same from the year 1839 to the day of the date of the writ. These facts are conclusive against the defendant's claim that the parts of the land thus used and occupied were necessary for the use of the mills. They cannot, therefore, pass as incident to a grant of the mills, or as parcel thereof. The land claimed was not fenced, nor was the millyard designated by any known bounds. Nothing more, therefore, can be included within the exception in the deed from Whitman to Hilton than was necessary for the use of the mills."

[6] Millett v. Fowle, 8 Cush. 150. The same ruling was made under

§ 1202. Agreement for removal.—The parties may control by an agreement, as between themselves and those who have knowledge of it, the legal effect of attaching an improvement of a permanent character to the land.[7] But

a lease where it was held that a lease of a "building" conveyed the land under the eaves, if the lessor owned the land: Sherman v. Williams, 113 Mass. 481, 18 Am. Rep. 522. In the latter case, Endicott, J., who delivered the opinion of the court, said: "The first question to be determined on this report is: Did the lease include the strip of land, ten inches wide, under the eaves in the rear of the brick building? Did it pass under the description, 'a certain brick building situated in said Boston, on Milk street, so called, and numbered 5, and 9, on said street?' The strip ten inches wide was substantially covered by the eaves of the building, and was owned by the defendants. The well-settled rule that the grant of a house carries with it the title to all the lands under the house which the grantor owns, extends to all the land covered or occupied by the house itself. As the eaves are a part of the building, the land under them is included in the description, when owned by the grantor. Where land is conveyed, bounded on a house as a monument, the land to the edge of the eaves only passes, that being the extreme part of the building; so where the house itself is granted or demised, the extreme parts of the house are the bounds and limits of the conveyance, and such title as the grantor has to the land thus occupied by the whole house passes by the grant or demise." See, also, Carbrey v. Willis, 7 Allen, 364, 83 Am. Dec. 688; Gear v. Barnum, 37 Conn. 229.

[7] See Smith v. Waggoner, 50 Wis. 155; Schumacher v. Edward P. Allis Co., 70 Ill. App. 556; Morrow v. Burney, 51 S. W. 1078, 2 Ind. T. 440. Although the owner of realty may, by proper contract of sale, sever a fixture from the realty, thereby converting it into a personal chattel, without at the time physically detaching such fixture, yet the contract must be in writing and be executed with the same formality as a conveyance of the realty, since in law the fixture is a part of the realty: Johnston v. Philadelphia Mortgage & Trust Co., 30 So. 15, 129 Ala. 575, 87 Am. St. Rep. 75. But where a chattel is annexed to realty under an agreement that the chattel shall remain personal property, such agreement need not be in writing: Pile v. Holloway, 129 Mo. App. 593, 107 S. W. 1043. Machinery placed upon land by a purchaser under an executory contract does not become a part of the realty where there is an expressed agreement between the vendor and purchaser that the machinery shall remain the personal property of the purchaser. The vendor cannot enforce a provision of the agreement limiting the time within which the machinery must be removed by the purchaser in case of default in making payments

a parol agreement of this character will not bind a subsequent vendee who has no notice of it. Hence, where a fence is built by a person upon another's land, under a parol agreement that the builder might remove it at pleasure, it becomes a fixture which will pass with a conveyance of the land to a *bona fide* purchaser who has no notice of the adverse title to the fence.[8] And the same principle, of course, applies to

for the property, where such default is due to the fault of the vendor. Rodgers v. Hite, 143 Fed. 594. An agreement for removal of personal property otherwise annexed to the real property so as to become a part thereof may be implied where an intention not to annex the property permanently to the freehold is shown. Albertson v. Elk Creek Gold-Min. Co., 39 Or. 552, 65 Pac. 978.

[8] Rowand v. Anderson, 33 Kan. 264, 52 Am. Rep. 529. See Sampson v. Graham, 96 Pa. St. 405. Where an act of sale was made of a plantation with the appurtenances thereto, and in the act is was stated that the appurtenances were included in a list annexed to the act, and the list did not include the fencing of the plantation, it was held that the fencing passed nevertheless with the land: Bagley v. Rose Hill Sugar Co., 35 So. 539, 111 La. 249. In Rowand v. Anderson, 33 Kan. 264, 267, 52 Am. Rep. 529, Johnston, J., in delivering the opinion of the court, said: "There is considerable disagreement in the decisions of the courts with respect to how far the doctrine of modifying the general law of fixtures, by agreement may be carried. Some of the cases would seem to go to the extent of holding that parties may, by agreement change the nature of property, make that which would otherwise be a part of the realty, personal property, and that a purchaser of the realty would be bound by such agreement, even though he had no notice of the same. Others of them are to the effect that the distinctions between realty and personalty cannot be changed by the mere agreement of the parties, and that a purchaser of real estate, in the absence of notice to the contrary, has a right to suppose that he takes with it every appurtenance which, under the general rules of law, passes with the grant of land, and that he cannot be affected by any secret claim or private agreement of which he has had no notice. It may be conceded that a party who, under a parol permission or license, places upon the land of another a permanent improvement, with the right, when he desires, to enter and take it therefrom, may exercise that right at any time before the permission or license is revoked by the landowner, and probably he has the right to enter to remove the fixture within a reasonable time after the revocation; and it would seem that any subsequent vendee who purchased the land with notice of such parol

buildings and all other structures.[9] "The policy of our law," said Mr. Chief Justice Williams, of Connecticut, "is that titles to real estate shall appear upon record, so that all may, in this way, be informed where the legal estate is. But were this new mode of conveyance to prevail, encumbrances might frequently be found to exist, against which no vigilance could guard, no diligence protect. Our records would be fallacious guides, and when we had gained all the information they could give, we should remain in doubt as to the title. It is much better to leave those who had ventured to rely upon the word or honor of another to resort to that word or honor for their redress, than to suffer a person who had resorted to the official register to be defeated by secret claims of this kind. The law cannot prefer the claims of those who take no care of themselves, to those who have faithfully used all legal diligence. If a loss is to be sustained, it is more reasonable that he who has neglected the means the law put into his power should suffer, rather than he who has used those means."[1] Where a building has been erected upon the land of another, so as to become a fixture, with the understanding that the builder is to remove it upon receiving notice from the owner of the land, a subsequent mortgagee, having no notice of such understanding, is entitled, after a decree of foreclosure and entry, to possession of the premises, the building as well as to the land. An action of trespass may be maintained by him against the person erect-

agreement or license, and of the interest of the parties in the fixture, would be bound by such agreement. But we think this doctrine cannot be carried to the extent of binding or affecting injuriously third parties to whom the land has been conveyed without reservation, and to whose notice the parol license had not been brought." See, also, Walker v. Schindel, 58 Md. 360.

[9] Powers v. Dennison, 30 Vt. 752; Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675; Peaks v. Hutchinson, 96 Me. 530, 59 L.R.A. 279, 53 Atl. 38.

[1] In Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675.

ing the building if he then remove it.[2] If an engine for the propulsion of machinery is purchased by the owner of a mill who executes a chattel mortgage on it to secure the payment of the price, although the owner may attach it physically to the freehold, it will remain personal property where the rights of third persons will not be prejudicially affected.[3] Where an agreement is made that the title to chattels shall not pass until payment is made for them they will remain personal property, unless they, or the realty would be seriously injured by their removal.[4] So, where it is provided that the title to machinery shall remain in the vendor until payment, a purchaser from the vendee cannot before payment attach the machinery to the mill so as to convert it into realty.[5] An agreement of this character where the removal of the machinery can be made without material injury to the real estate manifests an intention that the property shall remain personally, and this will be sufficient, to cause it to remain such.[6]

[2] Powers v. Dennison, 30 Vt. 752. The possession of the party erecting the building is said not to be notice: Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675. Where buildings were erected by a tenant under an agreement with the landlord whereby the tenant reserved the right to remove the buildings at any time during the lease, it was held that a subsequent purchaser of the property without notice of the agreement took the buildings as a part of the land: Union Central Life Ins. Co. v. Tillery, 152, Mo. 421, 54 S. W. 220, 75 Am. St. Rep. 480. A purchaser of realty is bound only to take notice of the record title of the realty and is not bound to examine the records for chattel mortgages for he is not affected by the record of a chattel mortgage upon fixtures; Ice Light & Water Co. v. Lone Star Engine & Boiler Works, 15 Tex. Civ. App. 694, 41 S. W. 835.

[3] Edwards etc. Lumber Co. v. Rank, 57 Neb. 323, 77 N. W. 765, 73 Am. St. Rep. 514.

[4] Duntz v. Granger Brewing Co., 41 Misc. Rep. 177, 83 N. Y. S. 957.

[5] Gill v. De Armant, 90 Mich. 425, 51 N. W. 527.

[6] Schellenberg v. Detroit Heating & Lighting Co., 130 Mich. 439, 57 L.R.A. 632, 90 N. W. 47, 97 Am. St. Rep. 489. See, also, the case of a planer and matcher for a saw mill, under a contract reserving title: Wm Cameron & Co. v. Jones, 41 Tev. Civ. App. 4, 90 S. W. 1129.

§ 1203. **Chattels not annexed to the realty.**—The general rule is that chattels which are not annexed to the freehold do not pass by a conveyance. An exception to this general rule is admitted in the case of articles which are constructively annexed, as doors, keys, locks, and windows of a house. "If there be anything well settled in the doctrine of fixtures, it is this: that to constitute a fixture, it is an essential requisite that the article be actually affixed or annexed to the realty. The term itself imports this."[7] Hence boards, rails, and bricks, cut and made from the soil of land belonging to the United States, do not pass to one who subsequently purchases the land from the government, although, at the time of the purchase, the several chattels are still upon the land.[8] And so cordwood and other timber cut into merchantable form, remaining on public land at the time the patent therefor is issued, form personal property, and the patentee is not entitled to it.[9] "A certificate of purchase or

[7] Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634. It may, in certain cases, be left to the jury to determine whether certain articles actually form a part of the realty: Leonard v. Stickney, 131 Mass. 541.

[8] Carpenter v. Lewis, 6 Ala. 682. Counters, meat racks and ice box used in a grocery business and meat shop, not attached to the real property, do not pass with a deed to the real property: Griffin v. Jansen, 19 Ky. Law Rep. 19, 39 S. W. 43.

[9] Peck v. Brown, 5 Nev. 81. Whitman, J., delivering the opinion of the court, said: "Unless the right to the timber cut passed to the respondent by his patent, he had none; and it could only pass as a fixture on or appurtenance to the realty; but timber felled by act of man, or wood cut, is personal property. Some of the decided cases go a great length in passing with the freehold what abstractly would be held personalty; perhaps none has further extended the rule or its application than Farrar v. Stackpole, 6 Me. 155, 19 Am. Dec. 201; and Kittridge v. Woods, 3 N. H. 503, 14 Am. Dec. 393. In the first of these cases, it was held that a mill chain, dogs, and bars in their appropriate places when the deed was made, the chain attached by a hook to a piece of draft chain, which was fastened to the shaft by a spike, passed under a deed conveying a sawmill with the privileges and appurtenances. This decision was based upon the principle 'that certain things, personal in their nature, when fitted and prepared to be used with real estate, change their character and appertain to the realty, as an incident or accessory to

patent vests in the patentee a title to the land, and generally all that is growing on, or is in the contemplation of law attached to the land, as houses, fences, growing timber, grain, etc.; and it is said that fallen timber passes with the land. But that which has been severed from the land, and by the art and labor of man converted into personal property, such as implements of husbandry, barrels, furniture, or even rails when not put into a fence or evidently intended to be so used upon the land (which could not be inferred if made by a stranger), do not pass with it, any more than the grain, grass, or fruit, which has grown upon and been gathered from it." [1]

§ 1204. **Same subject continued—Illustrations.**—A deed will not convey as fixtures or appurtenances to the land, hewed timber and fence posts unattached to the soil, and oral evidence is inadmissible to show that it was the intention of the parties that the deed should embrace or pass the title to these articles.[2] Wood and timber cut down before

its principal.' In the second case cited under the same rule, it was held that certain heaps of manure passed by deed for the land as appurtenant, being intended to be used upon it, and for its benefit. In the present case, the timber and wood were cut expressly to be taken from the premises, and the rule of decision quoted has no application."

[1] Chief Justice Wilson delivering the opinion of the court in Wincher v. Shrewsbury, 2 Scam. 283, 284, 35 Am. Dec. 108. See, also, Woodruff v. Roberts, 4 La. Ann. 127; Robertson v. Phillips, 3 Greene, G. 220.

[2] Cook v. Whiting, 16 Ill. 480. Scates, C. J., speaking for the court, said: "Viewing a vendee as one strictly protected in regard to things actually annexed or attached to, and in regard to things not fully severed from, the freehold, we should give him all that in law belongs to the land, under the terms and description in his deed. But after doing this in its most extended sense, we are not able to include these hewed timbers, posts, and round logs, lying loosely about upon the land, although originally provided and intended for a granary on the land, as fixtures becoming part of it. In Wincher v. Shrewsbury, 2 Scam. 283, 35 Am. Dec. 108, this court held that rails made upon Congress land and piled, would not pass to the purchaser by the usual description of land, although the act of severance might have been a trespass. I know that

a sale of the land becomes personal property, and hence, being severed from the inheritance, does not pass to the purchaser.[3] A rough split stone brought from a distance and placed in a dooryard for the purpose of being used at some future time as a doorstep, but not placed in position or used as such, is a chattel, and not a fixture.[4]

this subject is full of difficulty; and a question respecting such timber as may have been severed from the land by storms, decay, and accidents, will deserve serious consideration when presented. But here the separation by the act of the owner was complete, and he had unquestionably converted it into personalty, though with the intention of reannexing it to the freehold at a future time. But before this was done he sold his land and conveyed it, not only by the usual terms, but by a general description which included in its boundaries more than he intended to convey, and from which he reserved or excluded a part by specified boundaries. We cannot from this particularity found in the deed, suppose any more intended than is provided for in it, and fixtures will not include these articles as part of the description of land, tenements, or hereditaments appertaining thereto. But it is now insisted upon and claimed to be included under 'appurtenances' within the true intent of the deed. 'This term, both in common parlance and in legal acceptation, is used to signify something appertaining to another thing as principal, and which passes as an incident to the principal thing. Lord Coke says (Co. Lit. 121*b*) a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal.' Harris et al. v. Elliott, 10 Peters, 53, 54, 9 L. ed. 344; Leonard v. White, 7 Mass. 6–8, 5 Am. Dec. 19. See, also, Jackson v. Hathaway, 15 Johns. 451, 8 Am. Dec. 263. So these materials cannot pass under the term 'appurtenances.'"

[3] Crouch v. Smith, 1 Md. Ch. 401.

[4] Woodman v. Pease, 17 N. H. 282. Woods, J., said: "The term 'fixture' may embrace other things than such as are denoted by the word in its strict etymological sense; and whatever has been placed upon the soil, or upon a building for the purpose of being used as a part of the realty, may properly fall under the denomination of a fixture, although not so attached to it that it cannot be severed without disturbing or breaking the soil. But a chattel that is fit to be annexed to the freehold, and has been brought upon it with an intention on the part of the possessor to annex it, does not become a fixture unless actually annexed or placed in the position in which it was intended to be used, and in which it is adapted for use. These principles are so obvious, and admit of illustration so diversified and so familiar, that it is unnecessary to adduce authority or argument to

§ 1205. Use on the land.—The same principles that apply to timber and fence rails when severed from the freehold, also govern, when the question concerns a stone split out and slightly removed, and laid up for the purpose, and with the intention by the owners of the farm upon which it was quarried and left standing, of using it in the construction of a tomb elsewhere; such a stone would not pass by a deed of the farm. The rule with respect to chattels of this character is, that if they are intended for use on the land on which they lie, they pass by a deed of the realty; but if they are intended for use elsewhere, they do not pass by virtue of the deed.[5] As illustrating the proposition that a chattel cannot

sustain them. Their application to this case is very plain. The stone was brought into the yard by Peabody, for the purpose of being devoted at a future time to the finishing of the house which he had built. He intended to annex it to the house and to make it a part of it. In that respect it was like bricks, lime, lumber, or other materials to be used in building. So long as they remain unannexed to the house, they continue to be chattels; and assume the character of the realty and become assimilated with the land, by the process, whatever it may be, which prepares them for and places them in their positions to be used and enjoyed with the structure or with the soil. This stone was fit to be made a doorstep. It was carried there for the purpose of building a fence on the serve as such, and by such position adaptation for use, become parcel of the house itself. But that plan was never executed, and the stone remained a chattel, and did not become a fixture in any sense."

Timber cut from land and piled thereon, though cut with the purpose of builidng a fence on the land, does not become a part of the realty unless actually attached thereto: Longino v. Wester (Tex. Civ. App.) 88 S. W. 455. A hop press not attached to the building do not pass as an appurtenant of the land. Sherrick v. Cotter, 28 Wash. 25, 68 Pac. 172, 92 Am. St. Rep. 821. A safe placed on foundation of stone and cement constructed for the purpose of supporting the safe but which was not attached to the foundation was held not to be a fixture even though the safe could not be removed from the building without taking out a part of the wall of the room in which it was situated: Parker v. Blount County, 148 Ala. 275, 41 So. 923.

[5] Noble v. Sylvester, 42 Vt. 146. It was held that as there was nothing about the stone or its position to indicate the use to which it was to be put, this was a proper subject of explanation between the seller

be converted into realty except by attaching it to real estate so as to make it a fixture, and if it is not annexed in this mode, it retains its character as personalty, we may cite a case where this rule was applied with reference to a sawmill built upon timbers, lying upon the surface of the ground, erected for the purpose of sawing timber within a convenient distance, and then intended to be removed to another place. As the sawmill was not connected with the freehold, nor essential to its full enjoyment, it could be regarded in no other light than a mere personal chattel, and would not be transferred by a conveyance or patent of the land.[6] A mill and gin stand not attached to the soil except by its own weight, though it may be used for the purposes of a farm, is not a part of the realty; nor is a bell used for farm purposes, where it is set upon posts only, and is not permanently annexed to the soil.[7]

and purchaser at the time the deed was executed, and such explanation, though accompanied by a formal parol exception of the stone, which was unnecessary, might be by parol. Structural iron and cut stone, lying on a lot and intended to be used in a partially constructed building on the lot, held to pass by the owner's warranty deed of the lot: Byrne v. Werner, 138 Mich. 328, 69 L.R.A. 900, 101 N. W. 555, 11 Detroit Leg. N. 607, 110 Am. St. Rep. 315.

[6] Brown v. Little, 6 Nev. 244. Lewis, C. J., speaking for the court, said (p. 251): "We know of no method of converting a personal chattel into real estate, or giving it the character of realty, except by making it a fixture; and if it be not so attached as to become a future, it retains its character of personalty entirely unmodified or affected by its situation. That an erection of any kind placed on the land, but not annexed or fastened to, or imbedded in the soil, and not intended to be permanent, or left indefinitely thereon, cannot be deemed a fixture, is a proposition, we think, fully warranted by almost the entire weight of decisions; and if not a fixture, we are authorized in concluding that it is a personal chattel merely, and must be regulated by the law governing that class of property."

[7] Cole v. Roach, 37 Tex. 412. The case was reversed upon another point, but the court observed that these articles were not a part of the real estate. With reference to a cistern set upon blocks by the house to catch water, the court, per Ogden, J., observed (p. 418): "In a suit by the heir against the administrator, a cistern sitting against the wall was held in Massa-

§ 1206. Temporary removal.—Mr. Justice Cowan, after adverting to the general rule that anything of a personal nature, not attached to the freehold, cannot be considered

chusetts to be a fixture, and a part of the realty; but as between a landlord and a tenant, it has been often held by the courts to be a personal chattel, subject to removal by the tenant. We have found no case deciding the question when raised as between the vendor and vendee of realty; but we are inclined to the opinion that in this country where, in many instances, cisterns are used as a substitute for wells, and where a house or farm without a cistern attached would often be considered almost uninhabitable, where a cistern has been placed against the house for the purpose of supplying the inmates with water, and has been used and depended upon for that purpose, it should be considered a part of the realty as much as the key to the door, or the fence around the yard or field. It has become a necessity to the farm or dwelling, and should pass with it."

In Winslow v. Merchants' Insurance Co., 4 Met. 306, 38 Am. Dec. 368, Chief Justice Shaw, delivering the opinion of the court, to the effect that a steam-engine, boilers, and machinery placed in a building intended for the manufacture of steam-engines, are fixtures, says, however (p. 314): "As to what shall be deemed fixtures and part of the realty, when the question does not arise as between landlord and tenant, or tenant for life and remainderman, in regard to improvements made by the tenant, it is difficult to lay down any general rule which shall constitute a criterion. The rule that objects must be actually and firmly affixed to the freehold to become realty, or otherwise to be considered personalty, is far from constituting such criterion. Doors, window blinds, and shutters, capabe of being removed without the slightest damage to a house, and even though at the time of a conveyance, an attachment, or a mortgage, actually detached, would be deemed, we suppose, a part of the house, and pass with it. And so, we presume, mirrors, wardrobes, and other heavy articles of furniture, though fastened to the walls by screws with considerable firmness, must be regarded as chattels. The difficulty is somewhat increased when the question arises in respect to a mill or manufactory, where the parts are often so arranged and adapted, so ingeniously combined as to be occasionally connected or disengaged, as the objects to be accomplished may require. In general terms, we think it may be said that when a building is erected as a mill, and the water works or steam works which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, though not at the time of the conveyance, attachment, or mortgage, attached to the mill, are yet parts of it, and pass with it by a

as an incident to the land, even in a case between vendor and vendee, observes: "I have said that as a general rule they cannot be considered an incident unless they are affixed. This is not universally so. A temporary disannexing and removal, as of a millstone to be picked, or an anvil to be repaired, will not take away its character as a part of the freehold. Locks and keys are also considered as constructively annexed; and, in this country, it must be so with many other things which are essential to the use of the premises. Our ordinary farm fences of rails, and even stone walls, are affixed to the premises in no other sense than by the power of gravitation. It is the same with many other erections of the lighter kind about a farm. I shall hereafter have occasion to notice these, and a few other like instances of constructive fixtures. I admit that some of the cases are quite too strict against the purchaser; but as far as I have looked into them, and I have examined a good many, both English and American, they are almost uniformly hostile to the idea of mere loose, movable machinery, even where it is the main agent or principal thing in prosecuting the business to which a freehold property is adapted, being considered as a part of that freehold for any purpose. To make it a fixture, it must not only be essential to the business of the erection, but it must be *attached to it* in some way; at least, it must be mechanically fitted, so as in ordinary understanding to make a part of the building itself." [8] In an early case in Maryland, it was

conveyance, mortgage, or attachment: Powell v. Monson & Brimfield Mfg. Co., 3 Mason, 466; Farrar v. Stackpole, 6 Greenl. 154, 19 Am. Dec. 201; Gray v. Holdship, 17 Serg. & R. 415, 17 Am. Dec. 680; Voorhees v. Freeman, 2 Watts & S. 116, 37 Am. Dec. 490." See as to rails and bricks, Thweat v. Stamps, 67 Ala. 96.

[8] In Walker v. Sherman, 20 Wend. 636, 639. With reference to fixtures of various kinds, see Re Dawson, Ir. Law R. 2 Eq. 218; Rogers v. Brokaw, 25 N. J. Eq. 496; Baker v. Davis, 19 N. H. 325, 332; Hutchinson v. Kay, 23 Beav. 413; Gale v. Ward, 14 Mass. 352, 7 Am. Dec. 223; Swift v. Thompson, 9 Conn. 63, 21 Am. Dec. 718; Pierce v. George, 108 Mass. 78, 11 Am. Rep. 310; Tobias v. Francis, 3

held, upon a sale of a distillery and improvements upon execution, that the sheriff's deed passed the pumps, cistern, door, and iron grating connected with the property, but did not con-

Vt. 425, 23 Am. Dec. 217; Longbottom v. Berry, Law R. 5 Q. B. 123; s. c. 39 Law J. (N. S.) Q. B. 37; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Taffe v. Warnick, 3 Blackf. 111, 23 Am. Dec. 383. In Tobias v. Francis, supra, the owner of a wool-carding factory conveyed it with all the machinery. He took from the vendee a mortgage deed, at the same time, of the same property, for the purpose of securing the payment of the purchase money. The vendee entered, took, and retained possession. It was connected with the building in which it was worked by a band only, but it might be removed from the building without being first taken in pieces. Change of possession being necessary to the validity of a chattel mortgage, it was held that the machinery was personal property, and notwithstanding the mortgage, was liable to attachment at the suit of any creditor of the vendee. Gale v. Ward, *supra*, was a similar case. P. & D. Brigham, the owners, conveyed the land "having a wool-carding factory, and the appurtenances for carrying on the same, which are comprised in this grant," to one Beaton. Beaton at the same time gave to the Brighams a mortgage by like description, as security for the payment of the purchase money. Beaton also at the same time gave to the Brighams a lease of the premises by a like description for a term exceeding a year. The carding machines were seized by the sheriff by virtue of an execution against Beaton who was in possession. The reporter thus described the machines: "The said three carding machines stood on the floor of the said factory building, not nailed to the floor, nor in any manner attached or annexed to the building, unless it was by the leather band, which passed over the wheel or pulley, as it is called, to give motion to the machines. This band might be slipped off the pulley by hand, and it was taken off and the machines removed from time to time, when they were repaired. Each machine was so heavy as to require four men to move it on the floor, and was too large to be taken out at the door; but it was so constructed as to be easily unscrewed and taken in pieces, and the machines were so taken in pieces when removed by the deputy sheriff." The court held that the machines were personal property and liable to attachment by the mortgagor's creditor's, the mortgagees not being in possession. The law of this case was questioned in Kittridge v. Woods, 3 N. H. 506, 14 Am. Dec. 393. But in Baker v. Davis, *supra*, it was held that carding machines, which were fastened to the floor by nails through the legs, and operated by a band around a drum, in a room below, and through two holes in the floor, and then around a wheel, which was a

vey the joints, buckets, pickets, and faucets not affixed to the freehold.[9] Where the deed was silent on the subject, bricks in the kiln on a planation were held in Louisiana not to pass to the purchaser by a sale of the land; and, accordingly, where the purchaser had knowledge at the time the conveyance was made, that the bricks had been previously sold by the vendor to another person, the purchaser was held liable to the latter for their value, for a conversion of them to his own use.[1] The doctrine that physical annexation is essential to constitute an article a part of the realty is widely disapproved, and in some States entirely rejected.[2]

part of the machines, which band could not be taken off without cutting or ripping it apart, it being impossible to get the machines out of the building, and a picker, which was nailed strongly to the building and operated by a band, and a kettle set in a brick arch, and a clothier's press, which was an iron plate, fixed in a brick arch, on each side of which were two posts, with a beam and screw, framed and fitted into the building, the press not being any more easily moved than a part of the building, are fixtures, and pass by the extent of an execution upon the land."

[9] Kirwan v. Latour, 1 Har. & J. 289, 2 Am. Dec. 519. In McClintock v. Graham, 3 McCord. 553, it was intimated, the case being decided on another point, that a still fixed in a rock furnace built against the wall of a house, for the purpose of distilling, is not a fixture which would pass by a sheriff's sale of the land; because, in the language of the court, "it is susceptible of being removed without any injury whatever to the freehold, or any part thereof; and even without disfiguring the premises, which it seems is sometimes made the criterion, and without digging up the soil."

[1] East v. Ealer, 24 La. Ann. 129. See, also, Nimmo v. Allen, 2 La. Ann. 451; Key v. Woolfolk, 6 Rob. (La.) 424.

[2] Patterson v. Delaware Co., 70 Pa. St. 381, 385; Christian v. Dripps, 28 Pa. St. 271; Seeger v. Pettit, 77 Pa. St. 437, 18 Am. Rep. 452; s. c. Alb. L. J. 151; Hill v. Sewald, 53 Pa. St. 271, 91 Am. Dec. 209; Deal v. Palmer, 72 N. C. 582; Fisher v. Dixon, 12 Clark & F. 312; Bryan v. Lawrence, 5 Jones (N. C.) 337; Palmer v. Forbes, 23 Ill. 301, 313; Latham v. Blakely, 70 N. C. 368; Huebschmann v. McHenry, 29 Wis. 655. And see, Gray v. Holdship, 17 Serg & R. 413, 17 Am. Dec. 680; Cole v. Roach, 37 Tex. 413, 419; Hunt v. Bullock, 23 Ill. 320; Hoyle v. Plattsburg etc. R. R. Co., 51 Barb. 62; s. c. 54 N. Y. 314, 13 Am. Rep. 595; Minnesota Co. v. St. Paul Co., 2 Wall. 609.

§ 1207. **Articles constructively annexed.**—It is not necessary, in order that a deed may pass fixtures, that articles claimed as such should be actually annexed to the freehold. It is well settled that if they are constructively annexed, they, by virtue of the deed, go with the realty. In a case where hop-poles which were taken down and piled in the yard, but intended for use again in the season of hop raising, were held to be a part of the real estate and to pass by a deed, Gardiner, Chief Justice, said: "The root of the hop is perennial, continuing for a series of years. That this root would pass to a purchaser of the real estate, there can be no question. The hop-pole is indispensable to the proper cultivation of this crop. It is distinctly averred and admitted that the poles belonged to the yard upon these premises, that they were used for the purposes of cultivation, and were removed from the place where they were set, in the usual course of agriculture, with a view to gather the crop, and without any design to sever them from the freehold; but, on the contrary, with the purpose of replacing them, as the exigency of the new growth required. In a word, they were to be permanently used upon the land, and were necessary for its proper improvement. If the poles had been standing in the yard at the time of the sale, all admit that they would have formed a part of the realty. But by being placed in heaps for a temporary purpose, they would not lose their distinctive character as appurtenant to the land, any more than rails or boards from a fence in the same condition would become personal property." [3] A conveyance of the land, it has been held, will carry with it rough planks laid down, and used as the upper

[3] Bishop v. Bishop, 11 N. Y. (1 Kern.) 123, 124, 62 Am. Dec. 68. Denio, J., dissented, and in his dissenting opinion remarked: "We are allowed to know judicially what every person out of court knows, that hop-poles are not permanently attached to the land. The cultivator provides himself with a supply of them, and when the root of the hop, which is perennial, shoots forth in the spring, these poles are set up perpendicularly in the earth for the vine to entwine itself

floor of a gin-house.[4] In a case in Vermont there were double windows made for a house, and fitted to its window casings. They, however, were not nailed or fastened, but were held in place by being closely fitted and pushed in, in which condition they remained through one winter, and in summer were taken out and placed in another portion of the house; there were also blinds intended for sidelights, and set up in the hall, but never fitted to the windows or put in. It was not the intention of the grantor that either the windows or blinds should pass with the house, but he secreted them, so

around. When the crop is mature, the poles are taken down and stripped of their burthen, and set up in stacks, to be again used in the same manner the next year. The question is, whether this is such an affixing to the land, as to change the character of the poles from that of personal property, which they bore when brought into the field, into real estate. To convert personal chattels into real property by force of the law of the fixtures, there must, in general, be a permanent corporeal annexation of the chattel to the land, or to something which is itself annexed to the land. Without going over the cases, which were numerous, and were elaborately reviewed by the late Justice Cowen, in giving the opinion of the supreme court in Walker v. Sherman, 20 Wend. 636, I am satisfied with the conclusion at which that court arrived, that nothing of a nature personal in itself will pass by a conveyance of the land, unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land, or some building upon it." Fixtures which have been constructively severed from the freehold, but their physical annexation permitted are constructively reannexed to the freehold by a conveyance of the realty in which the fixtures are not referred to either by way of transfer or of reservation. Solomon v. Staiger, 48 Atl. 996, 65 N. J. L. 617.

[4] Bryan v. Lawrence, 5 Jones (N. C.) 337. As to doors and windows, see State v. Elliott, 11 N. H. 540; Pettengill v. Evans, 5 N. H. 54. Rails and fences are fixtures, and pass with the land: Mitchell v. Billingsley, 17 Ala. 391; Seymour v. Watson, 5 Blackf. 555, 36 Am. Dec. 556; Sawyer v. Twiss, 26 N. H. 348; Burelson v. Teeple, 2 Greene, G. 542; Glidden v. Bennett, 43 N. H. 306. See, also, Collins v. Bartlett, 44 Cal. 371; Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789; Goodrich v. Jones, 2 Hill, 142; Smith v. Odom, 63 Ga. 499; Climer v. Wallace, 28 Mo. 556, 75 Am. Dec. 135. But see Pennybecker v. McDougal, 48 Cal. 160.

that the grantee had no knowledge of their existence at the time of the sale, and there were no indications about the casings that any double windows belonged to them. The court held that, as the windows and blinds were never actually or constructively annexed to the house, they did not pass by a deed of the realty.[5] Unattached scantling, which, at the

[5] Peck v. Batchelder, 40 Vt. 233, 94 Am. Dec. 392. Wilson, J., in delivering the opinion of the court, remarked: "In order to entitle the plaintiff to recover, it was incumbent on him to show that the windows or blinds had become, and were, a part of the building conveyed to him by the defendant. . . . It appears the defendant owned the blinds and windows in question at the time he conveyed the house to the plaintiff; and if they had become, and were at that time, a part of the house conveyed, the fact that the defendant secreted them previous to the conveyance, or that the plaintiff had, at the time of the conveyance, no knowledge of their existence, would not defeat the plaintiff's right to the property. In the construction of a building, its doors, windows, blinds, shutters, etc., become a part of the building, and the manner of annexation is of no particular importance. There must be actual or constructive annexation in order to make them a part of the building. At the time the defendant conveyed to the plaintiff, the building had in it all the windows it was constructed with or for, and the mere fact that the defendant had made some sash, painted them, and set glass in them, intending to use them at some future time, in the construction of double windows for the house, does not constitute even constructive annexation. In order to make such windows a part of the realty, they must have been so annexed or attached to, or used upon the building, as to indicate that the owner intended by such annexation or use to make them a part of the building. The window frames and casings of the house were not constructed for double windows, and the referee has not found that the defendant had prepared even the ordinary stops by which double windows could have been permanently attached to the house, or securely kept in place. It is evident from the manner in which these windows were put in that, if they had been taken out and put back a few times they would have become loose and have fallen off, unless they had been in some way fastened to the building. The very manner in which the defendant put these windows in, and temporarily used them, shows that he did not intend, by such act or use, to make them a part of the building. The referee finds that the defendant did not intend these windows or blinds should pass with the house. The plaintiff, in the purchase of the house, was not deceived in respect to the windows or blinds. There

time of the execution of the deed was partly piled up in the barn, and partly used as a scaffolding for straw, and which had been used to hang tobacco on for curing, in barn erected on a farm where tobacco had been cultivated, the scantling being put up and taken down as the drying of the tobacco required, it was held, did not pass as fixtures by a deed of the farm.[6] It is not necessary that machinery should be actually annexed to the freehold to pass by a deed of the latter. If it is a constituent part of the manufactory, adapted to the purposes for which the building was erected, it will pass by a deed of the freehold although not actually fastened to it.[7] In fact, all articles which are constructively annexed to the freehold, though they may not be actually annexed such

was nothing upon the house, or windows attached to it, indicating that double windows or blinds had been attached to the building, or that such windows and blinds belonged to the house. The plaintiff, at the time of the conveyance, had no knowledge or information that double windows or blinds had been attached to the building, or made for that purpose; there is, therefore, no ground to claim that the price paid for the property was in any way affected in faith of double windows or blinds." But see Rahm v. Domayer, 137 Iowa, 18, 15 L.R.A. (N.S.) 727, 114 N. W. 546, where it was held that finishing lumber, doors and transoms placed in an unfinished building for the purpose of completing it passed with a deed to the land although the materials were only annexed thereto by their location and weight.

[6] Noyes v. Terry, 1 Lans. 219.

[7] Voorhis v. Freeman, 2 Watts & S. 116, 37 Am. Dec. 490. See, also, as to other cases of constructive annexation, Metropolitan etc. Society v. Brown, 26 Beav. 454; Pyle v. Pennock, 2 Watts & S. 390, 37 Am. Dec. 517; Ex parte Astbury, Law R. 4 Ch. 630; Place v. Fagg, 4 Man. & R. 277; Walmsley v. Milne, 7 Com. B., N. S., 115; Johnson v. Mehaffey, 43 Pa. St. 308, 82 Am. Dec. 568; Burnside v. Twitchell, 43 N. H. 390; Cole v. Roach, 37 Tex. 413; Rufford v. Bishop, 5 Russ. 346; s. c. Law J. Ch. 108, 114; Conklin v. Parsons, 1 Chand. 240; s. c. 2 Pinn. 264; Ripley v. Paige, 12 Vt. 353. In Ropps v. Barker, 4 Pick. 238, it was held that if A grants a part of a lot to B, bounding such part on a straight line, between two monuments, taking a stipulation that a fence standing partly on the line and partly on the land conveyed shall remain the property of the grantor, and if A subsequently grants the rest of the lot to C, bounding it on the same straight line, no right passes to C in that part of the fence which stood on the land of B.

as keys, doors, and windows, pass by the deed.[8] The general principle seems to be that all articles that may properly be considered as belonging to the real estate, necessary to its use and enjoyment, whether firmly fixed or temporarily detached, or from their nature only constructively annexed, pass by a deed of the land.

§ 1208. **Machinery in mills.**—Upon the question whether machinery in mills will pass by a deed of the premises, there is perhaps an irreconcilable conflict in the authorities. The law may be stated with a reasonable degree of certainty up to a certain point, and then, beyond that, all becomes confusion.[9] In accordance with the general rule, that, as between grantor and grantee, the firm and substantial annexation to the freehold by the owner of articles intended for the use of the realty and requisite to its enjoyment, constitutes them fixtures, which pass by a conveyance of the land, it is generally agreed that machinery which is permanently attached to the realty, such as boilers, steam-engines, and gearing, are parcels of the realty, and will pass to the purchaser by a deed of the

As to whether a ferryboat, chain, and buoys are fixtures, see Cowart v. Cowart, 3 Lea (Tenn.), 57.

[8] Petengill v. Evans, 5 N. H. 54; Mitchell v. Billingsley, 17 Ala. 391; Seymour v. Watson, 5 Blackf. 555, 36 Am. Dec. 556; State v. Elliott, 11 N. H. 540. And see, also, Walmsley v. Milne, 7 Com. B., N. S., 115, 6 Jur. N. S., 125, 29 Law J. Com. P. 97, 1 Law T., N. S. 62, 8 Am. Law Reg. 373; Burleson v. Teeple, 2 Greene, G. 540; Sawyer v. Twiss, 26 N. H. 348; Conklin v. Parsons, 1 Chand. 240, 2 Pinn. 264; Ripley v. Paige, 12 Vt. 353; Voorhis v. Freeman, 2 Watts & S. 116, 37 Am. Dec. 490; Society v. Brown, 26 Beav. 454; Peck v. Batchelder, 40 Vt. 233, 94 Am. Dec. 392; Liford's Case, 11 Co. Rep. 50*b*; Place v. Fagg, 4 Man. & R. 277, 7 Law J. K. B. 195; Wood v. Bell, 6 El. & B. 355; Bryan v. Lawrence, 5 Jones (N. C.) 337; Bishop v. Bishop, 11 N. Y. 123, 62 Am. Dec. 68; Goodrich v. Jones, 2 Hill, 142; Glidden v. Bennett, 43 N. H. 306.

[9] Sweetzer v. Jones, 35 Vt. 317, 82 Am. Dec. 639; Green v. Phillips, 26 Gratt. 752, 21 Am. Rep. 323; Brennan v. Whitaker, 15 Ohio St. 446; Crane v. Brigham, 11 N. J. Eq. 29, 36; Climie v. Wood, Law R. 3 Ex. 257; s. c. Law R. 4 Ex. 328; Sands v. Pfeiffer, 10 Cal. 258. See McKiernan v. Hesse, 51 Cal. 594; Taylor v. Collins, 51 Wis. 123.

land.[1] This question frequently arises between mortgagor and mortgagee. In these cases, as we have seen, the same rules apply as would if the controversy were between vendor and vendee.

§ 1209. **Removal without injury.**—A distinction is sometimes made between the fixtures placed in a mill which are indispensable to its operation as such, and those which are used temporarily or for particular classes of work. The former may pass by a conveyance or mortgage where the latter would not.[2] In some courts the rule has been announced

[1] Longbottom v. Berry, Law R. 5 Q. B. 123; s. c. 39 Law J., N. S., Q. B. 37, 45; Roberts v. Dauphin etc. Bank, 19 Pa. St. 71; McKim v. Mason, 3 Md. Ch. 186; Allison v. McCune, 15 Ohio, 726, 45 Am. Dec. 605; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Harris v. Haynes, 34 Vt. 220; Oves v. Oglesby, 7 Watts, 106; Sparks v. State Bank, 7 Blackf. 469; In re McKibbin, 4 Ir. Ch. 520. See March v. McKoy, 56 Cal. 85; Lyle v. Palmer, 42 Mich. 314; Helm v. Gilroy, 20 Or. 517; Southbridge Savings Bank v. Gibson, 147 Mass. 500, 1 L.R.A. 350; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 6 L.R.A. 249, 15 Am. St. Rep. 235; Farmers' Loan & T. Co. v. Minneapolis Engine Works, 35 Minn. 543; Lyle v. Palmer, 42 Mich. 314; McFadden v. Crawford, 36 W. Va. 671, 32 Am. St. Rep. 894; Morris' Appeal, 88 Pa. St. 368; Roddy v. Brick, 42 N. J. Eq. 218; Green v. Phillips, 26 Gratt. 752, 21 Am. Rep. 523; Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789; Langdon v. Buchanan, 62 N. H. 657; Stillman v. Flenniken, 58 Iowa, 450, 43 Am. Rep. 120; Brigham v. Overstreet, 128 Ga. 447, 10 L.R.A. (N.S.) 452, 57 S. E. 484; Peoples Nat. Bank, 14 Colo. App. 21, 59 Pac. 63.

[2] Morris' Appeal, 88 Pa. St. 368; Keeler v. Keeler, 31 N. J. Eq. 181; Farrar v. Chauffetete, 5 Denio, 527; Ferris v. Quimby, 41 Mich. 202; Smith Paper Co. v. Servin, 130 Mass. 511; Shelton v. Ficklin, 32 Gratt. 727; Robertson v. Corsett, 39 Mich. 777; McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 12; Southbridge etc. Bank v. Exeter Machine Works, 127 Mass. 542; Taylor v. Collins, 51 Wis. 123; McFadden v. Crawford, 36 W. Va. 671, 32 Am. St. Rep. 894; Green v. Phillips, 26 Gratt. 752, 21 Am. Rep. 323; Patton v. More, 16 W. Va. 428, 37 Am. Rep. 789; Roddy v. Brick, 42 N. J. Eq. 218; Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa, 57, 24 Am. Rep. 719; Langdon v. Buchanan, 62 N. H. 257; Hill v. National Bank, 97 U. S. 450, 24 L. ed. 1051; Calumet Iron & Steel Co. v. Lathrop, 36 Ill. App. 249.

that when an article can be removed without material damage to the freehold or the article itself, it is a chattel, and if this is not capable of being done it is a fixture. "The rule of the common law, as we understand and adopt it, may be summed up in a single sentence, and it is this: Wherever the article can be removed without essential injury to the freehold or the article itself, it is a chattel; otherwise, it is a fixture. This rule is recommended by its simplicity and definiteness. Depart from it, and we are at sea, without chart or compass. This rule, of course, may be controlled by the agreement of the parties, as well as by established usage or custom. And most of the exceptional cases to the foregoing rule, and which seem to conflict with it, will be found to arrange themselves under one of these heads." [3] The owner of a sash and blind factory purchased a molding machine and a planing machine, placing them on the main floor of the building; for greater firmness one was bolted to the floor; and the weight of the other was sufficient to cause it to stand without fastening; he executed a mortgage upon the real estate, including the building containing the machines, and subsequently executed a chattel mortgage upon the machines; the machines were held not to be fixtures which the mortgage upon the realty covered, but chattels embraced by the chattel mortgage. Mr. Justice Knapp observed: "They had no such attachment or physical annexation to the freehold, or anything appurtenant to the lands, as could impart to them the character of real estate; nor is there any evidence in the case of an intention of the parties to join them permanently to the freehold. They stood upon the floor of the building, in

[3] Wade v. Johnston, 25 Ga. 331, 336, per Lumpkin, J., delivering the opinion of the court. See Harris v. Haynes, 34 Vt. 220; Hunt v. Mullanphy, 1 Mo. 508, 14 Am. Dec. 300; Hill v. Wentworth, 28 Vt. 428; Graves v. Pierce, 53 Mo. 429; Fullam v. Stearns, 30 Vt. 443; Sweetzer v. Jones, 35 Vt. 317, 82 Am. Dec. 639; Bartlett v. Wood, 32 Vt. 372; Neufelder v. Third St. & S. Ry. Co., 23 Wash. 470, 53 L.R.A. 600, 63 Pac. 97, 83 Am. St. Rep. 831.

which they were used, without any other support, and without any manner of fastening to the floor, walls, or other part of the building, except that one being lighter than the other, was partially secured to the floor by screw bolts; and as to that, the evidence fully justifies the conclusion of the vice-chancellor, that the bolts placed in the soles of that machine were put there solely for convenience in its use, to render it more steady when in motion. The belts which were run between the fixed shafting and the machines were only for the purpose of communicating with the driving power and giving motion; their office is not, nor can they serve to annex and fix the machines to the real estate. It is true, that if the chattel is actually affixed to the realty, the strength and force of the union is of little consequence in determining its character as a fixture, but to create it a fixture, there must be annexation, and the connection must be such as is consistent with the suggestive of an intent permanently to annex it to the freehold. . . . There appears to have been no special adaptation of this machinery to the place where used, nor any preparation of the place to receive them. They were suitable and proper to be there, if such instruments were required for their appropriate work, but equally suitable and useful elsewhere. They were movable in the building, and were moved about at the convenience of the owner, and run from different parts of the shafting. They were made and designed, not for this place, or any particular place; they were constructed after fixed patterns, for all purchasers; things in gross; mere implements; heavy and complicated tools. If they ceased to be used in this factory, they were movable without alteration, without detriment to the building, and could be used equally well in another place provided with power to drive them." [4]

[4] Blancke v. Rogers, 26 N. J. Eq. (11 Green, C. E.) 563, 568. In Keeler v. Keeler, 31 N. J. Eq. (4 Stewt.) 181, the court say (p. 190): "The machinery and apparatus for furnishing motive power, light, and

§ 1210. Comments.—While some courts recognize the test of removal without injury as being the proper one, the doctrine is not sustained by the great weight of recent au-

warmth to the buildings, are in this case part of the realty. The steam-engine is securely and permanently bolted to a foundation set eight or ten feet deep in the ground, and it was put in for permanent use. It, with its appurtenances, is part of the realty, and so are the boilers which are a necessary adjunct to it, also the shafting, belting, couplings, and pulleys to communicate the power, and also the waterwheels and waterwheel governor: Crane v. Brigham, 3 Stockt. Ch. 29; Quinby v. Manhattan Cloth Co., 9 Green, C. E. 260; Keve v. Paxton, 11 Green, C. E. 107; Fish v. Waterproof Paper Co., 2 Stewt. 16; s. c. on appeal, *sub nom.* McMillan v. Fish, 2 Stewt. 610; Watson v. Watson Mfg. Co., 3 Stewt. 483. The apparatus for the manufacture of gas (called a generator), is situated in a pit made expressly for it in a small building built for it a short distance from the main building. It is connected with a gas-pump in the building, and the pipes are attached to the beams and girders by hooks, and in some places pass through holes in the side walls bored for the purpose. The generator and its appurtenances and the pipes are fixtures: Hays v. Doane, 3 Stockt. Ch. 84, 96; Ewell on Fixtures, 299; Regina v. Lee, Law R. 1 Q. B. 242. The gasburners are of the same character in this case. They are in no sense furniture, but are mere accessories to the mill: Sewell v. Angerstein, 18 L. T. N. S., 300. Some of the heating pipes are laid on hooks attached to boards which are fastened to the walls. They may be removed without disturbing the boards or hooks. In one place there are two nests of piping which rest on the floor without being attached to it. Such pipes so attached for heating purposes were, under like circumstances, held to be fixtures in Quinby v. Manhattan Cloth Co., 9 Green, C. E. 260. See, also, Phillbrick v. Ewing, 97 Mass. 133, and Stockwell v. Campbell, 39 Conn. 362, 12 Am. Rep. 393. Those which rest on the floor are not to be excepted under the circumstances. They are part of the system of piping in the building. The rest of the property mentioned in the complainant's mortgages is personal. The Danforth cap spinning-frames, Danforth cap twisting-frames, the ring and traveler twisting-frames, balling machines, carding machines, grinding machines, drawing frames; Higgins or jack fly-frames, Higgin's slubber, counter twist-speeders, mules, and other machines, though most of them are fastened to the floor by nails or screws, or held in position by cleats, are personal property. They are annexed merely to keep them in position; some of them could not be operated unless held firmly in place. Though, in putting down a new floor, it was laid down around the feet and standards of the machines, it was not laid over but only up to them."

thority. As has been repeatedly said, it is impossible to lay down any rule with which cases may not be found in conflict, but it is believed that the correct rule is stated with as great certainty as the nature of the subject admits in the following section.

§ 1211. **Proper test for considering machinery as fixtures.**—Perhaps the only rule that can be evolved from the mass of conflicting decisions is, that whether an article is a fixture or not must depend upon the combination of several tests, any one of which alone is not conclusive. In a case which is frequently cited, Chief Justice Bartlett says: "From the examination which I have been enabled to give to this subject, and after a careful review of the authorities, I have reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture. (1) Actual annexation to the realty, or something appurtenant thereto. (2) Appropriation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation, to make the article a permanent accession to the freehold, this intention being inferred from the *nature* of the article affixed, the *relation and situation* of the *party* making the annexation, and the purpose or use for which the annexation has been made. This criterion furnishes a test of general and uniform application; one by which the essential qualities of a fixture can, in most instances, be certainly and easily ascertained, and tends to harmonize the apparent conflict in the authorities relating to the subject. It may be found inconsistent with

The machinery used in a canning business is considered a fixture, and will pass by deed or mortgage: Dudley v. Hurst, 67 Md. 44, 1 Am. St Rep. 368. Dynamo and engines for driving the dynamo installed in a building from considerations of economy only, and not from necessity and which could be removed without injury to the building, are held not to be a part of the realty in New York Life Ins. Co. v. Allison, 107 Fed. 179.

the reasoning and distinctions in many of the cases; but it is believed to be at variance with the conclusion in but few of the well-considered adjudications." [5] The presumption in case of doubt is, that as the interest of the vendor of real estate is permanent, all annexations that he has made are for his prolonged enjoyment, and for the substantial and continued enchancement in value of the property.[6]

§ 1212. **Value added to realty.**—The course adopted by the majority of the decisions is to consider everything which has been attached to the realty for the purpose of adding to its value, a fixture passing with a conveyance of the land.[7] "Great diversity exists in the adjudications on this subject, and few decisions can be considered as absolute authorities in other instances, even of fixtures of a similar denomination. It will be found, on an examination of the books, that considerations of custom, intention, ornament, convenience, and so forth, have all had influence in controllng the cases. Whilst it has been held that chattels should not be regarded as fixtures, unless they are so far incorporated with the structure of which they form a part that they cannot be severed from it without injuring the structure itself, as in Farrar v. Chauffetete,[8] yet the general course of decision is in favor of viewing everything as a fixture which has been attached to the realty, with a view to the purpose for which it is employed or held, however slight or temporary the con-

[5] In Teaff v. Hewitt, 1 Ohio St. 511, 530, 59 Am. Dec. 634. See State Security Bank v. Haskins, 130 Iowa, 339, 8 L.R.A.(N.S.) 376, 106 N. W. 764; also, In re Goldville Mfg. Co., 118 Fed. 892, affirmed in William Firth Co. v. South Carolina Loon & T. Co., 122 Fed. 569; The Atlantic Safe Deposit & Trust Co. v. Atlantic City Laundry Co., 64 N. J. Eq. 140, 53 Atl. 212.

[6] Tifft v. Horton, 53 N. Y. 377, 382, 13 Am. Rep. 537; Potter v. Cromwell, 40 N. Y. 287, 100 Am. Dec. 485.

[7] Johnson v. Wiseman, 4 Met. (Ky.) 357, 83 Am. Dec. 475; Crane v. Brigham, 11 N. J. Eq. 29; Philipson v. Mullanphy, 1 Mo. 620.

[8] 5 Denio, 527.

nection between them. In accordance with this rule, it has been held repeatedly that the machinery of a manufactory is to be regarded as a part of the realty, whether it is attached to the body of the building, or merely connected with the other machinery by running bands or gearing which may be thrown off at pleasure, and without injury to the freehold. In general, it may be said that, as between vendor and vendee, the purchaser is clearly entitled to everything that has been annexed to the freehold with a view of increasing its value, or adapting it to the purposes for which it is used; and within this principle it has been held that pipes and bathtubs of a dwelling, the counters of a store, the vats, stills, and kettles of a brewery or distillery, are fixtures." [9] A vendor's lien for

[9] Rogers v. Crow, 40 Mo. 91, 95, 93 Am. Dec. 299, per Wagner, J., citing Walmsley v. Milne, 7 Com. B., N. S. 115; Wilde v. Waters, 16 Com. B. 637; Cohen v. Kyler, 27 Mo. 122; Tabor v. Robinson, 36 Barb. 485; Man v. Schwarzwalder, 4 Smith, E. D. 273; Bryan v. Lawrence, 5 Jones, 337; Johnston v. Philadelphia Mortgage & Trust Co., 129 Ala. 575, 30 So. 515, 87 Am. St. Rep. 75. In Johnson v. Wiseman, 4 Met. (Ky.) 357, 83 Am. Dec.475, Peters, J., delivering the opinion of the court, says (p. 360): "There can be no doubt that upon the sale of the freehold, fixtures will pass in the absence of any express provision to the contrary. It has been held in some cases that to give chattels the character of fixtures, and deprive them of that of personalty, they must be so firmly fixed to the realty that they cannot be removed without injury to the freehold from the act of removal, and apart from the subtraction of the thing removed; but the better opinion is, however, the other way, and in favor of viewing everything as a fixture which has been attached to the realty, with a view to the purposes for which it is held or employed, however slight or temporary the connection between them. It has accordingly been decided in a great number of cases, that the machinery of a manufactory is to be regarded as a part of the realty, whether it be attached to body of the building, or merely connected with the other machinery by running bands or gearing which may be thrown off at pleasure, and without injury to the freehold: Notes to Elwes v. Mawe, and authorities cited: 2 Smith's Lead. Cas. 249. Nor can it be said that actual annexation was so essentially necessary to constitute a fixture, even in the earliest and most technical periods of the common law, as to bear down and overpower all other considerations. The doctrine of heirlooms necessarily implies that chattels may be deprived of

the purchase money will attach to a sawmill erected by the purchaser upon the land and intended to be a permanent annexation to the land.[1] Where railroad spike machines are purchased by the owner of a rolling mill with the *bona fide* intention on his part of attaching them to the mill and they are necessary for the purpose for which they are to be used, they will be considered as part of the realty, and are not subject to attachment and sale as personal property.[2] So, with an engine and boiler. They will not be subject to sale on execution as personally.[3] Where a deed of a sawmill described the land conveyed, "together with all the mills, machinery, tools, fixtures and appurtenances pertaining to the same" and the mill site had been in use for a long period of time and the custom was to consider all machinery attached to the building as a part of it, the machinery and a appliances not being capable of removal without injuring them or the land, and it appearing by the tax books that there was no

their movable and personal character, and rendered inseparably attendant upon the inheritance, by the force of moral association. It has never been doubted that the keys of a house, or the fences or walls of a farm, are part of the freehold. It was held in Kittredge v. Woods, 3 N. H. 503, 14 Am. Dec. 393, and Parsons v. Camp, 11 Conn. 525, that the manure on a farm at the time it was sold vested in the vendee. And these decisions were followed in Goodrich v. Jones, 2 Hill, 142, and the purchaser held to be both entitled to the manure and the fences, although the latter has been detached from the soil: Goodrich v. Jones, 2 Hill, 142. These authorities are cited to show that the ancient rule which treated nothing as fixtures except such chattels as were fastened to the realty, and were more or less immovable, has been modified and molded to suit the improvements in art and science of modern times." See Fairis v. Walker, 1 Bail. 540; Voorhis v. Freeman, 2 Watts & S. 117, 37 Am. Dec. 490; Heermance v. Vernoy, 6 Johns. 5; Gary v. Burguires, 12 La. Ann. 227; Pierce v. George, 108 Mass. 78, 11 Am. Rep. 310; Allen v. Woodard, 125 Mass. 400, 28 Am. Rep. 250; Parsons v. Copeland, 38 Me. 537.

[1] Markle v. Stackhouse, 65 Ark. 23, 44 S. W. 808.

[2] McFadden v. Crawford, 36 W. Va. 651, 15 S. E. 408, 32 Am. St. Rep. 894.

[3] Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789.

assessment against the mills and machinery as personalty, the court held that the mill and machinery attached to it should be considered as real estate, and was subject to a vendor's lien.[4] Where a building is conveyed by a deed, and also "all steam heating apparatus and its connections," it is a question of fact for the jury whether iron screens placed in front of the steam radiating pipes which rest on the floor and are retained in position by their own weight, with marble slabs upon them, are transferred by the deed.[5]

§ 1213. **English view of movable machinery.**—In England and Ireland, the courts manifest a strong inclination to consider all machinery annexted to the floor, ceilings, or sides of a building in a "*quasi* permanent manner," by bolts or screws, as being fixtures which pass by a deed or mortgage to the purchaser or mortgagee. They hold that the facts, that the design of the annexation was solely to steady the machines when in use, that their removal might be affected without injury to them or to the freehold, and that the machines are in the nature of trade fixtures, which as beteween landlord and tenant, belong to the latter, can make no difference; they are nevertheless regarded as a part of the realty.[6] In a case determining what articles passed as fixtures, where the owner of certain premises created a mortgage upon them, and afterward executed a bill of sale of the machinery therein contained to a third person, and subsequently executed a deed to the mortgagee of the land covered by the mortgage, the assignee under the bill of sale having notice of the prior mort-

[4] Bemis v. First Nat. Bank, 63 Ark. 625, 40 S. W. 127.

[5] Leonard v. Stickney, 131 Mass. 541.

[6] Longbottom v. Berry, Law R. 5 Q. B. 123, 137; s. c. 39 Law J. Q. B. 37; 10 Best & S., 852, 877; 22 L. T. N. S. 385; Mather v. Fraser, 2 Kay & J. 536; 25 Law J. Ch. 361; Walmsley v. Milne, 7 Com. B., N. S. 115; 29 Law J. Com. P. 97; Cullwick v. Swindell, Law R. 3 Eq. 249; Climie v. Wood, Law R. 3 Ex. 257; s. c. in error, Law R. 4 Ex. 328.

gage, this question arose. The authorities are reviewed by Hannen, J., who says: "On the part of the plaintiff, it was strongly contended on the authority of Hellawell v. Eastwood,[7] that the machines and articles now in dispute, looking to the nature of the articles, the mode of annexation, and the object and purpose of annexation, were not in truth fixtures at all, but remained mere movable goods and chattels, which would be liable to distress, as the machines called cotton mules were held to be in that case. The grounds of decision given by the court in that case being, that the annexation there was so slight as to admit of removal of the machines without injury to the building or themselves, and the object and purpose of annexation being not to improve the inheritance, but to render the machines steady and more capable of convenient use as chattels. In that case, the mules were affixed in the same manner as many of the machines in the present case. But it is observable that the case was decided before any of the cases to which we have referred, and was cited in all, or more of them, but not followed in any. On the contrary, it was distinguished in Mather v. Fraser,[8] by the present lord chancellor, then vice-chancellor, who observed that it was a case between landlord and tenant, and was altogether inapplicable to the question whether machines fixed by the owner of the sail passed to a mortgagee of the freehold. In that case, machinery fixed in the same manner as the machines in Hellawell v. Eastwood,[9] were considered to pass to a mortgagee as fixtures; and so also in Walmsley v. Milne,[1] the fact that the machinery was so fastened as to admit of severance without injury to the building, or the things fixed, was also disregarded by the court, as was also, in Climie v. Wood,[2] the special addition facts found by the jury, that the object of annexation

[7] 6 Ex. 295; 20 Law J. Ex. 154.
[8] 2 Kay & J. 536.
[9] 6 Ex. 295; 20 Law J. Ex. 154.
[1] 7 Com. B., N. S., 115; 29 Law J. Com. P. 97.
[2] Law R. 3 Ex. 257; in error, Law R. 4 Ex. 328.

was for the more convenient use of the things fixed, and not to improve the inheritance. In the present case the machinery in question was nearly all firmly fixed to the building, in what the vice-chancellor, in Mather v. Frazer,[3] calls a *quasi* permanent manner, viz., by screws, or bolts, or soldered with lead; in most cases they were affixed to the floor, in some both to floor and roof, and in others, to the side walls. This fixing was clearly necessary, for they could not otherwise be effectually used, as, for the same reason, the fixing was obviously not occasional, but permanent. It is no doubt said in this case that the object of fixing was to insure steadiness and keep the machines in their places when worked; but the same thing could probably be said of most trade fixtures, from a steam-engine downward, and if the effect of this fixing is to cause the whole set of machines to be effectually used in the manufacture of wool and cloth, it seems very difficult to avoid coming to the conclusion that a necessary consequence is to cause the mill to be put to a more profitable use as a wool mill than it otherwise would be; it is also equally difficult to conceive that a machine, which, at all times, requires to be firmly fixed to the freehold, for the purpose of being worked, could truly be said never to lose its character as a movable chattel. We therefore think that the case of Hellawell v. Eastwood was well distinguished from cases like the present in Mather v. Fraser; and that all the fixed articles in this case were such articles, in the nature of trade fixtures, as were considered by the court of error in Climie v. Wood, to pass to the mortgagees, and that the passed here to the defendants, under their mortgage and subsequent conveyance."[4] In a case in Ireland, looms made fast to a tiled floor, by wrought-iron spikes driven through the titles, are fixtures that will pass by a conveyance."[5]

[3] 2 Kay & J. 536.

[4] In Longbottom v. Berry, Law R. 5 Q. B. 123, 137; s. c. 39 Law J. Q. B. 37.

[5] In re Dawson, Tate & Co., Irish R. 2 Eq. 218. See, also, Barnett v. Lucas, 5 I. R. C. L. 140; Boyd v. Shorrock, Law R. 5 Eq. 72; s. c.

§ 1214. **American cases.**—In this country, it sems to be generally considered, though there are many cases to the contrary, that if the articles can be removed without essential

37 Law J. Ch. 144; 17 L. T. N. S., 197; 16 Week. R. 102; Holland v. Hodgson, Law R. 7 Com. P. 328; Wiltshear v. Cottrell, 1 El. & B. 674; s. c. 22 Law J. Q. B. 177; 17 Jur. 758; 18 Eng. L. & Eq. 142; The Patent Peat Co., 17 L. T. N. S., 69; Parsons v. Hind, 13 Week. R. 860. The court said, per Miller, J., in In re Dawson, Tate & Co., Irish R. 2 Eq. 218 (p. 221): "Another, however, and a serious question, arises from the deed of 1866, not having been registered as a bill of sale, namely, whether the looms which had been erected in the factory at Banview, and mentioned in the schedule to that deed, were fixtures so as to pass by the mortgage of June, 1866, or movable chattels vested in the assignees. There has been evidence, both on the part of the assignees and mortgagees, as regards that question. . . . The evidence relied upon by the mortgagees of 1866, as establishing that the looms in question were fixtures, was that given by Watts, a practical engineer, who was sent down specially to the Banview factory for the purpose of making an examination of these looms. He stated that the floors upon which the looms were placed were paved over with tiles or bricks about a foot square; that three of the looms were not attached to the floor; that one hundred and one looms were attached by a wrought-iron spike driven through the feet of each loom into the floor. The spike is five inches long by a half inch thick, and he had to get a hammer and chisel to draw it out. The spikes were driven into the floor and the looms were fastened down to prevent them from moving; and he stated that the fastening was essential to their being worked. The evidence relied upon by the assignee was that of Mr. Woodford, who stated that although he was not an engineer, he was familiar with such subjects, and was a flax sewing-machine maker. He said there was a fastening on the looms, by a spike put down into the tiles, and that the tiles were about two inches thick; that if the belts by which the machines were moved were tight, they were liable to be lifted up, if not made fast to the floor (but that would be only at the time the machine might be set going), and that if not fastened down some accident might take place; nearly all the looms were fastened, and only three or four were loose; he does not say there was any use in a fastening, further than to prevent an accident in case of a tight belt. Upon the whole of the evidence in this case, and upon the question of the fixtures I cannot come to any other conclusion than that the one hundred and one looms at the factory in Banview, which were fastened in the manner and for the purposes described, had the elements necessary to constitute a fixture, and were, at the date of the

injury to the freehold or to themselves, and if the purpose of attaching them to a structure is solely to maintain them in a steady condition, they are personal property, and a deed or mortgage will not transfer them, unless such is the express intention to be gathered from the deed itself. Thus, machinery in a blacksmith and wagonmaker's shop, consisting of a boring lathe, an engine lathe, a wood-turning lathe, a press drill, a press punch, an upright saw, and a circular saw, all propelled by water and attached to the building for the purpose of making them firm, and which can be removed from the building without serious injury to it, are personal property, and not fixtures.[6] So, where property embracing various articles of machinery for carding, spinning, twisting, balling, preparing, and packing cotton, and standing upon the floor of the mill over the apertures therein, made for the passage of the leather bands or belts by which the machinery was moved; and where the machinery was not fastened to the building in any other manner than by such bands and belts, and in some cases by cleats tacked to the floor, the bands being used for motion, and not for fastening, and where each machine might be removed without injury to itself or to the building, it was held in a controversy between a person claiming the machinery under a mortgage upon the realty and creditors of the mortgagor under an execution against his property, and under a chattel mortgage, that the articles were not attached to the building in such a manner as to constitute them fixtures.[7] "To constitute an instrument or ma-

bankruptcy in this matter, fixtures attached to the freehold; but that the remaining three looms that were not so fastened, and as to which there is no very clear evidence as to whether in fact they ever had been used, could not be regarded as having been fixtures at the date of the bankruptcy."

[6] Bartlett v. Wood, 32 Vt. 372.

[7] Vanderpoel v. Van Allen, 10 Barb. 157. See, also, Swift v. Thompson, 9 Conn. 63, 21 Am. Dec. 718; Murdock v. Gifford, 18 N. Y. 28; Tobias v. Francis, 3 Vt. 425, 23 Am. Dec. 217; Cresson v. Stout, 17 Johns. 116, 8 Am. Dec. 373; Capen v. Peckham, 35 Conn. 88; Gale v. Ward, 14 Mass. 352, 7 Am. Dec. 223; Gaylor v. Harding, 37 Conn.

chine employed in the business of trade or manufactures, a fixture, so as to pass with the deed as parcel of the freehold, it must be permanently habitually attached to it, or it

508; Graves v. Pierce, 53 Mo. 429; McKim v. Mason, 3 Md. Ch. 186; Sturgis v. Warren, 11 Vt. 433; Penn Mut. Ins. Co. v. Semple, 38 N. J. Eq. 575; Southbridge Sav. Bank v. Exeter Machine Works, 127 Mass. 542; Maguire v. Park, 140 Mass. 21; Rogers v. Brokaw, 25 N. J. Eq. 496; Wolford v. Baxter, 33 Minn. 12, 53 Am. Rep. 1; McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 12; Robertson v. Corsett, 39 Mich. 777; Carpenter v. Walker, 140 Mass. 416; Hubbell v. East Cambridge Sav. Bank, 132 Mass. 447, 43 Am. Rep. 446; Scheifele v. Schmitz, 42 N. J. Eq. 700. In Vanderpoel v. Van Allen, 10 Barb. 157, Brown, J., said: "The property in dispute consists of various articles of machinery for carding, spinning, twisting, balling, preparing, and packing cotton yarn and cotton twine. It stands upon the floor of the mill, over the apertures or openings therein, made for the passage of the leather bands or belts by which it is moved, and is not fastened to the building otherwise than by such belts and bands, and in some few instances and articles by cleats tacked to the floor because it was out of level when placed upon it. The bands are used for motion, and not for fastening, and the cleats to give a uniform and level surface to the floor of the building. The motive power is water; the belts or bands passing over a wheel or pulley upon each separate machine, and from thence run over drums upon lines of shafting, geared in communication with the waterwheel. The belts or bands are slipped off and on the pulleys by hand, so as to put it in operation, or arrest its motion, at the pleasure of the operator. Every machine may be easily and conveniently removed without injury to itself or to the building in which it stands; and if so removed might be used with the same effect and for the same purpose on the floor of any other building where there is motive power to put it in operation. The mill or building would suffer no detriment from such removal, for it is immediately, and without any previous preparation, adapted to the use of similar machines for the manufacture of the same article, or for any other machines employed in a different manufacture, which stand upon a level floor, and are put in motion by a pulley and a band. The machinery was not constructed in the building or upon the premises where it is used, for the better enjoyment of the inheritance; but each separate article was made in a work or machine shop in a different place, and removed entire and complete and fit for use to the place where it now is. It is in proof that such like machinery is oftentimes the property of the manufacturer, while the mill where it is used is the property of another; and that it is a common occurrence to remove the articles separately from the mill

must be a component part of some erection, structure, or machine which is attached to the freehold, and without which the

to the workshop, to be repaired and remodeled, and when so repaired they are returned to the mill again. There is nothing in the pleadings or proofs to show when the property was placed in the mill—whether before or since the date of the plaintiff's mortgage—so that if it has now become a part of the freehold, it is subject to the plaintiff's lien, and cannot be removed. Otherwise it belongs to the defendants, and may be taken away and appropriated by them to the payment of their debt. Fixtures are defined to be 'chattels or articles of a personal nature which have been affixed to the land.' To make an article a fixture, 'it must not only be essential to the business of the erection, but it must be attached to it in some way; at least it must be mechanically fitted, so as, in ordinary understanding, to make a part of the building itself.' The general rule is 'that anything of a personal nature not fixed to the freehold cannot be considered as an incident to the land, as between vendor and vendee.' The property in question is not actually annexed to the freehold. The mere setting down upon the floor of the building, and the leather bands slipped on to the pulleys when it is in motion, do not effect a physical union. Nor do the circumstances, in my judgment, make out a constructive annexation. Each of these machines is complete and perfect, and, to a great extent, independent in itself. If any one of them is dependent on another, they are not all dependent on each other, nor on the water power and the mill, except for motion, for the proof shows that there is no particular fitness or adaptation to this mill or water power more than there is to any other. This machinery bears but little resemblance, if any, to the key of a door, the chain, dogs, and bars of a sawmill, the stone of a gristmill taken up to be picked, the venetian blind, window-shutters and doors temporarily removed from their hinges, or the mill irons and gearing dislocated and carried away by a flood, of which we read in the books; for they were essential and necessary parts of machinery or structures, which were so firmly united with the freehold as to make them fixtures beyond all dispute. The rigor of the ancient law of fixtures, as between landlord and tenant, has been much relaxed in modern times for the benefit of trade. In this State it has been modified as between heir and executor or administrator (2 Rev. Stats. 24, § 6); but between vendor and vendee, mortgagor and mortgagee, it remains as it always was. The uncertainty which we constantly encounter in the investigation of the subject sometimes arises from the nature of the thing claimed to be a fixture; and at other times, from the means by which it is supposed to be united with the freehold. Connection, or disconnection, union or separation, seemed to be the essence of the ancient rule; yet, td

erection, structure, or machine, would be imperfect and incomplete." [8]

§ 1215. **Different view.**—A different view, however, prevails in some of the States. Thus, in North Carolina, a cotton-gin and press attached to the freehold in the usual way have been held to be fixtures.[9] In Mississippi, gin-stands annexed to the freehold in the ordinary manner are regarded as fixtures which pass by a sale of the realty.[1] In Maine, it was held that belts, looms, carding machines, pickers, jacks, spoolers, and dressers, suited and designed for a woolen factory, and placed therein by the owners, although they were capable of removal without injury to the freehold, were fix-

insist upon it in its literal sense, will not free the subject from its real difficulties. There are certain things upon agricultural land—of which rail fences may be given as an example—resting upon its surface, and in no other way attached to it, light, movable, and actually moved about from place to place, and from time to time, to suit the convenience of the occupant, which the law and the universal sense of mankind regard as fixtures; while there are certain other things attached to the interior walls of a dwelling house, by nails, screws, and iron straps, of which mirrors and paintings may be given as examples, which are in like manner regarded as chattels. In respect to structures and machines used in the business of trade and manufacturing, there is a wide and manifest distinction between ponderous articles purposely fitted and adapted to the places where they are used, and unfitted and unadapted to all others, of which waterwheels, mill gearing, shafts, carriageways for sawmills, steam boilers, and engines may be given as examples, and those lighter, more portable, and wonderful creations of human ingenuity and skill, of which power looms, carding, spinning, and pin machines may be cited as examples, which stand like a piece of furniture upon a floor, are moved by any kind of motive power; which may be displaced, and repaired and replaced, without interruption to the business or hindrance to the other machinery, and which have no other connection with the freehold but that formed by the leather band which puts them in motion."

[8] Vanderpool v. Van Allen, 10 Barb. 157. And see Hellawell v. Eastwood, 6 Ex. 295; Parsons v. Hind, 14 Week. R. 860; Hutchinson v. Kay, 23 Beav. 413; Waterfall v. Peniston, 6 El. & B. 876; Rogers v. Brokaw, 25 N. J. Eq. 496.

[9] Bond v. Coke, 71 N. C. 97.

[1] Richardson v. Borden, 42 Miss. 71; 2 Am. Rep. 595.

tures, appertaining to the realty, and, accordingly, such articles, in a partition ordered among tenants in common, may be divided as real estate.[2] A planing machine, lathes, and vises in a machine shop or car factory, if they are necessary part of the machinery for carrying on the business, it was decided in Pennsylvania, are fixtures, appurtenant to the realty, without regard to the manner in which they are attached to the building in which they are used.[3] Acting on the principle that machinery in a cotton or woolen factory, necessary to constitute it, is a part of the freehold, and as such will pass by the owner's deed, or by the deed of the sheriff selling the real estate upon execution, the court in the same State determined that where such a fixture was detached by the former owner, after a sale by the sheriff, the purchaser of the real estate could maintain replevin for the article against the person who detached it.[4]

§ 1216. **Effect of statute.**—A statute in California provided that "any inhabitant of this State, who has put or placed improvements upon any lands belonging to this State, or the United States, or who has the right of possession of such improvements on said lands, shall have the right to remove such improvements from such lands at any time within six months after such lands shall have become the private

[2] Parsons v. Copeland, 38 Me. 537.

[3] Christian v. Dripps, 28 Pa. St. 271. It was also held in this case that the proof of a custom in opposition to the law of fixtures could not evade the rule.

[4] Harlan v. Harlan, 15 Pa. St. 507, 53 Am. Dec. 612; s. c. 20 Pa. St. 303. See, also, Symonds v. Harris, 51 Me. 14, 81 Am. Dec. 553; Deal v. Palmer, 72 N. C. 582; Latham v. Blakely, 70 N. C. 368; Tate v. Blackburne, 48 Miss. 1; Trull v. Fuller, 28 Me. 545; Bratton v. Clawson, 2 Strob. 478; Baker v. Davis, 19 N. H. 325; Fairis v. Walker, 1 Bail. 540; McDaniel v. Moody, 3 Stewt. 140. Compare Hancock v. Jordan, 7 Ala. 448, 42 Am. Dec. 600; Cole v. Roach, 37 Tex. 413. Dry kiln, planing machine, matching machine, etc., held in Michigan to be a part of the real property. Studley v. Ann Arbor Savings Bank, 112 Mich. 181, 70 N. W. 426.

property, by purchase or otherwise, of any person or persons, firm, corporation, or company, either within or without this State; and such inhabitant shall not be liable to an action for damages for the removal of such improvements within the time above stated. All houses, barns, sheds, outhouses, buildings, and fences, and all orchards and vineyards, shall be deemed and held to be improvements, within the meaning of this act." This statute, in respect to improvements which were attached to the soil, and become a part of the freehold, was held to interfere with the primary disposal of the public lands by the United States, and to be in conflict with the act of Congress admitting California into the Union.[5] But while this is held of improvements attached to the realty, so as to become a part of it, it is also held that, if buildings and fences erected on the public lands of the United States are not attached to the soil in such a manner as to form a part of the freehold, they do not pass to a purchaser from the

[5] Collins v. Bartlett, 44 Cal. 371; Stats. Cal. 1867–68, p. 708. Rhodes, J., delivering the opinion of the court in Collins v. Bartlett, said (p. 383): "This enactment raises the question whether this State has authority to provide that a patent issued in accordance with the acts of Congress, upon a sale of the public lands of the United States, shall not convey absolutely to the purchaser all that it purports to convey—all the real estate within the boundaries of the lands described in the patent. If houses, fences, orchards, and vineyards on the lands of the United States are real estate, they are as much a part of the freehold as the soil itself; and the statute, by giving to them other names, does not change their character, or sever them from the land. They being a part of the freehold, a patent issued in the usual form by the United States would convey them to the purchaser of the land, and the State cannot prevent them from vesting absolutely in the purchaser by virtue of the patent, without interfering with the primary disposal of the public lands by the United States. When the 'improvements' are in fact personal property, it needs not the aid of a statute to give the owner the right to remove them from the land, and it is equally clear that the statute, so far as it purports to give the claimant the right to remove them from lands of which they formed a part when they were sold and conveyed by the United States, is void, because in conflict with the act admitting this State into the Union."

United States, the latter having no interest in them; the person who constructs them is entitled to remove them after the issuance of a patent to the purchaser.[6] Statutes commonly designated as "betterment laws," which provide for the payment by the true owner for improvements made by another, intended to secure to the latter the fruits of his labor, have been held to be constitutional almost without question.[7]

§ 1217. **Right to remove under contract for purchase.** —Where a party is in possession of real estate under a bond for a deed, there being no agreement for the payment of rent, and fixtures are added by him to the realty, his right to remove them is determined by the rule which obtains between vendor and purchaser, and not that which prevails between

[6] Pennybecker v. McDougal, 48 Cal. 160.

[7] Among the many cases so holding we select the following: Ross v. Irving, 14 Ill. 171; Brown v. Storm, 4 Vt. 37; Childs v. Shower, 18 Iowa, 261; Longworth v. Worthington, 6 Ohio, 10; Whitney v. Richardson, 31 Vt. 300; Pacquette v. Pickness, 19 Wis. 219; Fowler v. Halbert, 4 Bibb, 54; Hunt's Lessee v. McMahan, 5 Ohio, 133; Withington v. Corey, 2 N. H. 115; Saunders v. Wilson, 19 Tex. 194; Bacon v. Callender, 6 Mass. 303; Moss v. Shear, 25 Cal. 44, 85 Am. Dec. 94; Love v. Shartzer, 31 Cal. 487. See, also, Fenwick v. Gill, 38 Mo. 510; Marlow v. Adams, 24 Ark. 109; Griswold v. Bragg, 48 Conn. 577; Coney v. Owen, 6 Watts, 435; Dothage v. Stuart, 35 Mo. 251; Jones v. Carter, 12 Mass. 314; Howard v. Zeyer, 18 La. Ann. 407; Steele v. Spruance, 22 Pa. St. 256; Pope v. Macon, 23 Ark. 644; Kidd v. Guild, 12 N. W. Rep. (Mich.) 158; Ormond v. Martin, 37 Ala. 598; Lynch v. Brudie, 63 Pa. St. 206. *Contra*, Nelson v. Allen, 1 Yerg. 376. And see Harris v. Inhabitants of Marblehead, 10 Gray, 44; Davis' Lessee v. Powell, 13 Ohio, 308; Society etc. v. Wheeler, 2 Gall. 105; McCoy v. Grandy, 3 Ohio St. 463. A carpenter shop erected after the execution of a mortgage upon premises, for trade purposes, and built of rough materials, placed upon blocks resting on boards put upon the surface of the ground, but not let into the ground, was held not to pass to a purchaser at a sale of the real estate under the mortgage: Kelly v. Austin, 46 Ill. 156, 92 Am. Dec. 243. See Rogers v. Brokaw, 25 N. J. Eq. 496; Crane v. Brigham, 11 N. J. Eq. 29; Randolph v. Gwynne, 7 N. J. Eq. 88, 51 Am. Dec. 265; Holland v. Hodson, Law R. 7 Com. P. 328.

landlord and tenant. This is but following out the strict rule of the common law, and in accordance with the principle that when a stranger erects a building upon the land of another without the latter's consent, it becomes a part of the land and he would occupy the position of trespasser by removing it.[8] As was said in one case where this question arose: "If the intention of Whitlock was to render the improvement permanent when erected, there can be no question that it became a part of the freehold, and no subsequent change of intention changed its character to that of personal property, rendering it liable to levy and sale on an execution from a justice of the peace. The intention at the time to render it a part of the realty, fixed its character beyond all dispute, and that character could not be changed by anything short of its severance by removal, or by an executed agreement for that purpose. The mere change of the intention of the owner cannot have that effect."[9] Where a person is in possession of land under a contract for its purchase without the obligation to pay rent, fixtures erected by him cannot be removed by him nor sold on execution issued against him as his personal property.[1] But if there is an agreement between the vendor and purchaser, under an executory contract of sale, that machinery placed upon the land shall remain the personal property of the purchaser, it does not become a part of the real estate. After the bankruptcy of the purchaser, the vendor cannot compel the enforcement of a provision of the contract within which the purchaser might remove the machinery in case he defaulted in making payment for the property, if the default was due to the failure of the vendor to perfect the title until after

[8] Tyler v. Fickett, 75 Me. 211; Seiberling v. Miller, 207 Ill. 443, 69 N. E. 800; Union Inv. Co. of Indiana v. McKinney, 35 Ind. App. 594, 74 N. E. 1001.

[9] Dooley v. Crist, 25 Ill. 551, 556, per Walker, J.

[1] Seiberling v. Miller, 207 Ill. 443, 69 N. E. 800, 106 Ill. App. 190.

the expiration of the time for performance, and after the purchaser was unable to perform, and where the vendor made no claim to the forfeiture until after the bankruptcy of the purchaser.[2]

§ 1218. **Application of rule.**—Applying the principle that the proper rule in cases of this kind is the one prevailing between vendor and vendee, the Supreme Court of Massachusetts decided that a trip-hammer firmly attached to a block set in the ground, the blower of a force-pump and its pipes for raising water on the premises, and shafting fastened to the building by screws and bolts, are part of the realty, and cannot be removed after breach of the bond; but a portable steam-engine and boiler capable of being removed, without removing brickwork, vises fastened to a workbench by screws and bolts merely, a planing machine and anvils not fastened to the buildings, a grindstone on a movable frame, and an emery machine fastened to the floor with bolts, both of the latter being capable of removal without injury to the building, are personalty, and may be removed after a breach of the bond.[3]

§ 1219. **Reason for rule.**—The rule and the reason for it has thus been succinctly stated: "Although, in a certain sense, a person occupying land under a contract of purchase may be said to be a tenant of the owner, still the analogy does not hold good in all respects. In one essential particular it fails. The occupier is not liable to pay rent to the owner. It would seem to follow that he has no right to remove fixtures annexed by him to the freehold. The reason why a tenant is allowed to remove structures erected for purposes of trade or con-

[2] In re Rodgers & Hite, 143 Fed. 594.

[3] McLaughlin v. Nash, 14 Allen, 136, 92 Am. Dec. 741. A person erecting a barn upon the real estate of another, under similar circumstances, has been held to have no right to remove it: Hemmenway v. Cutler, 51 Me. 407.

venience, affixed by him to the realty during his tenancy, is because having paid as rent a full equivalent for the use of the premises as demised it would be inequitable to compel him to forfeit articles at the end of his term, which he had procured for his own use and at his own expense. That reason is wholly inapplicable to a case like the present. The occupant has paid no equivalent for the use and enjoyment of the premises; nor is he compelled to surrender the estate at a fixed period of time, as upon the expiration of a term demised. He can, by fulfilling his contract of purchase, become the owner of the estate, and enjoy the full benefit of all the erections and improvements which he has made thereon. There is, therefore, no reason for applying to a case of this sort the very liberal rule in regard to fixtures which prevails where the relation of lessor and lessee subsists between the parties."[4] In that case, the person occupying the land, under an agreement with the owner to purchase it, was held not entitled to remove a wooden building with stone foundations placed upon the land, the building being used for a stable and shoemaker's shop.

§ 1220. **Some illustrations.**—An agreement was made between two persons, by which the first, the owner of a parcel of land, agreed to sell it to the second, and to convey it to him by deed when the latter should erect a house thereon; the second party agreed to erect a house on the land, and on receiving a deed to mortgage the property to the first to secure the purchase money. It was held that the person occupying the land under this agreement, did not, by erecting the house, acquire any property therein, but it became a part of the realty, and hence a mortgage of the house by him to a third person before he obtained a deed for the land, conveyed nothing to the mortgagee.[5] A purchaser of a lot in a

[4] Bigelow, J., in King v. Johnson, 7 Gray, 239, 241; Pomeroy v. Bell, 118 Cal. 635, 50 Pac. 683.

[5] Milton v. Colby, 5 Met. 78. Says Shaw, C. J., delivering the opinion of the court (p. 81): "It

city, holding it under a contract of purchase which contained clauses of forfeiture, erected a house upon the land by placing it upon blocks lying upon the ground; having failed to make the payments called for by the contract, he sold the house to a person who removed it from the lot; the seller of the lot replevied the house, and it was held that the purchaser so long as he occupied the premises under his contract, had no right to erect a building thereon with intent to remove it, that such intent would be in fraud of the rights of the vendor, and that the purchaser of the building occupied no better position, and upon a severance the owner had the right of possession, and might maintain replevin for its recovery as long as it could be identified and was not permanently attached to other land.[6] For further illustration, we may call attention to a case in Massachusetts where a bond was given by an owner

appears to us that the effect of this agreement was not that the builders of the house were to have a property in the house as a chattel; on the contrary, it was to constitute a part of the realty, and pass with it; and when the agreement should be executed according to its terms, it would enhance the value of the estate as a security to Nesmith for the purchase money. The general rule is, that the erection of a building on the land of another makes it a part of the realty, and of course it becomes the property of the owner of the soil; and it is only in virtue of an express agreement between the owner and builder, that one can have a separate property on a building as a chattel, with a right to remove it. The agreement between these parties, so far from being such an agreement, was, in legal effect, an agreement that the building and soil should be united and held together as one tenement, and the security of the builders was in the personal agreement of the owner, by which they could require him, on complying with the terms of the agreement on their part, to convey the fee to them, by which they would obtain a legal title to the buildings with the soil. No interest then passed by Diggles' deed to the plaintiffs; none in the building, for it was part of the realty; and none in the real estate, because the fee was in Nesmith."

[6] Ogden v. Stock, 34 Ill. 522, 85 Am. Dec. 332; Davis v. Easley, 13 Ill. 192; Eastman v. Foster, 8 Met. 19; Poor v. Oakman, 104 Mass. 309; English v. Foote, 16 Miss. 444; Perkins v. Swank, 43 Miss. 349; Oakman v. Dorchester Ins. Co., 98 Mass. 57; Christian v. Dripps, 28 Pa. St. 271.

of land to convey the same to a purchaser on the payment of a specified sum. The vendee erected a house on the land, but there was no agreement on the part of the vendor that it might be removed. The vendee paid part of the price agreed upon, and assigned to his son for an inadequate consideration the bond for conveyance, in order to prevent the land from being levied upon by his creditors. Some of the creditors of the vendee had, however, in the meantime, attached the house and caused it to be sold as personal property, and possessing full knowledge of the facts, they took a conveyance of the land from the vendor. It was held that before the assignment of the bond to the vendee's son, the vendee did not possess such an interest in the land as could be attached or levied upon by his creditors; that the house built by him on the land could not be considered as personal property, but must be treated as real estate; and that his son, if he tendered to the vendor the balance due by the terms of the agreement, and demanded a conveyance in accordance with the provisions of the bond, might, in case of the vendor's refusal, maintain a bill in equity against him for a specific performance.[7] It is proper in this connection to note a case where a party in possession of land under a contract of pur-

[7] Murphy v. Marland, 8 Cush. 575. Shaw, C. J., delivering the opinion of the court, referring to the defense made by the defendant, that he had a right to hold it from C the assignee, for the benefit of the creditors of B, or some of them, and that he had in fact conveyed it to some of them, said: "The defense assumes that the assignment of this chose in action from Peter Murphy to his son, the design both of assignor and assignee being indirectly to defeat creditors, was fraudulent and void; and as every plaintiff must prevail on the strength of his own title, if that of the plaintiff is void, he cannot have this remedy, whether the defendant is justifiable in his course or not. But the construction which has uniformly been put on the statutes, declaring such conveyances fraudulent and void, is that they are voidable only, that they are not fraudulent *per se*, but only as against creditors, that they are as good as between the parties, and can only be avoided by a creditor, or by an assignee or other party acting in behalf of a creditor. This principle is too clear to require many

chase, providing that if he failed to comply with its terms, all tools and machinery placed upon the land by him should be the property of the vendor. A third party leased an en-

authorities: we cite only one of the most recent: Oriental Bank v. Haskins, 3 Met. 332, 37 Am. Dec. 140. In the case of Ensign v. Kellogg, 4 Pick. 1, already cited, it is held that the obligor in such a bond could not object, that the assignment by the obligee to the assignee was voluntary and without consideration; although being so it would be void as against creditors, if creditors could avail themselves of it. Then the question occurs whether the defense can be sustained in behalf of creditors. Ordinarily, where a conveyance is alleged to be fraudulent and void as against creditors attaching or taking property on execution, proving the fraudulent intent by the parties to defeat creditors, will enable the creditor to recover. But the reason is because the fraud is usually charged upon some conveyance or alienation of real or personal property, in which the debtor had an interest capable in some form of being taken, levied upon, sold, or otherwise directly reached by process of law for the payment and satisfaction of the creditors' claims. But when the thing transferred is such that by no process of law, trustee attachment or otherwise, it could be reached by a creditor, the conveyance is not made void by the statute, and no creditor can interfere or authorize the avoidance of it. In the present case, the chose in action which was the subject of conveyance from Murphy, senior to his son, had no such conveyance been made, could not have been reached by process of law. The equitable interest in the land stipulated to be conveyed, as the debtor had no legal interest, and no equity of redemption, or such other equitable interest as is made attachable by statute, could not be levied on: Howe v. Bishop, 3 Met. 26. The conveyance did not create a debt due from Marland to Peter Murphy, which would render him liable to the trustee process. Nor had Peter Murphy any interest in the building which could be attached as personal property. That right of personal property in a building can only exist when a building is erected on the land of another with his consent, and under an express or an implied agreement that the builder may remove it. It was so held in the case cited by the defendant, in which it was also held that independently of contract with the builder, it was a fixture and would pass with the land: Ashmun v. Williams, 8 Pick. 402. This is confirmed by a recent case which appears to be directly in point: Milton v. Colby, 5 Met. 78. In the present case, there was no agreement or consent of the owner of the soil that the building might in any case be removed; and the builder was to be secured in his rights, not by leave to remove the building, but by the power of acquiring the land on which it stands. It is not for the defend-

gine and boiler to the vendee, giving him also a privilege of purchase, knowing that the machinery was to be affixed to the land, but not knowing of the provisions of the contract between the vendor and vendee. These articles were affixed by the vendee to the land in such a manner that their removal could not be effected without destroying the masonry and wall to which they were affixed. The purchase of the land was not completed by the vendee, and he forfeited the lease of the chattels; but the court decided that as against the vendor these articles remained the personal property of the party who leased them to the vendee.[8]

ant to decide at his discretion, between the respective claims of the assignee and the creditors of the person with whom he has contracted. He is bound to perform his obligation according to law; and the establishment of the rightful claims of the one, and a performance accordingly, will exempt him from the claims of the other. It is said that giving effect to the plaintiff's claim in this case, will be to give the sanction of the law to a title obtained by a fraudulent and void conveyance. But it is only when a conveyance is made to defeat creditors by a transfer of property, which, but for such conveyance, could have been reached by legal process to satisfy such debts in favor of such creditors, that the law holds the conveyance fraudulent; when it can have no such effect, the law does not hold it fraudulent, but valid. It was suggested on the part of the defendant that if the creditors of Peter Murphy can make no claim to the property through him, they are without remedy. To this it is answered, on the other side, that they might have proceeded against their debtor under the insolvent law, and that the assignee would become vested with all the rights of the debtor, legal as well as equitable, including valuable choses in action, for the benefit of all the creditors. This certainly was plausible, and we do not at present perceive why, if this course had been seasonably adopted, it would not have been effectual; but of this it is not necessary to express an opinion, no such course having been pursued." See, also, Smith v. Altick, 24 Ohio St. 369; Tabor v. Robinson, 36 Barb. 483; Watertown Steam Engine Co. v. Davis, 5 Del. 192; First Parish in Sudbury v. Jones, 8 Cush. 184; Cooper v. Adams, 6 Cush. 87; Eastman v. Foster, 8 Met. 19, 26; Howard v. Fessenden, 14 Allen, 124, 128; Hinckley v. Baxter, 13 Allen, 139.

[8] Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107, and cases cited. The court said that what the rule would be if the vendor occupied the position of a *bona fide* purchaser,

§ 1220a. **Buildings.**—Where a building is erected by one person on the land of another, it is *prima facie* a part of the realty, but if it is erected with the understanding that it may be removed when desired, it is then not a part of the real estate but personal property, and trover will lie for its conversion.[9] A building erected on the land of another without the latter's consent is presumptively a fixture, though the presumption is subject to rebuttal.[1] But the building may become personal property if the parties so agree.[2] And where

need not be determined, for he did not occupy that position, but having put the vendee in possession, the vendor must be held to stand in the shoes of the vendee, and the property in question treated as personalty in his hands as well as in the hands of the vendee.

[9] Smith v. Benson, 1 Hill, 176; Leland v. Garset, 17 Vt. 403; Huebschman v. McHenry, 29 Wis. 655; Jenkins v. McCurdy, 48 Wis. 628, 33 Am. Rep. 841; Lipsky v. Borgman, 52 Wis. 256, 38 Am. Rep. 735; Dolliver v. Ela, 128 Mass. 557; Taylor v. Collins, 51 Wis. 123; Kimball v. Darling, 32 Wis. 675. On land there was situated a house used as a residence and also as a saloon, and on one side of it, and next to the saloon, was erected a wooden structure, used in connection with the saloon as a dancing hall. The sills of this structure were fastened together at the ends with nails or spikes, and the studs were fastened to the sills in the same manner. The plates were fastened in the same manner, at the top of the studding, the sills and plates being thirty-two feet in length and constructed of two by eight or two by ten timber. In some places the sills rested on the ground, at others on cedar posts set into the ground, and on cedar railroad ties and stones. A floor was laid over the whole space, and on the center was a post eight feet high, from the top of which rafters extended to the plates, the roof being of brush. In the space between the building seats twelve feet in length were constructed for the musicians, upon cross-pieces fastened to both buildings The attached building was unfinished, but was intended to be completed and to be permanently used in connection with the main building. The attached building was considered a part of the realty. Lepsky v. Borgman, 52 Wis. 256, 38 Am. Rep. 735. See, also, Harmon v. Kline, 52 Ark. 251; Brown v. Corbin, 121 Ind. 455.

[1] First Parish v. Jones, 8 Cush. 184; Bonney v. Foss, 62 Me. 248; Howard v. Fessenden, 14 Allen, 124; Elwes v. Briggs Gas Co., L. R. 33 Ch. D. 567; Harmon v. Kline, 52 Ark. 251.

[2] Howard v. Fessenden, 14 Allen, 124; Merchants' Nat. Bank v. Stanton, 55 Minn. 211, 43 Am. St. Rep. 491.

the owner of the land consents to the erection, the right to remove it may be implied.[3] Where a vendee has entered into possession under a contract, a building of a permanent character erected by him on the land becomes a part of it, and where there is no agreement giving him the right, cannot be removed by him.[4] If a building has been erected by one on the land of another with the right of removal by virtue of an agreement to that effect, it may be mortgaged as personal property.[5] Where the building is not originally personal property, it cannot become such subsequently by a parol

[3] Pullen v. Bell, 40 Me. 314; Lapham v. Norton, 71 Me. 83; Osgood v. Howard, 6 Me. 452, 20 Am. Dec. 322; Handforth v. Jackson, 150 Mass. 149; Russell v. Richards, 10 Me. 429, 25 Am. Dec. 254. Said Mellen, C. J., speaking of buildings being personal property when so agreed: "We understand among the profession, this is the principle recognized and acted upon in practice, that such property is considered personal, and is accordingly always sold on execution in the same manner as all other personal estate is sold at auction. Should we decide this cause in opposition to the above-mentioned principles and practice, we should open a door to innumerable frauds, which might be effectually committed with impunity. A person might erect expensive buildings on the land of a friend in whom he could confide, by his express permission, and thus in case of failure in business, perhaps a contemplated or intended failure, he would enjoy a home and ample accommodations at the expense of his defrauded creditors, for if the buildings became the property of the owner of the land, then his creditors could not seize them on execution, and the friend could not be adjudged the trustee of the builder, in consequence of their standing on his land, because the houses are neither goods, effects, nor credits of the builder": Osgood v. Howard, 6 Me. 452, 25 Am. Dec. 322.

[4] Miller v. Waddingham, 91 Cal. 377, 13 L.R.A. 680. See, also, Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 251; Kingsley v. McFarland, 82 Me. 231, 17 Am. St. Rep. 473; Westgate v. Wixon, 128 Mass. 304; Ogden v. Stock, 34 Ill. 522, 85 Am. Dec. 332; Hinkley & Egery Iron Co. v. Black, 70 Me. 473, 35 Am. Rep. 346; Allen v. Mitchell, 13 Tex. 373; Michigan Mut. L. Ins. Co. v. Cronk, 93 Mich. 49; Howard v. Fessenden, 14 Allen, 124.

[5] Lanphere v. Howe, 3 Neb. 131; Smith v. Benson, 1 Hill, 176; Denham v. Sankey, 38 Iowa, 269; Docking v. Frazell, 34 Kan. 29; Brown v. Corbin, 121 Ind. 455; Goodenow v. Allen, 68 Me. 308; Holt County Bank v. Tootle, 25 Neb. 408; Deering v. Ladd, 22 Fed. Rep. 575.

agreement.[6] Although a trespasser may believe that he has a valid title to the land, buildings erected by him become a part of the realty.[7] Where the same person owns both the land and buildings, the latter, of course, are a part of the realty and pass under a deed conveying the land. If the grantor desires to retain the title to the building, he must do it by some reservation in the deed, or by an agreement that will comply with the statute of frauds. He cannot show by parol that a building was to be reserved.[8] If the owner of land takes the personal property of another and attaches it to the land so that its identity is not lost, and so that it may be removed and used elsewhere, the personal property does not become a part of the real estate, but the owner may recover it in replevin.[9] But if the owner of the land should build a house on his land with the materials of a stranger, and the nature of the property has become changed, he is compelled to pay only the value of the material.[1] Certain manufacturers in consideration of the agreement of the owner of land to erect a building on it and to convey the land and building to them agreed to maintain a factory for a certain length of time and this agreement was carried into effect by the owner erecting the building and by the manufacturers placing machinery in it, but the appliances were subsequently sold at a sheriff's sale under a judgment against the manufacturers. The purchaser at the sale conveyed his title to a corporation, but as the title had never been conveyed the court held that in the hands of the corporation the fixtures

[6] Aldrich v. Husband, 131 Mass. 480; Parsons v. Copeland, 38 Me. 537.

[7] Honzik v. Delaglise, 65 Wis. 494, 56 Am. Rep. 634.

[8] Leonard v. Clough, 133 N. Y. 292, 16 L.R.A. 305; Muir v. Jones, 23 Or. 332.

[9] Gill v. De Armant, 90 Mich. 425; Lee Snyder v. Vaux, 2 Rawle, 423, 21 Am. Dec. 466; Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307; Eisenhauer v. Quinn, 36 Mont. 368, 14 L.R.A.(N.S.) 435, 93 Pac. 38.

[1] Peirce v. Goddard, 22 Pick. 559, 33 Am. Dec. 764.

were a part of the freehold to the same extent as if the corporation had itself attached the property to the freehold under the contract of purchase and that without the consent of the owners of the legal title the machinery could not be removed.[2] The general rule is that a purchaser who has erected a structure on land while in possession, but who has not yet obtained title cannot remove it without the owner's consent.[3]

§ 1221. **Word "fixtures" in deed.**—The question as to whether certain articles pass by the conveyance may, in some instances, be determined by its language. In one mortgage the property described was "all of the stock of goods and merchandise now in the store." In a subsequent mortgage drawn by the same person, the property described was "all of the stock of goods and merchandise now in the store, and fixtures." The court held that the fixtures were not included in the first mortgage.[4] Where the term "fixed machinery" was used, a blower pipe, by which air was conveyed from a blower to a forge, both of the latter being permanently fixed in their places, was regarded as included by the term used.[5] Real estate described by metes and bounds was conveyed for a certain sum, and by a bill of sale executed at the same time certain articles were sold. The vendor took back a mortgage on the real estate which was described in the same manner as in the deed, for security for the payment

[2] Seiberling v. Miller, 207 Ill. 443, 69 N. E. 800.

[3] Union Ins. Co. v. McKinney, 35 Ind. App. 594, 74 N. E. 1001; Pomeroy v. Bell, 118 Cal. 635, 50 Pac. 683. As to buildings erected by mistake on the land of another, see Dutton v. Ensley, 21 Ind. App. 46, 69 Am. St. Rep. 340; Atchison etc. R. Co. v. Morgan, 42 Kan. 23, 4 L.R.A. 284, 16 Am. St. Rep. 471. As to buildings erected on another's land by permission, see Salley v. Robinson, 96 Me. 474, 52 Atl. 930, 90 Am. St. Rep. 410; Ingalls v. St. Paul etc. R. Co., 39 Minn. 479, 12 Am. St. Rep. 676.

[4] In re Eldridge, 4 Nat. Bank. Reg. 498, 2 Biss. 362.

[5] Alvord Carriage Mfg. Co. v. Gleason, 36 Conn. 86.

of the part of the purchase money remaining unpaid. The vendees afterward executed a chattel mortgage on the property embraced in the bill of sale, and the court held that the real estate mortgage affected only the property conveyed by the deed; inasmuch as the deed and bill of sale were parts of one transaction, each must be considered as intended to perform its appropriate function in the sale.[6] The question is one of interpretation, and the language is to be construed as is the language of other contracts.[7] An owner of a hotel contracted to sell the same "and the appurtenances and improvements thereunto belonging," the plaintiff reserving, among other things, the right, within a specified time after delivery of possession, to remove from the upper rooms of the hotel his "furniture, carpets, and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed." The vendees having subsequently paid the purchase money, received from the vendor possession and a deed which described the property as it had been described in the contract of sale, and which also contained a recital that it had been made in pursuance of the contract of sale, and subject to the terms, conditions, and reservations contained therein. Both at the time of the execution of the agreement and the subsequent deed, certain gas-fixtures, consisting of chandeliers, globes, brackets, burners, pendents,

[6] Fortman v. Goepper, 14 Ohio St. 558. And see Folsom v. Moore, 19 Me. 252. But see McRea v. Central Nat. Bank, 50 How. Pr. 51.

[7] For particular instances of construction, see Martin v. Cope, 28 N. Y. 180; Hoskin v. Woodward, 45 Pa. St. 42; Hancock v. Jordan, 7 Ala. 448, 42 Am. Dec. 600; Metropolitan etc. Society v. Brown, 26 Beav. 454, 5 Jur., N. S., 378, 28 Law J. Ch. 581; Hare v. Horton, 5 Barn. & Adol. 715; Begbie v. Fenwick, Law R. 8 Ch. 1075, 24 L. T., N. S., 58; Farrar v. Stackpole, 6 Me. 154, 19 Am. Dec. 201. And see, also, Potts v. New Jersey Arms Co., 17 N .J. Eq. 404; Teaff v. Hewitt, 1 Ohio St. 536, 59 Am. Dec. 634; Wright v. Chestnut Hill Iron Ore Co., 45 Pa. St. 475; Haley v. Hammersley, 3 We Gex, F. & J. 587, 30 Law J. Ch. 771; Quinby v. Manhattan Cloth etc. Co., 24 N. J. Eq. 260.

etc., a kitchen range with boiler attached, a patent water-filter, tanks, and mosquito screens, were attached to the property conveyed. The vendor, within the time specified in the contract of purchase, demanded the privilege of removing these articles from the hotel. The demand was refused, and he commenced an action for their recovery. The court held that these articles passed by the deed to the grantee as appurtenances.[8] But a deed conveying land, "with all the buildings thereon and certain property connected with or situated in or about the premises," and enumerating specific fixtures and personal property, and conferring the privilege upon the grantor to remove within a specified time "all property not specifically conveyed" by the deed, does not convey trade fixtures which are not specified.[9]

§ 1222. **Contract of purchase—Payment of rent—**A contract of purchase provided that the purchaser was entitled to remain in possession, and upon the payment of a specified sum with interest was to obtain a deed. If he made a default, he was to be considered a tenant at will. It was decided that while such purchaser might for some purposes be regarded an equitable mortgagor, that, as a general rule, the parties under such a contract occupied toward each other the relation of vendor and vendee, and the latter was not en-

[8] Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 251.

[9] Kirch v. Davies, 55 Wis. 287. Where a stock yard with buildings and appurtenances were sold and a dispute arose as to whether certain property passed under the deed, a stipulation was entered into whereby the controversy was submitted to the court for arbitration. A compromise was made reciting that "all of the property *in and about said premises* shall pass as fixtures with said realty." Thereupon the vendor executed an instrument reciting that he had sold the premises with the clause "personal property in and *about the buildings* is to be considered as fixtures." The court held that certain rails not on the premises and far removed from the buildings and tracks, the existence of which was unknown to the vendee did not pass under the agreement: Alper v. Tormey, 82 Pac. 1063, 1 Cal. App. 634.

titled to remove from the premises any annexation to them of a substantial and permanent character. Speaking of the grounds for the existence of this rule, the court observed: "We apprehend the true reason why a purchaser, before the completion of the contract, has no authority to remove improvements which he may have placed upon the land, is not because he is a mortgagor, but because the law presumes they were annexed with the design of being permanent. The exception in favor of trade fixtures is made, because the annexations are supposed to be accessory to the calling of the tenant, and not to the land. That they are made, not with the design of being permanent, but of being severed at the end of the term. Whilst with the purchaser the presumption is that they are made with the design of their permanent engagement in connection with the land, and as an accessory to it. He makes them in view of their becoming his when he shall have acquired the absolute ownership of the land by conveyance. But until that time he has only the same right to them which he has to the freehold. In any event, the doctrine seems to be too well settled to be now disturbed." [1]

§ 1223. **Question of intent considered.**—The intention with which a chattel is attached to the freehold should always be looked to in determining whether it has become a fixture or not. The intention with which the annexation was made cannot, however, be said to afford anything like a conclusive reason for considering whether the chattel has lost or still retains its character as personalty. It is a circumstance entitled to weight, and that it all. Where there has been no annexation, either actual or constructive, the

[1] Smith v. Moore, 26 Ill. 392, 393, considering and correcting the opinion in the same case in 24 Ill. 512. See Raymond v. White, 7 Cowen, 319; Boone v. Chiles, 10 Peters, 224; Lapham v. Norton, 71 Me. 83; Westgate v. Wixon, 128 Mass. 304.

mere intention to attach personalty is not sufficient to convert it into real estate. Thus, a purchaser at a sheriff's sale of a rolling mill is not entitled, as a part of the realty, to rolls cast for the mill, paid for and delivered at the mill, but which remained there for more than two years without being turned or finished off or put into the mill. "The test question is, Were they elementary parts of the mill at the time of the sale? And, as a matter of *fact,* it is quite plain that they were not; for the mill had always run without them. No doubt they were *intended* to be made part of the mill, but we do not see how we can take the intention without fact, in order to declare what constitutes the mill. If we do, then the sale of a half-built or half-ruined house would include all the materials provided for its completion or repair. A very provident man is quite sure to have materials on hand which he sees will sometime be necessary for the repair of his works, or for supplying deficiencies in them; but his having them with this intention does not make them constituent parts of his works. Thus, he will provide extra saws for a sawmill, or bolting cloth for a flour mill, or extra castings for the running gear, or lumber, nails, screws, and other materials to make improvements or repairs; but this does not convert personal into real property, so long as the fact remains that they are not yet made constituent elements of the mill or other structure. That fact we can ascertain and define with reasonable certainty, but we can have no measure for the ever varying degrees of prudent forethought. And if mere intention could affix such articles to the realty, then a mere change of intention would unfix them, or prevent their becoming affixed, and we should thus be without any rule at all to guide us. Besides, it is rather a contradiction in terms to say, at the same time, that they *are* parts of the structure, and are *intended to be made so.*" [2] If mill saws have never

[2] Johnson v. Mehaffey, 43 Pa. St. 308, 82 Am. Dec. 568; per Lowrie, C. J., Mundine v. Pauls, 28 Tex. Civ. App. 46, 66 S. W. 254.

been attached to the mill, or used in it, the fact that the owner had purchased them for the purpose of using them in his mill, and kept them there for over a year, will not constitute them fixtures so as to pass as fixtures with the mill.[3]

§ 1224. **Same subject, continued.**—Where a grantor had hauled posts and timber to his farm, it was decided that his simple intention, formed before the sale of the farm, to erect the posts into a fence, and the timber into a granary, was not, in the absence of any effort to do so, sufficient to

[3] Burnside v. Twitchell, 43 N. H. 390. But the court held the saws actually attached to the mill, without any intention of removing them, became a part of the realty. Sargent, J., in the course of the opinion, said: "As to the sixteen saws never used, they cannot be said to have been so affixed. They were never set in the mill or used there, or in any way attached to it, or any part of it. The mere fact that they were purchased with the intention to be used there is not sufficient to make them fixtures. If they had been once affixed, and had been taken out to repair or to file, while the others were at work in their places, the case would be different, for they would none the less be parts of the mill when thus removed for a temporary purpose than when in actual use. Articles once affixed and used in such a way as to become parts of the freehold, though disannexed at the time of the sale for a temporary purpose, still pass by the conveyance of the real estate: Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 232, 37 Am. Dec. 203; Lathrop v. Blake, 23 N. H. 66, and cases cited. But we think that the saws that had been set and used in the mill for a year or more (and as long as it would seem as the mill was used), while thus in use, were as much a part of the mill as the water wheel or the carriage. They were made fast to portions of the mill by bolts or keys, or in some way, depending somewhat upon whether they were circular or upright saws, which the case does not show. Machines and other articles essential to the occupation of a building, or to the business carried on in it, and which are affixed or fastened to the freehold and used with it, partake of the character of real estate, become part of it, and pass by a conveyance of the land. Nor does so much depend upon the character of the fastening, whether it be slight or otherwise, as does upon the nature of the article and its use as connected with the use of the freehold: Despatch Line v. Bellamy Mfg. Co., 12 N. H. 232, 233, 37 Am. Dec. 203, and cases cited." See Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107.

convert the property into realty, and that, therefore, the posts and timber did not pass to the purchaser.[4] When an article has become permanently affixed to the freehold and acquired the nature of a fixture, a mere intention on the part of the owner to remove, unaccompanied by any acts showing such an intention, cannot convert it again into personalty. The owner possesses the undoubted power of severing any article from the realty, and making it personalty. But where this has not been practically accomplished, a purchaser is entitled by his deed to everything connected with the freehold in a fixed and permanent manner. To recognize any other rule would open the door to the perpetration of the greatest frauds. Any rule of a different character would make the unexpressed will of the owner the only guide, and in every case the question as to what articles passed by a deed would be involved in inextricable confusion.[5] And testimony is inadmissible to show a secret and unaccomplished intention of

[4] Cook v. Whiting, 16 Ill. 480. See Manchester Mills v. Rundlett, 23 N. H. 271; Tripp v. Armitage, 4 Mees. & W. 687; s. c. 8 Law J. (N. S.) Ex. 107; Johnson v. Hunt, 11 Wend. 135; Conklin v. Parsons, 1 Chand. 240; s. c. 2 Pinn. 264; Ripley v. Paige, 12 Vt. 353; Peck v. Batchelder, 40 Vt. 233, 94 Am. Dec. 392; Hedge's case, 1 Leach Cr. Law, 240; Ewell on Fixtures, 39.

[5] Tate v. Blackburne, 48 Miss. 1; Bratton v. Clawson, 2 Strob. 478. See, also, Snedeker v. Warring, 12 N. Y. 178; Rogers v. Brokaw, 25 N. J. Eq. 496; Treadway v. Sharon, 7 Nev. 37; Noble v. Sylvester, 42 Vt. 146; Selger v. Pettit, 77 Pa. St. 437; Lord v. Detroit Sav. Bank, 93 N. W. 1063, 9 Detroit Leg. N. 706, 132 Mich. 510. In Gasaway v. Thomas, 56 Wash. 77, 105 Pac. 168, plaintiff was in possession of certain mining claims under contract of purchase by installments and to develop the claims, his rights to be forfeited upon failure to perform any condition of the contract. Plaintiff installed a hoisting engine and air compressor which were attached to a log, also, a boiler which was set in a stone foundation, and a temporary shed was built to protect the machinery. These improvements were made in order to prospect the claims and to determine whether he would be justified in making further expenditures or improvements. They were held not to be fixtures as between the vendor and vendee as an intention not to permanently annex them was shown.

the grantor for the purpose of controlling the facts and circumstances determined by the law itself.[6]

§ 1224a. **Evidence of conversations.**—Still where, owing to the conflicting evidence as to the movable character of certain articles claimed as fixtures, there exists a doubt as to whether the owner intended that they should be moved to another tract, evidence of conversations had with him showing his intention is admissible.[7] And in all cases, the intention, when clearly ascertained, with which an article has been attached to the realty is entitled to much consideration, and in many cases has been the controlling circumstance by which the question as to whether it should be treated as a fixture has been decided.[8]

[6] Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780; Bemis v. First Nat. Bank, 63 Ark. 625, 40 S. W. 127. Where machinery may be removed from a building without damage to the remainder of the property, the intent of the parties is controlling: Harris v. Hackley, 86 N. W. 389, 127 Mich. 46, 8 Detroit Leg. N. 230. Also, see Palmateer v. Robinson, 38 Atl. 957, 60 N. J. Law, 433. A chattel mortgage on fixtures given concurrently with a real estate mortgage of the land to which the fixtures are attached is not conclusive evidence of an intent that they should not be permanently attached: Studley v. Ann Arbor Savings Bank, 112 Mich. 181, 70 N. W. 426; Homestead Land Co. v. Becker, 96 Wis. 206, 71 N. W. 117. The intention to make the article a permanent fixture should plainly appear: Weathersby v. Sleeper, 42 Miss. 42 Miss. 732; Cole v. Roach, 37 Tex. 413; Teaff v. Hewitt, 1 Ohio St. 511, 533, 59 Am. Dec. 634; Hunt v. Mullanphy, 1 Mo. 508, 14 Am. Dec. 300; Fortman v. Goepper, 14 Ohio St. 558; Hill v. Wentworth, 28 Vt. 428; Capen v. Peckham, 35 Conn. 88, 95. But the intention to make a permanent annexation may be presumed from the permanent improvement to the freehold effected thereby. See Wilde v. Waters, 16 Com. B. 637; Brearley v. Cox, 24 N. J. L. 287; Potter v. Cromwell, 40 N. Y. 287, 100 Am. Dec. 485; Lancaster v. Eve, 5 Com. B., N. S., 717; Tifft v. Horton, 53 N. Y. 377, 13 Am. Rep. 537; Holland v. Hodgson, Law R. 7 Com. P. 328; Baldwin v. Walker, 21 Conn. 168; Ogden v. Stock, 34 Ill. 522, 85 Am. Dec. 332. See, also, Smith v. Moore, 26 Ill. 394; Huebschmann v. McHenry, 29 Wis. 655.

[7] Benedict v. Marsh, 127 Pa. St. 309.

[8] Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Langdon v. Buchanan, 62 N.

§ 1225. **Gas-fixtures.**—The weight of authority in this country is to the effect that gas-fixtures screwed on to the gaspipes of a building are chattels, and do not pass by a

H. 257; Cavis v. Beckford, 62 N. H. 229; Schaper v. Bibb, 71 Md. 145; Stevens v. Rose, 69 Mich. 259; Padgett v. Cleveland, 33 S. C. 339; National Bank v. North, 160 Pa. St. 303; Maguire v. Park, 140 Mass. 21; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 6 L.R.A. 249, 15 Am. St. Rep. 235; Southbridge Sav. Bank v. Exter Machine Works, 127 Mass. 542; McRea v. Central Nat. Bank, 66 N. Y. 489; Turner v. Wentworth, 119 Mass. 459; Peet v. Dakota etc. Ins. Co., 1 S. D. 462; Ottumwa Woollen Mills Co. v. Hawley, 44 Iowa, 57, 24 Am. Rep. 719; Allen v. Mooney, 130 Mass. 155; Rogers v. Prattville Mfg. Co., 81 Ala. 483, 60 Am. Rep. 171; Tillman v. De Lacy, 80 Ala. 103; Aldine Mfg. Co. v. Barnard, 84 Mich. 632; Ferris v. Quimby, 41 Mich. 202; Smith Paper Co. v. Servin, 130 Mass. 511; Hill v. National Bank, 97 U. S. 450, 24 L. ed. 1051; Hubbell v. East Cambridge Bank, 132 Mass. 447, 42 Am. Rep. 446; Manwaring v. Jenison, 61 Mich. 117; Smith v. Blake, 96 Mich. 542; Crippen v. Morrison, 13 Mich. 23; Hinkley E. Iron Co. v. Black, 70 Me. 473, 35 Am. Rep. 346; Quinby v. Manhattan etc. Co., 24 N. J. Eq. 460; Stevens v. Rose, 69 Mich. 259; Morrison v. Berry, 42 Mich. 389, 36 Am. Rep. 446; Wheeler v. Bedell, 40 Mich. 693; Robertson v. Corsett, 39 Mich. 777; Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 251; Lavenson v. Standard Soap Co., 80 Cal. 245, 13 Am. St. Rep. 147; Foote v. Gooch, 96 N. C. 265, 60 Am. Rep. 411; Benedict v. Marsh, 127 Pa. St. 309; Ege v. Kille, 84 Pa. St. 333; Morris' Appeal, 88 Pa. St. 368; Tolles v. Winton, 63 Conn. 440; Fifield v. Farmers' Nat. Bank, 148 Ill. 163, 39 Am. St. Rep. 166; Harmony Building Assn. v. Berger, 99 Pa. St. 320; Hill v. Sewald, 53 Pa. St. 271, 91 Am. Dec. 209; Harrisburg Electric Light Co. v. Goodman, 129 Pa. St. 206; New Chester Water Co. v. Holly Mfg. Co., 3 U. S. App. 264, 3 C. C. A. 399, 53 Fed. Rep. 19; Capen v. Peckham, 35 Conn. 88; Stockwell v. Campbell, 39 Conn. 362, 12 Am. Rep. 393; Alvord Carriage Mfg. Co. v. Gleason, 36 Conn. 86; Meigs' Appeal, 62 Pa. St. 28, 1 Am. Rep. 372; Seeger v. Pettit, 77 Pa. St. 437, 18 Am. Rep. 452; Vail v. Weaver, 132 Pa. St. 363, 19 Am. St. Rep. 598; Benedict v. Marsh, 127 Pa. St. 309; Hill v. Wentworth, 28 Vt. 428; Cherry v. Arthur, 5 Wash. St. 787; Binkley v. Forkner, 117 Ind. 176, 3 L.R.A. 33; Eaves v. Estes, 10 Kan. 314, 15 Am. Rep. 345; Jones v. Bull, 85 Tex. 136; Atchison etc. Ry. Co. v. Morgan, 42 Kan. 23, 4 L.R.A. 284, 16 Am. St. Rep. 471; Docking v. Frazell, 38 Kan. 420; Walker v. Flouring Mill Co., 70 Wis. 92; Taylor v. Collins, 51 Wis. 123; Arnold v. Crowder, 81 Ill. 56, 25 Am. Rep. 260; Fletcher v. Kelly, 88 Iowa, 475, 21 L.R.A. 347; Johnson v. Mosher, 82 Iowa, 29; Elliott v. Wright, 30 Mo. App. 217; Harkey

deed of the premises. "Gaspipes which run through the walls and under the floors of a house are permanent parts of the building, but the fixtures attached to these pipes are not. They are not permanently annexed, but simply screwed on projections of the pipes from the walls left for that purpose, and can be detached by simply unscrewing them." [9] And as these articles are considered mere personal property, they will not pass to a purchaser by a sheriff's deed made upon the sale of real estate.[1] But in some courts, the view is taken that the gasaliers are a part of the gaspipes, and being necessary to the practical enjoyment of the gaspipes, should be classed as fixtures.[2] But the pipes upon which the fixtures are screwed do not pass by a deed as fixtures.[3]

v. Cain, 69 Tex. 146; Willis v. Morris, 66 Tex. 628, 59 Am. Rep. 634; Moody v. Aiken, 50 Tex. 65.

[9] McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38, 40, 37 Am. Rep. 471, per Rapallo, J; Shaw v. Lenke, 1 Daly, 487; Vaughen v. Haldeman, 33 Pa. St. 522, 75 Am. Dec. 622;; Montague v. Dent, 10 Rich. 135, 67 Am. Dec. 572; Rogers v. Crow, 40 Mo. 91, 93 Am. Dec. 299. In Shaw v. Lenke, *supra*, Brady, J., said: "The adjustment of the bracket or chandelier to the gaspipe is not such actual annexation to the freehold as is contemplated by law. The fixture itself, though employed for a useful purpose, and often highly ornamental, is not indispensable to the enjoyment of the realty. It forms no part of the soil by annexation, actual contact, or otherwise. It is not fastened to the wall, and it can be removed without injury either to the wall, freehold, or pipe to which it is attached. In addition to this, it may be said with propriety that it has become by usage and general concession as much an article of furniture as a mirror or carpet, although not so universally owned." See, also, Jarechi v. Philharmonic Society, 79 Pa. St. 403, 21 Am. Rep. 78; Towne v. Fiske, 127 Mass. 125, 34 Am. Rep. 353; Lawrence v. Kemp, 1 Duer, 363; Heysham v. Dettre, 89 Pa. St. 506; Guthrie v. Jones, 108 Mass. 191; Seeger v. Pettie, 77 Pa. St. 437, 18 Am. Rep. 452; Chapman v. Union Mut. L. Ins. Co., 4 Ill. App. 29; Hays v. Doane, 11 N. J. Eq. 84. But see *contra*, Johnson v. Wiseman, 4 Met. (Ky.) 357, 83 Am. Dec. 475.

[1] Vaughen v. Haldeman, 33 Pa. St. 522, 75 Am. Dec. 622.

[2] Sewell v. Angerstein, 18 L. T. 300; Ex parte Wilson, 2 Mont. & A. 61; Johnson v. Wiseman, 4 Met. 357, 83 Am. Dec. 475; Ex parte Acton, 4 L. T., N. S., 261. See Smith v. Commonwealth, 14 Bush, 31, 29 Am. Rep. 402.

[3] Ex parte Acton, 4 L. T., N. S.,

While the general rule is that gas-fixtures are chattels, and do not pass by deed of the premises, yet the intention of the owner, shown by other acts, may convert them into fixtures; and they may by virtue of these acts pass to the grantee. Thus, the owner of a house, as an inducement to a person to purchase, told him, during the negotiations for the sale, that the house was complete and ready to move into, and that "all he had to do was to walk in and light the gas," as it was complete. After the sale the former owner brought an action to recover the gas-fixtures on the ground that they did not pass by the deed; it was held, however, that the gas-fixtures became attached to the freehold, and passed by a deed of it, for the reason that the statement made as an inducement to the purchase demonstrated that the gas-fixtures had been attached to the house to increase its general value, and not for temporary use.[4]

§ 1226. **Manure.**—All manure which is made in the ordinary course of husbandry, and which, at the time of the execution of the deed, is upon the premises, will pass, by the deed, as an incident to the land, unless it is expressly reserved. "It must be regarded as settled in this State, that as between grantor and grantee, all manure made in the ordinary course of carrying on the farm, and which is upon the premises at the time of the sale and conveyance, will pass to the grantee as an incident to the land conveyed, unless there be a reservation in the deed; and that it makes no difference whether it be in the field, or in the yard, or in heaps at the windows, or under cover. It is an incident and appurtenance to the land, and passes with it, like the fallen timber and trees, the loose stones lying upon the surface of the earth, and like the wood and stone fences erected upon the land, and the materials of such fences, when placed

261; Ex parte Wilson, 2 Mont. & A. 61.

[4] Funk v. Brigaldi, 4 Daly, 359.

upon the ground for use, or acicdentally fallen down." [5] In New Jersey, while it is admitted that manure, after it is spread upon the land, and appropriated to fertilizing purposes, becomes a part of the freehold and passes by a deed of the real estate, yet it has been decided that where land is conveyed by deed without any clause of reservation, the title to manure lying in and around the barnyard does not pass to the grantee. This decision is, however, opposed by the weight of authority, and cannot be recognized as announcing the generally accepted rule.[6] Where manure is made in a livery-

[5] Plumer v. Plumer, 30 N. H. (10 Fost.) 558, 568, per Eastman, J; Snow v. Perkins, 60 N. H. 493, 49 Am. Rep. 333; Conner v. Coffin, 2 Fost. 538; Parsons v. Camp, 11 Conn. 525; Goodrich v. Jones, 2 Hill, 142; Sawyer v. Twiss, 6 Fost. 345; Kittredge v. Woods, 3 N. H. 503, 14 Am. Dec. 393; Needham v. Allison, 4 Fost. 355; Stone v. Proctor, 2 Chip. D. 108; Veheu v. Mosher, 76 Me. 469; Chase v. Wingate, 68 Me. 204, 28 Am. Rep. 36; Strong v. Doyle, 110 Mass. 92; Snow v. Perkins, 60 N. H. 493, 49 Am. Rep. 333; Hill v. De Rochemont, 47 N. H. 88; Perry v. Carr, 44 N. H. 118; Norton v. Craig, 68 Me. 275; Daniels v. Pond, 21 Pick. 367, 32 Am. Dec. 269; Brigham v. Overstreet, 128 Ga. 447, 10 L.R.A. (N.S.) 452, 57 S. E. 484.

In Wetherbee v. Ellison, 19 Vt. 379, it is held that the manure of animals, made upon a farm, whether spread about the barnyard, or lying in piles at the stable windows, or lying in piles in the stable where it has been allowed to accumulate, will pass by a deed of the freehold as appurtenant to it, and that a tenant is not entitled to remove the manure, although he owned the crops from which it was made. It was also held where the defendant, who was in the occupancy of the farm as a tenant at the time of its conveyance by the owner to the plaintiff, removed from the farm, subsequently to the conveyance, the manure which had been allowed to accumulate in the stable before that, even if as between the defendant and the grantor of the plaintiff, the defendant had the right to remove the manure, yet in the absence of any notice, actual or constructive, to the plaintiff of his right, the intention of defendant to remove it at the time he piled it in the stable could not affect the right of plaintiff to it, where that intention was not manifested by any act sufficient to put the plaintiff upon inquiry at the time of the sale.

[6] Ruckman v. Outwater, 4 Dutch. (28 N. J. L.) 581. Haines, J., delivering the opinion of the court, said: "The question thus presented is, whether by the deed of conveyance of a tract of land, without any clause of reservation, the title to the manure lying in and around the barnyard where it had accumu-

stable or out of the ordinary course of husbandry, it does not pass by a deed of the real estate. "The reasons given for holding that manure made in the ordinary course of husbandry goes with the farm, exclude the idea that when made out of the ordinary course of husbandry, it is a part of the realty."[7] The rule that manure made on a farm

lated passed to the grantee. By an ordinary deed of conveyance of land nothing passes to the grantee but the real estate and its appurtenances, and whatsoever is attached or affixed to it, that it cannot be removed without injury to the freehold. Hence the question arises, whether manure so lying in a barnyard is a part of the real estate, or an appurtenant to it, or so attached to the freehold that it passes with it by virtue of the deed of conveyance. The question is not to be determined by the rules of law regulating fixtures, for the property in question is in no respect a fixture, an article of a personal nature affixed to the freehold, and which cannot be removed without injury to it, nor is it claimed as such. It is claimed as part of the freehold itself, an appurtenant to it, and which, for the sake of agriculture and good husbandry, should not be removed. But as between the grantor and grantee, I can discover no reason, nor can I find any satisfactory authority for such claim. Manure in the yard is as much personal property as the animals and litter from which it is produced, as much so as the grain in the barn, or the stacks of hay in the meadow. And it is not material whether it lies upon heaps or scattered around the yard, whether as thrown from the doors or windows of the stable, or where it accumulated from the droppings of the cattle. But when it is spread upon the land, and appropriated to it for fertilizing purposes, then, and not till then, does it become a part of the freehold. Posts and rails, designated for the farm, are personal property so long as they remain in piles or otherwise unappropriated; but as soon as they are converted into fences they become a part of the freehold affixed to it, so as to lose the character of personalty. As well may the timber, stones, and other materials brought together for the construction of a building be regarded as a part of the farm before the building is erected, as the manure before it is applied." See Smithwick v. Ellison, 2 Ired. 326, 38 Am. Dec. 697.

[7] Proctor v. Gilson, 49 N. H. 62, 65, per Bellows, C. J. In that case, where a deed was made of a house and stable with a small piece of land used as a backyard, but not cultivated, it was held that the manure in the stable cellar made by the horses of the grantor, a teamster, did not pass by the deed, and, also, that proof that at the time of the conveyance there was a parol agreement that the manure should pass with the land was not admissible. See, also, Snow v. Per-

passes to the grantee as an appurtenance to the real estate conveyed is one adopted from motives of policy for the promotion of the interests of agriculture. When a sale is made not of an entire farm but of only a small part of it, the rule does not apply.[8]

§ 1227. **Permanent severance.**—As annexation, either actual or constructive, is essential to constitute a chattel a fixture, it naturally follows that when that annexation no longer exists, the article formerly attached to the realty should resume its character as personalty. Where a severance of a fixture is permanent, and not made with the intention of a reannexation, the fixture becomes personal property, and, unless expressly enumerated in the deed, will not pass by a conveyance of the land. Thus, a fire burned down the improvements upon a piece of real estate, conveyed by a deed of trust, and some of the fixtures were removed. The trustee afterward sold the property under the trust deed, using the same description in his deed as was contained in the deed of trust. Under these circumstances, it was decided that there being no expressed intention to sell the removed fixtures, they were not conveyed by such sale, and that while the trustee might sell the fixtures as personal property, they would not pass by a sale of the ruined premises merely.[9]

kins, 60 N. H. 493, 49 Am. Rep. 333; Perry v. Carr, 44 N. H. 118; Plumer v. Plumer, 30 N. H. 558; Farrar v. Smith, 64 Me. 74; Needham v. Allison, 24 N. H. 355; Sawyer v. Twiss, 26 N. H. 349; Corey v. Bishop, 48 N. H. 146; Lassell v. Reed, 6 Me. 222.

[8] Collier v. Jenks, 19 R. I. 137, 61 Am. St. Rep. 741.

[9] Curry v. Schmidt, 54 Mo. 515. Judge Adams, delivering the opinion of the court, after observing that the question was not whether the trustee or beneficiaries in the trust could have reached the fixtures that were detached, if necessary for the payment of the debts, but whether the title to the fixtures passed by a mere sale of the ruined premises, continued: "There is nothing in the case to show that such was the intention of the parties. In my judgment the trustee could have sold the fixtures as personal property; but he had no right to sell them merely by selling the ruined premises. In the condition

An owner of land on which there was a sawmill with the machinery therein, executed a mortgage which was foreclosed and the premises sold; the purchaser at the foreclosure sale having subsequently contracted to sell the premises to the plaintiff, the latter went into possession; the mortgagor, prior to the sale under the judgment of foreclosure, had removed a portion of the machinery, leaving the severed articles in and about the mill, where they were at the time of the sale, and of the contract to sell to plaintiff. It was held that even if the purchaser at the foreclosure sale became the owner of the severed property by virtue of his purchase of the land, his deed of the land did not convey to the plaintiff the property which had been detached from the realty.[1] Where there has been a constructive severance of

that the premises were in, and as they stood upon the ground when sold, those fixtures formed no part of the realty."

[1] O'Dougherty v. Felt, 65 Barb. 220. Mullin, J., speaking for the court, said: "By virtue of the mortgage, the mortgagee acquired a lien on all that formed a part of the realty at the time it was given, and, when he foreclosed, he had a right of action for the property severed before the foreclosure: Southworth v. Van Pelt, 3 Barb. 347; Van Pelt v. McGraw, 4 N. Y. 110. It is not material whether the remedy of the mortgagee is trover for the property severed, or an action for damages by reason of the severance. In either case, the property having ceased to be a part of the realty, a conveyance of the premises to which it was attached will not carry the articles severed. Unless personal property is mentioned in a deed of land, it will not of course, pass. So that on the sale by Stewart to the plaintiff, the property severed did not pass, even if Stewart became owner of it by virtue of his purchase on the foreclosure sale. There is no evidence that anything but the land was sold, and that did not embrace the property in question." Where a vault, forming part of the realty, is removed, the measure of damages is its value immediately preceding its removal, and not the price that might be obtained for it in open market, if removed from the building: Rhoda v. Alameda County, 58 Cal. 357. In Straw v. Straw, 39 Atl. 1095, 70 Vt. 240, it was held that where, in a conveyance of factory premises, a water wheel and shafting were reserved, the reservation operated to make the water wheel and shafting personal chattels. The grantor did not lose his right to remove the chattels by allowing them to remain attached to the factory for more than two years. Also, where a henhouse was

the fixtures from the freehold, although the purchaser of the realty and fixtures allows their physical annexation to remain undisturbed, the fixtures will be constructively reannexed to the freehold by the execution by the purchaser of a subsequent deed conveying the realty in which there is no reference to the fixtures, either by way of conveyance or of reservation.[2] A conveyance of the land will not pass timber cut and piled on it for the purpose of building a fence.[3]

§ 1228. **Temporary severance.**—Where the removal is for a temporary purpose merely, the articles retain their character as realty, and pass to a purchaser by a deed. Thus, rails which had formed a part of a fence, but had been temporarily severed from the realty, were held to pass by a deed of the premises.[4] So it has been held that the stanchion timbers, tie-up planks, hinge staples, and tie-chains of a barn, which it was apparent had been removed for convenience in repairing the barn, passed by a conveyance of the farm and buildings.[5]

§ 1229. **Severance by act of God.**—If the severance occurs by an act of God, does the property become personalty, or retain its character as personalty? This may often become a question of great importance, where some lien exists upon real estate, which embraces the buildings placed thereon

erected on land of another with the understanding that it should remain personal property, a subsequent purchaser of the land with the understanding that the henhouse was reserved cannot defend an action for conversion in reselling the land with the henhouse on the ground that the owner of the henhouse was given two months notice to remove the same: Pile v. Holloway, 107 S. W. 1043.

[2] Solomon v. Staiger, 65 N. J. L. 617, 48 Atl. 996.

[3] Longino v. Wester, 88 S. W. 445.

[4] McLaughlin v. Johnson, 46 Ill. 163. And parol proof was also held inadmissible to show what fixtures passed by the deed.

[5] Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780; Goodrich v. Jones, 2 Hill, 142. See Walker v. Sherman, 20 Wend. 639, 640.

as a part of the land. In a case in Pennsylvania, the owner of a lot of ground, upon which a large frame building had been erected, conveyed the property in trust for the benefit of creditors; a judgment which was a lien upon the real estate conveyed had been recovered against the assignor prior to the assignment. A storm two days after the execution of the assignment demolished the building, leaving the foundation and floors nearly uninjured, but breaking the superstructure so that the materials could not be replaced. The whole was levied upon and sold upon execution based upon the judgment against the assignor, and the court, upon a controversy between the execution purchasers and the voluntary assignees, held that the ruins and fragments were real property, and passed by the sheriff's deed. Strong, J., who delivered the opinion of the court, said: "The true rule would rather seem to be, that that which was real shall continue real until the owner of the freehold shall by his election give it a different character. In Shepherd's Touchstone, 90, it is laid down that 'that which is parcel, or of the essence of the thing, although at the time of the grant it be actually severed from it, does pass by a grant of the thing itself. And, therefore, by the grant of a mill, the millstone doth pass, although at the time of the grant it be actually severed from the mill. So by the grant of a house, the doors, windows, locks, and keys do pass as parcel thereof, although at the time of the grant they be actually severed from it.' It must be admitted that the case before us is one almost of the first impression. Very little assistance can be derived from past judicial decision. There is supposed to be some analogy between the character of these fragments of the building and that of a displaced fixture. The analogy, however, if any, is very slight. These broken materials never were fixtures, though they had been fixed to the land. They had been as much land as the soil on which they rested. Sever-

ance had never been contemplated."[6] In California, a house removed by a flood from land upon which there was a mortgage lien, was sold by the owner to a person having notice of all the facts. The court held that the severance and removal of the house from the land released the house from the operation of the lien of the mortgage, and that the purchaser had a perfect title to it.[7]

§ 1230. **Stoves, furniture, etc.**—The general rule is, that stoves fastened in the usual way, and capable of removal without injury to the freehold, do not pass by a deed.[8]

[6] Rogers v. Gilinger, 30 Pa. St. 185, 72 Am. Dec. 694. The court said further: "Nor will the *tortious* act of a stranger be allowed to injure the reversion: 2 Maule & S. 494, 1 Term. Rep. 55; Garth v. Sir John Cotton, 1 Ves. Sr. 524. These principles are reasserted in Shult v. Barker, 12 Serg. & R. 272, 7 Conn. 232, 3 Wend. 104, 20 Am. Dec. 667. Nor will a severance by the owner of that which was a part of the realty, unless the severance be with the intent to change the character of the thing severed, and convert it into personalty, prevent it passing with the land to a grantee. Thus it was held in Goodrich v. Jones, 2 Hill, 142, that fencing materials on a farm which have been used as part of the fences, but are temporarily detached without any intent to divert them from their use as such, are a part of the freehold, and as such pass by a conveyance of the farm to a purchaser. Is the rule different when the severance occurs not by a tortious act, nor by a rightful exercise of proprietorship, without any intent to divert the thing severed from its original use, but by the act of God? The act of God, it is said, shall prejudice no one (4 Co. 86 *b*), yet the maxim is not true, if a tempest be permitted to take away the security of a lien creditor, and transfer that which was his to the debtor or the debtor's assignees."

[7] Buckout v. Swift, 27 Cal. 433, 87 Am. Dec. 90. See Clark v. Reyburn, 1 Kan. 281; Woehler v. Endter, 46 Wis. 301; Harris v. Bannon, 78 Ky. 568; Citizens' Bank v. Knapp, 22 La. Ann. 117. And see Hutchins v. King, 1 Wall. 53; Gardner v. Finley, 19 Barb. 317; Hill v. Gwin, 51 Cal. 47; Dorr v. Dudderar, 88 Ill. 107.

[8] Freeland v. Southworth, 24 Wend. 191; Williamson v. Bailey, 3 Dane's Abr. 152, § 25. In Freeland v. Southworth, 24 Wend. 191, Bronson, J., said: "I think the stove and pipe were not affixed to the freehold, and did not pass by the conveyance of the land to the plaintiff. It is not alleged that the stove was fastened to the building in any manner whatever, and the temporary fastenings about the pipe

Some decisions may be found in which stoves have been declared to be fixtures, and regarded as part of the freehold. But in most of them, the attachment to the building was made in such a manner that they could not be removed without serious injury to it.[9] Articles of furniture, such as hangings, bookcases, carpets, mirrors, etc., though they may be fastened for a temporary purpose, do not pass by a deed of the realty.[1] A cupboard made and fitted into a recess, and fastened there by nails or screws, does not pass by a conveyance of the real property.[2] Marble slabs laid upon brackets screwed into the walls, but not fastened to them, do not pass by a deed, and the vendor may remove them.[3]

were such as could be removed without the slightest injury to the chimney. In Goddard v. Chase, 7 Mass. 432, on which the plaintiff relies the stoves were set in the chimneys so that it was necessary to pull down the fireplaces to get them out. Stoves put up in such a manner that they can be removed at pleasure, and without injury to the building, have never been considered a part of the freehold in this State. See 2 Rev. Stats. 467, § 22, and p. 83, §§ 9, 10. . . . I see nothing to distinguish this from the ordinary case of stoves put up in such a manner that they can be removed and replaced, or others substituted at pleasure, without in any way impairing the building. The stove was a part of the furniture of the house, which the vendor had a right to remove with his other goods." See Kerby v. Clapp, 44 N. Y. S. 116, 15 App. Div. 37, holding that a cooking range and heater which can be removed without injury to the freehold are not fixtures.

[2] See Goddard v. Chase, 7 Mass. 432; Smith v. Heiskell, 1 Cranch C. C. 99; Blethen v. Towle, 40 Me. 310; Folsom v. Moore, 19 Me. 252; Tuttle v. Robinson, 33 N. H. 104: Andrews v. Powers, 72 N. Y. S. 597, 66 App. Div. 216; Mantel, gas grate and necessary fixtures become a part of the realty because they are permanently attached thereto and cannot be removed without material injury.

[1] Shaw v. Lenke, 1 Daly, 487; Walker v. Sherman, 20 Wend. 646; McKeage v. Hanover F. Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471. Mirrors, however, set into the wall as a part of the house at the time of its erection will pass: Wane v. Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674; Spinney v. Barbe, 43 Ill. App. 585.

[2] Blethen v. Towle, 40 Me. 310.

[3] Weston v. Weston, 102 Mass. 514. Says Morton, J: "After the judgment for possession, and before the execution was issued, he removed and carried away a number of marble and imitation marble

slabs, which the plaintiff claims were fixtures, and passed to him by the conveyance from said defendant. But upon the facts reported by the auditor, we are of opinion that these slabs were not so annexed to the real estate as to become part of it. They were not attached to the wall, and could be removed without injury to the house or to themselves. They formed a part of the furniture of the rooms, useful and convenient, but not essential to the enjoyment and use of the house, and not permanently incorporated with the freehold so as to become a part of it. The plaintiff, therefore, cannot recover their value in this suit." See, also, D'Eyncourt v. Gregory, Law R. 3 Eq. 382; Ex parte Morrow, 1 Low. Dec. 386; Rogers v. Crow, 40 Mo. 91, 93 Am. Dec. 299; Snedeker v. Warring, 12 N. Y. 170. Windows and blinds, although temporarily separated from the house, pass by a deed: Peck v. Batchelder, 40 Vt. 233, 94 Am. Dec. 392. So will a furnace attached to the brickwork: Stockwell v. Campbell, 39 Conn. 362, 12 Am. Rep. 393; Main v. Schwazwaelder, 4 E. D. Smith, 273. As to steam radiators, see National Bank v. North, 160 Pa. St. 303; Capehare v. Foster, 61 Minn. 132, 63 N. W. Rep. 257, 52 Am. St. Rep. 582. A deed or mortgage of an opera house will pass all the furniture, pictures, and furnishings necessary for a complete opera house: Grosvenor v. Bethell, 93 Tenn. 577.